The law of third party motor vehicle insurance in Lesotho: a comment on the new order

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Introduction

The law of compulsory third party motor vehicle insurance in Lesotho took a new turn on 1 January 1990 when the Motor Vehicle Insurance Order 26 of 1989 came into force. Prior to this Order the law applicable was contained in Order 18 of 1972. In addition judicial interpretations put on it and other pronouncements of the courts on the subject of motor insurance have been binding. Judgments of South African, British and other jurisdictions’ courts, which command a persuasive status in the country, have whenever relevant also been relied on.

As is the case with similar statutes elsewhere in the Commonwealth, and although Order 18 was a post-independence statute, its introduction was really a part of the on-going process of extending British law into the colonies and ex-colonies. In the specific case of motor vehicle insurance, this legislation was primarily inspired by the feeling that ordinary road users and working people needed some kind of relief or compensation for losses and damages arising from motor vehicles, which like other industrial inventions had come to be accepted as desirable hazards. Accordingly, it came to be accepted that the most effective method of taking care of this problem would be for the various participants in the creation of the risk, namely motor vehicle owners or drivers, to pool their resources by contributing to an insurance fund from which victims of car accidents who satisfied certain requirements would be compensated. Hence the creation and regulation of the business of third party

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motor insurance. Suffice it to add that as in the case of other compensation schemes, it was largely due to the struggles and efforts of the working people themselves that parliament eventually approved the scheme.

Order 26 of 1989 was introduced to correct certain loopholes identified in respect of the 1972 Order. It was also aimed at simplifying the procedural aspects of motor insurance which were thought to be too complex and cumbersome under the old Order. Thus, under Order 26, there is no longer any need for insurance companies to indicate their willingness to carry on the business of third party motor insurance by means of a lengthy process of application and Gazetting. Instead it is up to the minister to make arrangements or agreements with companies. In terms of sections 3 and 4, he may then impose a motor vehicle insurance levy on fuel which is to be used for the purposes of compensating any person for any loss or damage falling under s 6. This section simply provides that

The insurer shall be obliged to compensate any person for any loss or damage which the third party has suffered as a result of –

(a) any bodily injury to himself;
(b) the death of or any bodily injury to any person; in either case caused by or arising out of the driving of a registered motor vehicle by any person in Lesotho, if the injury or death is due to the negligence or other unlawful act of the person who drove the registered motor vehicle or of the owner or his servant in the execution of his duty.

Other changes are that motor vehicle owners or drivers need no longer undergo a cumbersome process to obtain insurance cover. Similarly, the process of making claims has been simplified. According to Mr Tsephe some of the shortcomings of the old order which paved the way for Order 26 were that not all motorists bought the tokens of insurance prescribed by the old Order, the old system was open to abuse as some people tended to print or steal tokens (either on their own or in league with printing organisations); and it cost a lot of money to print tokens.

The same official added that some of the advantages which the authorities see for the new Order are that every vehicle regardless of size will pay a premium upon the purchase of fuel; that the more a vehicle travels and thus the more it is exposed to the danger of an accident, the more its owner or driver pays in terms of insurance premiums at a higher fuel consumption is thereby incurred. (In other words, the premiums are no longer static with the result that those who travel more unfairly benefit from the minor travellers of the

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2For more details on the historical background to the system of third party motor insurance in Lesotho see Ntsietso Mokitimi A Critical Analysis of the Compulsory Motor Vehicle Insurance Protection to Victims LLB dissertation National University of Lesotho Faculty of Law 1987 at 8 and see also JL Kanywanyi supra.

3JL Kanywanyi op cit.

4Section 5.

5An official of the Minister of Planning and Finance, private interview 12 July 1990.
same vehicle or business vehicle range); that it is impossible to evade insurance as every vehicle in Lesotho requires fuel for its propulsion; and that it is easy to collect premiums.

These considerations aside, Order 26 was also enacted to bring Lesotho into line with other members of the Customs Union which are already using the new system of motor vehicle insurance. The new system was conceived in South Africa where the Grosskopf Commission had been appointed to answer certain questions relating to membership of the consortium of motor vehicles; cover loss or damage to property by motor vehicles; fault or faultless liability insurance; and the use of fuel as a mechanism for realising premiums.  

