THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NUMBER 473/2001

In the matter between :

INTERLINK POSTAL COURIER SA (PTY) LTD **Appellant**

and

THE SOUTH AFRICAN POST OFFICE LTD **Respondent**

Coram: **MARAIS, ZULMAN, CAMERON, CLOETE *et* LEWIS JJA**

Heard: **24 FEBRUARY 2003**

Delivered: **27 MARCH 2003**

The interpretation of s 16 of the Postal Services Act, 124 of 1998 in relation to the provision of a 'courier service'.

J U D G M E N T

MARAIS JA/

MARAIS JA

[1] I have had the benefit of reading the judgment of my learned brother Zulman JA. I share his view as to the lack of merit in the preliminary point but I am unable to share his view as to the fate of the appeal.

[2] I do not consider the meaning ascribed by the court *a quo* to the words "courier services" to be a restrictive meaning. In my view, the ordinary meaning of those words does not encompass the depositing in a letter box at a given address of the items listed in paragraph 1 (a) of Schedule 2 when they are intended to be delivered to a particular person.

[3] It is common knowledge that the facilities for the reception of such items which exist in residential and professional and business properties in South Africa range from rudimentary to highly sophisticated.

To say that a letter addressed not merely to a particular address but to a named addressee at that address and which is pushed through the slot provided in a gate or door, and which letter may lie upon the floor or in a letter box until someone (not necessarily the addressee) notices it and picks it up or takes it out, has been delivered by a courier to the intended recipient is, to my way of thinking, to debase the commonly understood concept of a courier service.

[4] It is so that the dictionary meanings of the word "courier" all envisage a delivery of something but they obviously do not include a common or garden postman who "delivers" by leaving an item at a street address. That this is so is, I think, reinforced by the structure of the Act which clearly envisages a distinction between ordinary postal services (which plainly postulate address rather than addressee deliveries) and courier services. To read the latter as requiring merely address and not personal deliveries would elide unacceptably

the distinction that lies at the heart of s 16. Accordingly, where a letter is addressed to a named person and a courier service is to be provided then it is to that person that delivery must take place – not simply to the address at which that person is thought to be. It is conceivable of course that a courier might be engaged to deliver a letter or parcel to a particular place as opposed to a particular person. But where the method of delivery to a named intended recipient is merely to leave the item at an address at which the intended recipient might or might not be, or at which the item delivered might be lost or misappropriated or put aside or forgotten before it reaches the recipient's hands, I do not believe that it can be said, within the meaning of the Act, to have been delivered to the intended recipient by means of a courier service. The method of "delivery" employed has been no different from that of a common or garden postman.

[5] That there are other elements present in the service provided which are characteristic of a courier service takes the matter no further. If a critical element of a courier service is lacking (and in my view actual delivery of the item to the named intended recipient or the intended recipient's authorised agent to accept delivery, as opposed to leaving it at his, her or its supposed address, is such an element), it cannot be classified as a courier service.

[6] I reach that conclusion simply by giving to the words "courier service" what I take to be their ordinary meaning, a meaning which seems to me to be underscored by the context in which they are used in the Act. I leave out of account such evidence as there might have been as to the meaning given to the expression by the trade.

[7] It is also of some significance that the Act itself, in dealing with the future licensing requirements for a courier service (s16(5)(d)(ii)), requires that an

applicant for a licence must undertake, *inter alia*, to 'track and trace the whereabouts of any item received or collected for delivery by such a person's business undertaking'. If it were contemplated that delivery to a street address, where no evidence of receipt of an item would be obtained, was sufficient for such delivery, it is hard to see how this requirement could be met. How would a courier track and trace an item if it had been simply left at a street address? While the subsection does not, of course, define the nature of a courier service, and while it relates to undertakings to be made in future by an applicant for a licence, it gives at least some indication of what the legislature meant by 'courier'. Leaving an item in a postbox does not allow for meaningful tracking and tracing, and thus it cannot have been intended that that form of delivery would suffice to qualify the service as a courier service.