The recommendations of the Grosskopf Commission resulted in the enactment of the Motor Vehicle Accident Act, 1986. There is no evidence for the notion that similar concerns might also have promoted the promulgation of Order 26, but it is not impossible that these could have played a part as some of the basic changes occurred within related areas. It would further appear that by seeking to make the regional motor vehicle insurance system uniform, the order also seeks to ensure that a motorist is covered by insurance wherever he goes within the countries concerned. This noble regional goal however, seems to have been stifled prematurely by the Order itself by providing that recovery for losses or damages caused outside Lesotho by Lesotho registered vehicles will only be possible upon the existence of a Ministerial prescription.

In this article we seek to highlight some of the new Order's unique characteristics, stressing where it differs from previous legislation. In addition, the real significance and implications of the Order in terms of efficiency benefits to the third party and cost effectiveness are examined. As a starting point, we consider the question of who may carry on the business of motor insurance in Lesotho. This is followed by a discussion of the contents and substance of the contract of motor insurance itself. The rest of the discussion relates to the various provisions of the new Order. A comparative approach is employed for purposes of enhancing our understanding of the extent of the changes. The terms "new Order" and "old Order" are used to refer to Orders 26 and 18, respectively.

The Business of motor insurance and who may engage in it in Lesotho

Section 5 of the new Order provides that the minister may enter into an agreement or make such other arrangements with any insurer for the purpose of administering and managing the levy collected in terms of s 3.

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6ie Botswana, South Africa and Swaziland.
8Mr Tsephe supra.
9Section 4(2). See also s 6(2).
introduction of the arrangements envisaged under s 5 at once dispenses with the obviously bureaucratic procedures and requirements of the old Order which stipulated that only registered companies could engage in the business of motor insurance. In particular, those procedures and requirements were that during the month of October of every year any insurance company could notify the minister in writing of its willingness to undertake all classes of motor vehicle insurance, including in the notification such details as a tariff of its premiums. If the minister was satisfied that such a company was competent to carry on that business, he was in turn required to publish in the Gazette of the month of November a notice of the willingness and right of the applicant company to undertake motor vehicle insurance, including information on the company’s proposed tariff of premiums.

A company no longer wishing to conduct motor vehicle insurance business was entitled to notify the minister in October of any year and the same procedure would be followed as to notification of the members of the public. Under section 3(2), the minister was empowered to prescribe conditions or regulations with which any company permitted to carry on the business of motor insurance could be required to comply. When a company became incompetent to carry on the business of motor insurance, or when it failed to comply with any provision of the order or condition or regulation imposed by the minister, a similar procedure was followed to compel such company to stop dealing in motor vehicle insurance.

Another notable aspect of these registration or pre-commencement procedures of the old Order, was that the minister was entitled to impose a security or guarantee on any company before it could engage in motor vehicle insurance. Such securities or guarantees were to be used in the event of the circumstances contemplated under section 3(3), viz the loss of competence by a registered company to carry on the business of motor insurance, becoming material. This was an obviously burdensome requirement which could not be trusted adequately to safeguard the interests of those insured. The South African practice of re-insurance by means of a Motor Vehicle Insurance Fund, was in this respect, preferable as it guaranteed that a sizable pool of funds from various consortium members would be available instead of a fund determined by discretion, based on the size and ability of the company, and held apart from other insurers’ funds.

Subsections (7), (8) and (9) of the same section dealt with the minister’s right to ensure compliance with the registration requirements (ie procedures and conditions), termination of the right to engage in motor insurance, and enforcement of the Order’s other provisions in respect of commencement of business. The new Order avoids the bureaucratic practices of the outgoing Order. To commence business, all that is required is an ordinary agreement or

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10Eg s 3.
11Section 3(1).
12See the Grosskopf Commission Report op cit.
arrangement between the minister and a willing company. Such agreement or arrangement should be notified to members of the public annually not later than three months before the first day of January by way of publication in the Gazette. No direct contract between the owner or driver of the insured vehicle and a designated company is required. The insurer's right to test for roadworthiness, to fix premiums, and to refuse to insure any motor vehicle if the application was submitted thirty days earlier than the beginning of the period of insurance intended, or when the vehicle was operated under a special or temporary permit but the permit was not shown, are eliminated. In addition an insurance company's right to refuse to insure provided it believed reasonably that the applicant or any member of his household or any person authorised by him had in the past unduly endangered or was likely unduly to endanger the safety of the public in future has been removed. Similarly, under s 10 of the old Order, a registered company could apply for the cancellation of the insured driver's licence. This too has gone. It is submitted that the elimination of the power of insurers to test for roadworthiness or to refuse to insure in respect of unsafe drivers and vehicles is a mistake as it removes one of the ways by which the authorities ensured that only roadworthy vehicles operated on the roads. Furthermore, it will most certainly unleash an undesirable increase in the number of unroadworthy motor vehicles roaming the streets, resulting in more accidents and insurance claims. The mere knowledge that insurers can still pursue offending motor vehicle owners or drivers afterwards ensures only minimal restraint and is of no significant value compared to the preventive nature of the insurer's original rights. Indeed it is contended that to an average person who is injured or killed, accident prevention by way of keeping out unfit vehicles is more useful than statutorily restricted compensation he may recover.

It is significant to note that, apart from the foregoing changes, the new Order also eliminates such problems of interpretation as the question of what constitutes "a member" of the insured or applicant's household. On the question of insurance cover itself, despite the ease with which it is effected under the new Order, a few questions nevertheless do arise. First, it is not clear whether the minister can enter into agreements or make arrangements with more than one insurance company. The use of the term "arrangements" would seem to imply such a possibility. If this is the case, a question arises as to how members of the public are to know or choose which company to claim from. There is also a question of how to prevent fraud, as some claimants might try to make several claims from different companies in respect of a single incident. Furthermore, it is not easy to see how the levy will be distributed among different companies, as it is obvious that the volume of business for all companies cannot be the same, nor can such a multitude of

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13Section 8(1).
14Section 8(1). See also s 18.
15See Brand v Kotze 1948 SA 769 and Macgillivray v WR Investments 1959 3 SA 17. See also Abrahamson v Voluntary Worker's Housing Utility Co 1953 3 SA 216.
companies be expected to handle an equal number of claims in any given year. This means that if many companies are contemplated, there would certainly be some inequities as some companies might benefit unfairly or lose from those who sell more fuel or handle more claims, respectively.

The incidence of insurance

Under s 22(1) of the old Order no person was entitled to drive or to permit another person to drive a motor vehicle on a public road or street or in any other place to which the public had access, unless the motor vehicle was insured under s 4 and 6 of the Order. However, the section did not apply to

- motor vehicles owned by any state or government or the representative of any government;
- vehicles registered outside Lesotho if a person who drove or permitted another to drive such a vehicle had made such provision as might have been prescribed by regulation, to insure that compensation would be paid for any such loss or damage which might have been caused by or have arisen out of the driving of such motor vehicle in Lesotho; or
- if the owner had a valid exemption certificate under s 24 of the Order.

A contract of insurance was evidenced by the issuing of a written declaration of insurance and a token of insurance attached to a vehicle.16 As in the case of an ordinary insurance, a deliberate or false statement of particulars was an offence punishable by a fine not exceeding one hundred Rand.

Under the new Order it is no longer necessary to establish whether or not a motor vehicle causing loss or damage has been physically insured or has been exempted. Indeed, a direct contract of insurance between the driver or owner of a vehicle and a Gazetted insurer is not required. Provided a motor vehicle runs on fuel and is registered in Lesotho, it is insured. It is not stated whether where it is known that the offending vehicle was running on foreign fuel or free fuel a third party can still claim compensation. Similarly, the Order is silent on the right to compensation when the offending vehicle is registered in a foreign state but is kept or operated in Lesotho. Perhaps this silence was deliberate so as to compel vehicle owners or drivers to register vehicles locally in terms of section 6(1) and (4) of the Road Traffic Act, 198117 and thus win more money in terms of tax for the government. It could also be due to the knowledge that claimants could claim from insurers at the place of registration of the vehicle concerned if such place is part of the Common Customs Area or has laws which entertain such claims. It is submitted however, that not to have permitted recovery within Lesotho was erroneous as the offending vehicles run on Basotho fuel and are therefore (at least in theory) insured in Lesotho. Furthermore, requiring people to travel outside Lesotho to make claims in respect of loss or damage caused by such motor vehicles subjects them to