[8] It is ordered that the appeal be and is hereby dismissed with costs including the costs of two counsel.

R M MARAIS
JUDGE OF APPEAL

CAMERON JA)
LEWIS JA) CONCUR

ZULMAN JA

INTRODUCTION

[1] The issue in this appeal concerns the appellant's right to conduct a 'courier service' in terms of the Postal Services Act, as amended[1] (the Act). The court *a quo* (Fitzgerald AJ) interdicted and prohibited the appellant (the first respondent a quo), at the instance of the respondent (the applicant a quo) from *inter alia,* providing any type of 'reserved postal service which entails street delivery of postal articles'. The judgment is reported[2]. The appeal is with the leave of the court *a quo*.

1 124 of 1998
2 2002(1) SA 221 (C)

PRELIMINARY POINT

[2] In argument before this Court the appellant's counsel sought to reintroduce a point *in limine,* which had been expressly conceded and abandoned in the court *a quo*. The point is this. At the time when the application was heard in the Court *a quo*, the respondent had not yet been issued a licence as contemplated in s 16(3) of the Act. Accordingly the appellant contended that the respondent had no *locus standi* to complain that the appellant's street deliveries exceed the bounds of a 'courier service' and infringed the respondent's right to conduct a 'reserved postal service'. The basis for seeking to resurrect the point is that the concession is one of law and is accordingly not binding on the appellant. The respondent opposes the reintroduction of the point on a number of legal grounds. I believe that there is no merit in the point, if only for the simple reason that the respondent had a clear legal interest in the subject matter of the dispute. However, in the light of the conclusion that I have come to on the merits of the matter, it is unnecessary to consider the point any further.

THE ACT

[3] The Post Office Act[3] was amended in certain respects and repealed in others by the Act. Certain sections of the Act came into operation on 1 January 1999

[3] 44 of 1958

whilst the remainder came into operation on 1 April 2000. It is to be noted that in so far as this appeal is concerned with the meaning of English words that the English text of the Act was signed by the President.

[4] Chapter lll of the Act is headed 'REGULATION OF POSTAL SERVICES'. The chapter contains some 14 sections (ss 15 to 28). Of direct relevance to the matter at issue are ss 15(1) and 16(5) which provide as follows -

> '15(1) Subject to the provisions of this Act, no person may operate a reserved postal service except under and in accordance with a licence issued to that person in terms of this Chapter.'

> '16(5)(a) Any person who, immediately before the date of commencement of this section provided a courier service of a type contemplated in Schedule 1, must be regarded as being licensed to provide such a courier service, subject to paragraph (b).
>
> (b) A person may not be regarded as being licensed in terms of paragraph (a) if that person has failed to apply to the Minister through the Regulator for such a licence within 90 days after the date of commencement of this section or within such extended period as the Regulator may allow.
>
> (c) After receipt of an application in terms of paragraph (b) the Minister must, subject to paragraph (d), grant the application and thereafter the Regulator must issue a licence to the applicant.
>
> (d) A person may not be licensed to provide a courier service in terms of this subsection unless that person undertakes -
>
> (i) to receive, collect and deliver items contemplated in item 1 (a) of Schedule 1;
>
> (ii) to track and trace the whereabouts of any item received or

collected for delivery by such person's business undertaking;

(iii) to deliver items within a definite time, in the case of deliveries across international borders;

(iv) to deliver items within the Republic on the date of receipt thereof or at the latest by 13:00 on the next working day; or

(v) to clear items through customs, where applicable.'

THE ABSENCE OF A LICENCE

[5] The respondent no longer appears to attack the court *a quo's* conclusion that the appellant is to be regarded as being licensed to provide a 'courier service', notwithstanding the fact that the appellant might have provided such a service unlawfully prior to the commencement of s16.[4] I am in respectful agreement with this conclusion.