16Sections 4 and 5, respectively.
17Act 8 of 1981.
unnecessary expense and complications. After all, for a country like Lesotho which is almost wholly dependent on South Africa it is unrealistic not to accept that some of its motor vehicle owners will prefer to keep their vehicles under South African registration for job related reasons or to benefit from that country's lower tariffs on registration.

Other questions on this matter are whether where losses or damages are caused by vehicles enjoying diplomatic protection, or where the person driving an offending vehicle has diplomatic immunity, such vehicles, and persons will be treated without reference to such status and thus render Gazetted insurers liable to pay compensation? In short, does it mean that government and other previously exempt motor vehicles are now insured whenever fuel is procured for them from public filling stations, with the consequent effect that Gazetted companies become liable thereby to third parties who have suffered damage? Needless to say, such a position in respect of diplomatic vehicles would contradict international law, and as the fuel they use is local, the Act should have pronounced itself on their exemption from insurance as was the case previously. Suffice it to add that the use of the term third party in the light of an absence of a personal contract between motor vehicle owners or drivers and Gazetted insurers is a misnomer. At common law, the term, third party largely contemplates or is used to designate a non-party to a contract. It cannot therefore be used in that sense in the absence of an existing contract.18

One obvious consequence of the absence of a requirement for a direct personal contract between motor vehicle owners or drivers and insurers is that it diminishes the significance of the question of ownership of the offending motor vehicle as well as that of the traditional ban on the right to transfer an insurance policy.19 Thus, problems such as when exactly a new owner has become an owner, and therefore, whether he is entitled to take out motor vehicle insurance on his own are no longer relevant.

At common law the question of ownership is quite crucial in determining the right or power to insure as well as that of recovery.20 In Mdlalo v

18Indeed it can even be argued further that in the absence of such a personal contract between the claimant and insurers it should be possible for any one, including actual owners of offending motor vehicles upon satisfaction of all the grounds, to recover compensation, cf Digby v General Accident, Fire and Life Assurance Corp Ltd 1940 3 All ER 190. Even Stegen v Shield Insurance Co Ltd 1976 2 SA 175 which sets the rule, can be distinguished as there was a personal contract in that case and the owner was the driver.

19In law an insurance policy is personal. It is not transferable. See Erasmus v Van de Venter 1960 4 SA 100. Under the outgoing Order the outgoing owner was required to remove the token of insurance before making delivery of the vehicle to its new owner. He was thereafter required to return the token to the insurer who was also to be informed of the name and address of the new owner, a requirement, needless to say, which was honoured more in breach than practice. See s 20(2). See also Peter v General Fire and Accident Insurance Co 1938 2 All ER 267. See also Monare v LNIC Civ/app/19/84 and Thompson v New India Assurance 1957 4 SA 374.

for instance, it was clearly settled that a motor vehicle will be regarded as belonging to its registered owner until all steps necessary to effect registration have been completed so as to nullify the first registration. It is then that the new owner becomes an owner; a position which is slightly at variance with the common law principles on sale which stress delivery plus intention of the parties as the determining factors. In effect, what the case settled was that only the registered owner was insured. The others drove as authorised representatives of the owner if the contract of insurance was valid. If it was not then any other person who attempted to procure a new policy did so on his behalf or the new policy was null and void for want of insurable interest. Similarly, under the old Order, the only person who was entitled to insure was the owner even though the premiums themselves could be paid by any other person. Under the new Order all these problems are non-existent as the question of a direct contract of insurance is no longer relevant. Section simply provides that so long as the motor vehicle in question is registered in Lesotho, and all the other ingredients such as the existence of negligence or other unlawful act are present, then a third party is entitled to recover.