THE CRUX OF THE JUDGMENT *A* QUO

[6] The crux of the judgment of the Court *a quo* on the essential matter now at issue is encapsulated in the following remarks of Fitzgerald AJ[5] -

> 'Having found that the first, third and fourth respondents are to be regarded as being licensed to provide a courier service, I now turn to deal with the further submission of Mr Burger [counsel representing the applicant in the Court *a* quo] that, in any event, and even in regard to these respondents, a courier service does not involve the speed delivery of postal items but rather, as he put it, 'door-to-door deliveries'.
> It is apparent that no definition of courier service as used in s 16 is to be found in the Act. In this regard Mr *Burger* submitted that, where a statute deals with a particular trade or business and employs a term which is used in that trade or business, such

4 Judgment of the court *a quo* 231B
5 232G – 234C

term should be given the meaning used in that particular trade or business. (See *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 (1) SA 114 (A) at 119.)

Mr *Burger* submitted further that, insofar as the term 'courier service' is used in the context of a statute regulating the postal industry, it is proper to have regard to its meaning 'in that trade'. It is relevant in this regard that in the representations on the proposed Postal Bill of 1998, to which I have referred above, the express carrier industry stated in para 2.5 as follows:

'(I)t is important to take note and be mindful of the fact that the express carrier industry provides that which is generally referred to as a "value added service", including, *inter alia, unlike the traditional services rendered by the Postal Company, door to door pick-up and delivery services,* customs clearance services, meticulous proof of delivery including a track and trace service which enables a client to pinpoint the exact location of an article at any particular moment in time. These services are provided on an extremely time definite basis with the result that the normal business administration is not slowed down and/or hampered by delays.'

In answer, Mr *Heunis* [counsel representing the respondent in the Court *a quo*] submitted that statutes are as a rule addressed to the general public and not to a particular trade or section of the community. Therefore, so he continued, our Courts are reluctant to draw the conclusion that words and expressions in a statute are used in a technical sense. (See *Association of Amusement and Novelty Machine Operators v Minister of Justice and Another* 1980 (2) SA 636 (A) at 660.)

There is indeed no definition of the term 'courier service' in the Act. It is also correct that s 16(5)(d) thereof does, as Mr *Heunis* contended provide an indication of the attributes of a courier service. [The learned acting judge quoted the section and continued]

Accordingly, Mr *Heunis* submitted that I should determine the nature of courier services by reference solely to this section and to the ordinary meaning of the words used therein.

Mr *Burger* contended, however, that s 16(5)(d) itself contains words that must be given a meaning, viz 'delivery' and emphasised that these words were used in the context of a courier service which, as aforesaid, is itself not defined in the Act.

While it is indeed so that the absence of any specific definition of the term 'courier services' in the Act is deliberate, and while acknowledging the belated inclusion therein at s16(5), it seems to me that there is merit in these contentions of Mr *Burger.*

Accordingly, were I to give the language used in s16(5)(d) its ordinary, grammatical meaning, as contended by Mr *Heunis*, I would, in my view, thereby ignore that the Legislature did, in terms of the Act, intend to preserve a statutory monopoly (albeit while permitting courier services within the activities of reserved postal services) for the applicant.

Accordingly, and having regard to the attributes of a courier service as described in the representations made on behalf of the industry (and to which, albeit in another context, Mr *Heunis* submitted I should have regard), the language used in s 16(5)(d), in my view, falls to be restrictively interpreted to exclude (notwithstanding the apparently

> unqualified use of the words 'deliver' and 'delivery' therein) street to street deliveries by a courier service.
> This latter activity is so traditionally a fundamental characteristic of the activities of the applicant that to ignore the meaning ascribed thereto in the trade in the interpretation of s16(5)(d) would serve merely to undermine the obvious intention of the Act, namely to preserve the statutory monopoly of the applicant. A contrary construction would, in essence, equate a courier service with that reserved service provided by the applicant, save for speed of delivery, and the alleged powers to track and trace which are said to be particular to the courier service. This seems unwarranted.
> In all the circumstances I am of the view that Mr *Burger* is correct in submitting that street to street deliveries of postal articles, as opposed to door-to-door pick up and delivery services, fall outside the services which are lawfully required to be provided by a courier service.'

[7] The central issue raised on appeal is whether Fitzgerald AJ was correct in finding that the appellant was not to be regarded as providing a 'courier service' within the meaning of the Act to the extent that it delivered postal articles to street addresses as opposed to making 'door to door' deliveries.

[8] Schedule 2 of the Act, which is headed 'unreserved postal services', deals (in its amended form) with 'courier services' as follows-

> '1. Unreserved postal services include –
>
> (a) all letters, postcards, printed matter, small parcels and other postal articles that fall outside the ambit of the reserved services set out in Schedule 1 up to and including thirty kilograms;
>
> (b) courier services in respect of items mentioned in paragraph (a); and
>
> (c) any other postal service that falls outside the ambit of the reserved services as set out in Schedule 1' (underlining supplied).

In terms of item 1 of Schedule 1 (as amended) 'reserved postal services' include-

> ‘(a) all letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitations set out in item 3;
>
> (b) issuing of postage stamps; and
>
> (c) the provision of roadside collection and address boxes.’

Item 2 of Schedule 1 (as amended) provides that-

> '2. For purposes of this Schedule, a letter means any form of written communication or other document, article or object that is directed to a specific person or persons or specific address and is to be conveyed other than by electronic means and includes a parcel, package or wrapper containing any such communication or article conforming to the mass or size limitations set out in item 3.'

Item 3 of Schedule 1 (as amended) provides that-

> 'The reserved postal services include all items described in items 1(a) and 2 of a mass up to and including one kilogram or size which enables it to fit into a rectangular box with the following dimensions:
>
> length 458 mm
> width 324 mm
> thickness 100 mm
>
> Cylinders having a maximum length of 458 mm and 100 mm thickness and or a mass of up to one kilogram are regarded as letters.'

Item 4 of Schedule 1 sets out exemptions from letter mail, which are not subject to licensing in terms of the Act. These exemptions are not relevant for present purposes.

[9] The Act defines 'courier service' in s 1 as meaning 'a service provided by a person licensed or registered to provide such a service in terms of this Act.' This definition affords no assistance in determining what is embraced in a 'courier service'.

[10] Before this Court, counsel for the respondent submitted that it is plain from a reading of the Act as a whole that a distinction is drawn between a 'reserved postal service' and a 'courier' service' and that, in counsel's words, 'never the twain shall meet'. Counsel conceded that this distinction was essential to his argument. Indeed it is, for without it, counsel could not go on to submit, as he did, that whatever the ambit of a courier service may be, street deliveries are a 'reserved postal service' which only the postal company can perform.

[11] Counsel's cardinal submission is not correct. Section 16(5)(a) expressly and in terms contemplates that a person shall be regarded as licensed to provide a courier service 'of a type contemplated in Schedule 1' which, it is apparent (as both counsel conceded), must mean 'in respect of' or 'in regard to' the items specified in Schedule 1. Item 1 refers to 'letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitation set out item 3' and item 2 defines a 'letter' as 'any form of written communication or other document, article or object that is directed to a specific person or persons or specific address...' Section 16(5)(a) therefore contemplates a 'courier service' including

delivery of letters etc – precisely the reserved postal service which Fitzgerald AJ held was reserved to the respondent.

[12] The same subsection ss 5(a) makes the deeming provision, which it embodies 'subject to paragraph (b)'. It does not make the deeming provision subject to pararagraph (d). Paragraph (d) requires undertakings by a person who is to be issued with a licence. It is of no assistance in interpreting what is meant by a courier service for the purposes of s 5(a). It is a regulatory provision, which deals with the future not the past. Had the Legislature intended that it was only a person who had, before the commencement of the Act, performed the services in paragraph (d) who would be deemed to perform courier services in respect of reserved postal articles, it would have made the deeming provision in paragraph (a) subject to this condition also. It did not do so. The reason is that the Legislature recognised that couriers were illegally performing reserved postal services and intended to allow them to do so legally in the future, provided certain undertakings were given. Those undertakings were to be a condition for the issue of the license not a condition for the person to be recognised as having provided a courier service as at the date of commencement of the Act. Furthermore it is to my mind significant that not even in s 16(5)(d) did the Legislature require an applicant for a license to undertake to perform a