Liability of the insurer

As seen above, under section 6 of the new Order an insurer is obliged to compensate third parties for loss or damage suffered as a result of bodily injury (or injuries) to themselves or death or bodily injury (or injuries) to any person.

Section 6(2) adds that the insurer is also obliged to pay compensation in respect of any loss or damage resulting from or arising out of the driving of a motor vehicle registered in Lesotho in such other place outside Lesotho as the minister may prescribe. The use of the terms “loss” and “damage” in 6(2) while “death” and “injury” are used in 6(1) suggests that 6(2) confers a right to recover in respect of lost or damaged property. If this is the case and while the section seems to ignore losses or damages to property occurring within Lesotho, then this would be most significant as the provision would be a departure from the old Order’s prescriptions which entailed that a separate and cumbersome action had to be instituted in order for a claimant to recover compensation for loss or damage to his property. However, the use of the terms elsewhere in the Order, as for example in section 9, seems to envisage death or injury as opposed to the effect of the accident on property. This position must have been derived from South Africa where the Grosskopf Commission recommended it. Needless to say, such a continued refusal to include loss of property no longer seems justified. The Commission’s own arguments that a property loser has a common law claim plus an option to take his own insurance are not very convincing as the injured or killed person enjoys these same options. The insurer’s liability in either case (ie bodily injury

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21 1973 1 SA 931.
or death or loss or damage to property if applicable) is however dependent on the third party's ability to prove that the death, injury, loss or damage was caused by, or arose out of, the driving of a registered motor vehicle and that the owner or his servant or driver had committed some act of negligence or other unlawful act. However, section 8 qualifies the right of third parties who were passengers or those whose claims are in respect of injury or death occasioned to another person), at the time of their loss or damage by requiring that such persons should have been conveyed for reward; or have been injured or killed in the course of business of the owner of the registered offending vehicle; or employees of the driver or owner of the registered motor vehicle in question who were injured or killed in the course of such employment.

The same section provides that the liability of the insurer to a third party in respect of one occurrence shall be limited to M12 000, while in respect of many third parties claiming against one occurrence it shall not exceed M60 000 irrespective of their number. Where the claimant is an employee of the driver or owner of the motor vehicle in question who is entitled to compensation under the Workmen's Compensation Act 1977, then the liability of the insurer shall be limited to the difference between the sum of M12 000 (or whatever other lesser sum the claimant would have claimed) and any lesser sum which such claimant is entitled to under the workmen's compensation scheme. Where many claimants who are entitled to compensation under the scheme are involved, the total liability of the insurer in connection with any one occurrence shall not exceed M60 000.

In terms of s 9, the insurer shall not be obliged to compensate any person for any loss of damage:

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable if s 6 had not been enacted;

(b) suffered as a result of bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death was being conveyed in circumstances other than those set out in s 8 of the order;

(c) if the claimant is unable to identify either the motor vehicle or the driver thereof;

(d) suffered as a result of bodily injury to any person who:

(i) unreasonably refuses or fails to subject himself, at the request of the insurer and at the cost of the insurer, to any medical examinations by a medical practitioner designated by the said insurer;

(ii) refuses or fails to furnish the insurer at its request and cost, with copies of all medical reports in his possession that relate to the relevant claim for compensation;

(iii) refuses or fails to allow the insurer at its request to inspect all records relating to himself that are in the possession of any hospital or his medical practitioner;

(iv) unreasonably refuses or fails to submit to the insurer together with his claim form as prescribed by regulation, or within a reasonable period thereafter
and if he is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out;

(v) refuses or fails to furnish the insurer with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof; or

(vi) refuses or fails to furnish in writing within a reasonable period such further particulars of the said accident as the insurer may require.