door-to-door delivery service only. But even if regard is had to s 16(5)(d) the words ‘deliver’ and ‘delivery’ used in section 16(5)(d) are not, as pointed out by the learned judge *a quo,* defined. There is in my view no sound justification for giving the words read in conjunction with the words 'courier service', the narrow meaning given to them by Fitzgerald J so as to exclude deliveries to street addresses in the sense understood by the court *a quo*. To my mind the ordinary meaning of the words 'deliver' and 'delivery' in the context of a courier service is not to be disturbed. The *South African Concise Oxford Dictionary* gives as one of the meanings of the verb ‘deliver’ - to ‘bring and hand over (a letter or goods) to the appropriate recipient’ and the noun ‘delivery’ as *inter alia* ‘the act in of delivering something, especially letters, goods or services.’ The *Encarta World English Dictionary* defines ‘delivery’ in relation to mail as the ‘the carrying of sth [something] to a particular person or to a particular address’. It is in this ordinary sense that the words are used in the Act.

[13] I find nothing in the scheme or wording of the Act which supports the restrictive interpretation given to the phrase ‘courier service’ by the court *a quo*. On the contrary, if one has proper regard to the ordinary meaning of the words, with reference to the context in which they are used as set forth in various dictionaries, I see no legitimate basis for excluding street deliveries of postal

items from the operation of a 'courier service' as contemplated in the Act. As pointed out by Kotze JA in *Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another*[6]

> 'The normal and permissible method available to a court to ascertain the ordinary meaning of words is to turn to authoritative dictionaries – the most reliable sources of information in regard to the general accepted usage of words - for aid.'

Amongst such authoratative dictionaries one may usefully refer to the *South African Oxford English Dictionary*[7] where the meaning of the word 'courier' is given as 'A messenger who transports goods or documents in haste'. *Black's Law Dictionary*[8] gives the following as the meaning of the word 'courier'- 'A messenger esp. one who delivers parcels, packages, and the like'. *The Encarta World English Dictionary*[9] defines the word 'courier' as follows- 'A person or company that delivers documents or small and valuable packages by hand'. No dictionary to which I have had regard contemplates delivery to a person as a characteristic, much less an essential characteristic, of the service provided by a courier. There are many reasons why a person would employ a courier, other than the added security which person to person delivery, if offered by such a

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6 1980 (2) SA 636 (A) at 660 F-G
7 2002
8 Seventh Edition 1999
9 Bloomsbury 1999

courier, affords. Two that immediately spring to mind are speed and reliability of the service offered. Neither of these excludes street to street deliveries.

[14] Accordingly, the words 'deliver', 'delivery', and ‘courier service’ are to be given their ordinary natural grammatical meaning in their context in the Act. This is so because no special meaning is indicated, and this would also accord with trite principle of giving effect to the intention of the Legislature as evidenced by the words it uses, read in their ‘ordinary sense’ and in context. (See for example, *Venter v R*[10], *Union Government (Minister of Finance) v Mack*[11], *Bhyat v Commissioner for Immigration*[12]*).*

[15] The respondent submitted that it was proper for Fitzgerald AJ to have had regard to the meaning ‘in the trade’ of the term ‘courier’ (Cf *Kommissaris Van Doeane en Aksyns v Mincer Motors Bpk*[13]*)*. Reliance was placed upon extracts from written submissions made to Parliament on behalf of 23 members of the Express Courier Industry prior to the Act being assented to on 20 March 1998. I immediately point out that the appellant states that the respondent has not shown that the interpretation given by the 23 members is accepted by the majority of the members of the industry and that some 304 other known providers of courier

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10 1907 TS 910 at 913
11 1917 AD at 739
12 1932 AD 125 at 129
13 1959 (1) SA 114 (A)

services were not represented in the written representations in question. This statement is not challenged by the respondent. But that apart, as a general rule, statutes are addressed to the general public and not to a particular trade or section of the community. Furthermore courts are reluctant to draw the conclusion that words and expressions in a statute are used in a technical sense (*Association of Amusement and Novelty Machine Operators)*[14].