Sub-sections (a) to (c) of s 9 raise a few crucial questions. Sub-section (a) for one is clearly a repetition of the much despised common law position which bases the insurer’s liability on the existence of negligence or other unlawful act or breach of duty. Not all of these elements are always easy to establish. This simply means that the third party is not entitled to recover from an insurer unless it can be proved that the owner of the offending motor vehicle or the person who drove it would have been liable at common law. Against this position it has to be remembered that the founding basis of compulsory third party motor insurance was to escape from the obstructionist elements of the common law. Section 9(a), like the outgoing s 16, therefore simply entrenches this common law position and waters down whatever gains victims of reckless driving would have made through compulsory motor insurance if it carried with it the right of automatic recovery upon proof of injury or death by a victim; provided the insurer or driver could prove contributory negligence or some other defence. The influence of the Grosskopf Commission is clear. That commission was of the view that automatic recovery would lead to two things. First it would be costly, and second it would lead to deliberate acts. It is submitted that in the case of rogueish behaviour it is not many people who can take their own lives for purposes of recovery. In terms of cost it is not every day that a perfectly normal tyre bursts or a normal car malfunctions leading to death or injury and therefore excessive claims. Indeed by the commission’s own figures, the number of those who recover is minimal. Surely, it could not be true that those who do not recover have elected or contributed in one way or another to their injuries. By denying automatic recovery and demanding fault the Order is perpetuating hardship.

As to the question of benefits being diminished by a general right of recovery, it is not proposed that relief be uniform for all victims. The degree and extent of damage or loss should remain the guiding principle. In this connection it is also important to remember that under the old system not every motorist was paying but now all cars are covered by means of a fuel levy. In this way the cost of automatic recovery can be minimised. Furthermore, even though the Grosskopf Commission does not support automatic recovery one must not lose sight of the fact that in the Republic a Motor Vehicle Insurance Fund from which even victims of hit and run accidents can be compensated is still in operation, this is not the case in Lesotho.

23See Rose’s Car Hire (Pty) Ltd v Grant 1948 2 SA 466 (AD).
24LJ Kanywanyi op cit 38.
Section 9(b) on the other hand excludes the right of recovery of passengers in family and other cars not authorised to carry paying passengers. Two principle reasons can be raised for this provision. In the case of paying or other passengers being conveyed in unauthorised cars, it seems they are denied cover because they are breaking the law anyway. Thus, in *Parity Insurance Co v Marescia*, which involved claims for compensation by persons who were unlawful paying passengers in a motor vehicle not authorised to convey such passengers, it was held that a person who is being conveyed for reward in an insured vehicle is not entitled to compensation from the insurer as by paying the reward while knowing that the conveyance is an offence he makes himself party to the offence. In the case of family members however, it seems that the basis for denying them cover is once again the common law position. At common law, a wife married in community of property could not sue her husband for damages. She could not therefore be entitled to sue somebody else for actions of her husband even if he had paid money in anticipation of such actions. Similarly, minors generally have no *locus standi* so they continue to be denied it under the Order. They can only claim through their parents or guardians. It is submitted however, that unless s 9(b) is read in conjunction with s 9(a) great confusion will be created with the implication that even people who are married out of community of property excluding marital power will be similarly denied the right to claim compensation. Such a proposition would clearly be absurd given the common law exception to the rule. Besides, there seems no rational ground for denying a woman married in community or out of it, the right to claim compensation from an insurer, who has duly been paid his premiums and stands independently of the marriage. Section 9(a) in our view is therefore unnecessarily wide.

Section 9(c) is clearly a blow to victims of hit and run accidents who are often unable to identify the vehicles or drivers responsible for their injuries or in the case of dead victims, there may be no witness to assist those claiming through them. Section 9(d)(v) on the other hand, is notable for placing a duty to submit particulars of the accident giving rise to the claim to the claimant. This seems to be an unnecessary duplication as s 17 also requires the driver to furnish the insurer with similar information. Moreover, this section, just like s 9(d)(vi), unfairly shifts the burden and expense onto the already suffering claimant. While it is appreciated that leaving everything in the hands of the offending driver or owner exposes the claimant to the danger of having his case twisted against him, this danger is somewhat diminished by the knowl-
edge that police statements would at all times accompany the driver or owner’s statements.