[16] The deponent to the respondent's supplementary founding affidavit (Mr P F Swart)[15], 'without attempting an all encompassing definition', submits that, 'the following characteristics are the minimum elements which must be present before a postal service provider will be categorised as a courier service by the postal industry:

36.1 Door-to-door collection and delivery (as opposed to street delivery to mail boxes). This would include collecting the item from a particular person and delivering it in the hands of another.

36.2 A track and trace system, of which the most important components are proof of delivery and the ability to determine the whereabouts of a postal article at any given time.

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14 (Supra) at 660 D - E

15 Swart is a senior manager, postal distribution of the respondent in the Western Cape and describes himself as 'someone who has been closely involved in the postal industry for more than 7 years'.

36.3 The delivery of documents and parcels (as opposed to ordinary letter mail or business accounts).

36.4 Express delivery within a guaranteed time frame and which is faster than ordinary mail via the post office.

36.5 Value-added service, referring in fact to all of the above services in respect of which the customer pays a premium (i.e. above ordinary mail tariffs).'

[17] The appellant in its answering affidavit deposed to by its chief executive officer Mr J C Wessels[16] denies that a 'courier service' provider must at least have the characteristics listed by Swart in order to qualify as a courier for the purposes of the Act and submits that the Legislature 'clearly intended not to assign a particular, technical meaning to the term 'courier service' and it must be therefore be accorded its ordinary, grammatical meaning.'

[18] There is thus an obvious dispute of fact on the papers as to the proper meaning of the words 'courier service' in the industry. But in any event I am of the view that the evidence of the 23 members of the Express Carrier Industry is irrelevant and inadmissible to determine the meaning of the concept 'courier

[16] Wessels founded a postal services business known as City Post RSA in 1995

service' in the Act. This is so since I do not believe that the words are used in the Act in any technical or special sense. The following remarks of Steyn CJ in *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk*[17] are instructive in this regard:

> 'Die eerste vraag is wat onder "motorkarre" in hierdie item verstaan moet word. Die appellant beroep hom op die reël dat waar 'n Wet vir 'n bepaalde bedryf bedoel is, hy uitgelê moet word volgens die betekenis wat die woorde in daardie bedryf het, en beweer dan dat hierdie item bedoel is vir die motorbedryf, dat die woord "motorkar" in daardie bedryf 'n spesiale betekenis het wat 'n afleweringswa van die onderhawige soort sou insluit, dat die Parlement die woord in bedoelde sin gebruik het, en dat hy toegelaat moet word om die aangevoerde betekenis met getuienis te staaf. Na my mening gaan hierdie redenasie nie op nie. Genoemde reël sou geld waar 'n woord of uitdrukking in 'n bepaalde bedryf of sake-afdeling algemeen in 'n besondere sin verstaan word deur die persone wat met die bedryf of sake-afdeling en die daarin erkende taalgebruik vertroud is, en waar dit blyk dat die Wetgewer die woord of uitdrukking in daardie sin gebesig het. Die aanwending van die reël stuit in die huidige geval teen verskillende moeilikhede.'

[19] Insofar as the submissions made to Parliament may be regarded as part of the legislative history of the Act, they would, on the basis of 'the approach adopted by South African courts for more than a century'[18], be inadmissible. (See for example *Mathiba and Others v Moschke*[19], *Mavromati v Union Exploration Import (Pty) Ltd*[20] and *S v M en Andere*[21].) In any event it is

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17 1984 (3) SA 623 (A)
18 1959 (1) SA 114 at 119 B - E
19 1920 AD 354 at 362
20 Per Devenish – Interpretation of Statutes at 124
21 1949 (4) SA 917 (A) at 927
1979 (4) SA 1044 (BH) at 1048 A-C

significant that in defining 'courier service' in the circuitous manner that it did in s1 of the Act, the Legislature appears not to have had regard to the submissions made by certain members of the Express Carrier Industry in formulating a definition, which accorded with their submissions.

[20] I do not accept the reasoning of Fitzgerald AJ that it is 'the obvious intention of the of the Act' to 'preserve the statutory monopoly of' the applicant, to permit of street deliveries of postal articles. I believe that there is substance in the contention advanced in the appellant's heads of argument to the effect that the intention underlying the inclusion of s16 was to permit persons to provide a service complementary to, and in competition with that of the Post Office thereby recognising the advantages of private enterprise and the constitutional right of individuals to choose a trade occupation or profession.[22] The balancing of interests of the respondent, couriers such as the applicant and the general public was achieved by the prescription of terms and conditions in the granting of licenses to be issued to persons who had previously carried on the business of

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The law appears to be developing slowly to allow some regard to be had to the legislative history of unclear legislation see the (separate concurring) judgment of Mokgoro J in *Case and Another v Minister of Safety and Security and Others Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at 624-5 paragraph 12, note 18; see also *S v Makwanyane and Another* 1995 (3) SA 391 at 404 – 5 paragraphs 12 – 15; even then the stage has not been reached where regard may be had to submissions made by certain interested parties as opposed to statements of a Minister introducing a Bill in Parliament.

[22] Cf s 9 read with s 22 of the Constitution of the Republic of South Africa Act 108 of 1996

couriers prior to the enactment of the Act. I also agree with the appellant's contention that the effect of the judgment of the court *a quo* would to a large extent close the window of opportunity afforded by s 16 of the Act to the appellant.

[21] In all of the circumstances I am of the view that the court *a quo* erred in concluding that street deliveries of postal articles, as opposed to door-to-door pickup and delivery services, fall outside the services, which may lawfully be provided by a courier.

[22] I have had the benefit of reading the judgments of my learned brothers Marais and Cloete JJA. I respectfully disagree with Marais JA's view as to the fate of the appeal. I concur in the judgment of Cloete JA.

THE ORDER

[23] In my view the appellant should succeed in the point it raised on appeal and should accordingly be awarded the costs of the appeal. That success cannot, however, carry the costs of the proceedings in the court *a quo* as the respondent succeeded in obtaining the interdict embodied in paragraph 3 of the Court's order,[23] against which there was no appeal. The third and fourth respondents in the Court *a quo* did not appeal against paragraph 2 of the order and it cannot be

[23] 234 G - H

altered by this Court insofar as they are concerned. I would accordingly uphold the appeal with costs and alter paragraph 2 of the order of the Court *a* quo so as to delete the reference to the appellant (the first respondent *a* quo).

R H ZULMAN
JUDGE OF APPEAL

CLOETE JA/

[1] I have had the benefit of reading the judgments of my learned colleagues Marais JA and Zulman JA. I respectfully agree with the latter and, with equal respect, find myself unable to agree with the former.

[2] A courier is 'a messenger who transports goods or documents'.[24] To my mind the essential characteristic of a courier service is the right on the part of the customer to give directions to the courier. It is primarily the mandate given by the customer and accepted by the courier which

[24] *South African Concise Oxford Dictionary*

dictates the service to be provided and which distinguishes a courier from what Marais JA terms a 'common or garden postman'. If the mandate is to make personal delivery to a specific addressee, then personal delivery must take place. The mandate can equally be to make delivery to a post box at a specific address. The evidence discloses that the appellant is able to do either.

[3] Once it is accepted, as it is by Marais JA, that a courier may be engaged to deliver a letter or parcel to a particular place as opposed to a particular person (or such person's agent), what is characterised by my learned colleague as the 'critical element' of a courier service delivery to a person is lacking and it cannot accordingly be a critical element in the definition of a courier service.

[4] The fact that most of the appellant's customers choose street to street deliveries does not derogate from the fact that the appellant is subject to the directions of those who employ it. It is that characteristic, and not the scale of the appellant's street to street deliveries, which is decisive. Furthermore the fact that a letter will lie on the floor or in a letterbox at its destination until someone picks it up does not to my mind mean that it could not have been couriered there. As Zulman JA points out, a courier service is not necessarily employed only because of the added security which person to person delivery affords.

[5] I have been unable to find in any dictionary which I have consulted[25] and I am unable to discern in the Act itself, any requirement

[25] *The Oxford English Dictionary* (2nd ed); *The Shorter Oxford English Dictionary* (3rd ed); *The Concise Oxford Dictionary* (6th ed); *South African Concise Oxford Dictionary; Webster's Third New International Dictionary*; *Webster's Revised Unabridged Dictionary; The Imperial Dictionary of the English Language*; *The Universal English Dictionary*; *The American Heritage Dictionary of the English Language* (4th ed); *Encarta World English Dictionary*; *Merriam-Webster Dictionary*; *West's Legal Thesaurus/Dictionary; Black's Law Dictionary* (7th ed);

that delivery must be to a person before a service can be categorised as a courier service.

[6] So far as the Act is concerned, I am unable, with respect, to find any distinction in s 16, much less a distinction which lies at the heart of that section, between what Marais JA terms 'ordinary postal services' on the one hand, and a 'courier service', on the other. Subsection 4(a) provides:

> 'A reserved postal service of the postal company contemplated in this section, excluding a courier service in respect whereof the postal company must be licensed or registered separately, may be provided by a wholly-owned subsidiary of the postal

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Butterworths Australian Legal Dictionary; and *s.v.* 'koerier', *Woordeboek van die Afrikaanse Taal* (Schoonees *et al*), *Kernwoordeboek van Afrikaans* (De Villiers, Smuts and Eksteen), *HAT* (4th ed), *Afrikaanse Woordeboek* (Terblanche and Odendaal) and*Verklarende Afrikaanse Woordeboek* (Labuschagne and Eksteen).

> company, without such subsidiary being required to hold a licence in terms of this Act if . . .'

That subsection contemplates that a reserved postal service includes a courier service, otherwise it would not have been necessary for the legislature to exclude a courier service. In addition, subsection 5(a) provides:

> 'Any person who, immediately before the date of commencement of this section provided a courier service of a type contemplated in Schedule 1, must be regarded as being licensed to provide such a courier service . . .'.

The type of service contemplated in Schedule 1 is 'reserved postal services'. A distinction between 'ordinary postal services' and courier services is not to be found in the Act itself. Indeed, the former concept nowhere appears in the Act. It is the consequence of an unwarranted definition of courier services not dictated by the Act. But perhaps the most telling feature of s 16 is that ss (5)(d) does not require a courier to undertake personal deliveries only, as a condition for being granted a

licence. I do not interpret the 'track and trace' provision in s 16(5)(d)(ii) as impliedly importing such a requirement. The phrase is nowhere defined in the Act. The evidence shows that the service provided by the appellant enables the appellant to establish the whereabouts of an item entrusted to it at every stage from the time it is collected, up to and including the time of delivery at a street address. That in my view constitutes compliance with the section. In addition, should a customer require proof of delivery, the signature of a recipient will be obtained. If indeed all a licensed courier is permitted to do, is to make personal delivery, then this essential limitation would surely have been included in s 16(5)(d), in terms; but it is not.

[7] Section 16 of the Act clearly contemplates that couriers will compete with the postal company in the provision of reserved postal

services. There is in my respectful view no basis, either on the ordinary meaning of the phrase 'courier service' or to be found in the scheme of the Act, for limiting that competition to person to person deliveries. And once it is plain, as it is from s 16 of the Act, that competition is to be allowed, it cannot be reasoned (as was done by the learned Judge in the Court *a quo*) that street deliveries must be excluded from courier services because this function was traditionally reserved for the postal company: the whole purpose of s 16 is to break that monopoly.

[8] I would accordingly uphold the appeal with costs and alter the order of the Court *a quo* as proposed by Zulman JA.

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T D CLOETE
JUDGE OF APPEAL