One matter on which the new Order makes an adjustment to the outgoing Order’s position is that of definition of “motor vehicle” itself. The new Order defines a motor vehicle as

any vehicle designed or adapted for propulsion or haulage on a road by means of fuel or electricity and includes a trailer, caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle.

This definition differs from that contained in the outgoing Order in that it specifies the means of propulsion required to signify the intended vehicles, viz, fuel and electricity. It is surprising however, that a vehicle propelled by electricity should be treated as insured as no levy is charged on electricity for purposes of insurance. The only way a vehicle propelled by electricity could be covered is by establishing that a levy on fuel also means a levy on that mode of power. This however, is illogical as the order itself consciously refers to fuel and electricity as separate modes of power.

In terms of the old Order a motor vehicle was any vehicle designed or adapted for propulsion or haulage on a road by means of any power (not being exclusively human or animal power) without the aid of rails. Clearly the new order limits the range of vehicles which can be treated as insurable. But unlike the old Order, it does not expressly exclude vehicles weighing not more than five hundred pounds which are specially constructed for use by persons suffering from physical disabilities. Instead it includes trailers and such other items as caravans and agricultural or other implements which are designed or adapted to be drawn by motor vehicles. The obvious question is, can one who suffers loss or damage by a trailer or by an agricultural implement such as a plough which was not being hauled at the time of the incident recover compensation from the insurer. This question is pertinent because a trailer or agricultural implement cannot be said to be driven as it is not propelled by fuel or electricity. In this respect it is important to note that in the old Order the wording of the provision was such that a motor vehicle included a trailer of such vehicle. The new simply says it includes a trailer implying that a trailer on its own is a motor vehicle. However, even without reading the outgoing provision, it is significant to remember that in practice under the old system, trailers were insured separately. Thus, in Santam Versekeringsmaatskappy Bpk v Kemp,28 where while being hauled by a tractor, a trailer lost a wheel and caused injury, it was held that even if a trailer is being hauled, is a motor vehicle and ought to be insured separately. In terms of the new Order where there is no room for a separate contract of insurance in respect of trailers or the main vehicles themselves, it is hard to see the basis for recovery from the insurer

when a detached trailer or agricultural implement causes loss or damage. Perhaps the only way out of this uncertainty is to continue to treat a detached trailer as part of the vehicle that left it on the spot of the accident.

Aside from these questions, the rest of the new Order's provisions are similar, at least in content, to those of the outgoing Order. The most notable ones are ss 8(1)(a) and (b) which place limitations on the amounts of money individual and group third parties can claim. Accordingly, the criticism directed at the sums specified under the old Order, particularly as regards their inadequacy in the light of current inflation, remains valid. Similarly, the new order's prescription period of two years is the same as that of the old Order.\(^{29}\) The only significant difference is the provision in the new Order excluding the application of all the other prescription laws. Even here, however, there are exceptions to the exclusionary rule as certain categories of people (such as minors, mental patients and persons under curatorship) continue to be entitled to claim compensation despite the prescription.\(^{30}\)

With regard to the procedures of making claims, these remain basically the same as those of the old Order. The only exception is that in terms of the new Order a medical report is invalid unless it is completed by the medical practitioner who treated the third party in question.\(^{31}\) In the absence of such practitioner, a superintendent of the hospital concerned or his representative may complete them. However, where the medical practitioner concerned, or the superintendent or his representative fail to complete a report on request within reasonable time and it appears that as a result of the passage of time the claim in question may become prescribed, then the medical practitioner who has fully satisfied himself regarding the cause of the death or injury of the victim may complete the report.

Finally, provisions outlawing the making of claims directly against the owner or driver of the motor vehicle in question, unless the insurer is unable to pay compensation or its liability has been terminated are the same in both the old and the new Orders. Similarly, the right of recourse exists in the new Order just as it did in the old one. It should follow, therefore, that whatever interpretations may have been put on those provisions in respect of the old Order, should be binding or persuasive in respect of interpretations of the new provisions.

Conclusions

It has been seen that Order 26 of 1989 which repeals the Motor Vehicle Insurance Order 18 of 1972 was prompted by loopholes and inconsistencies in the latter. The new Order has removed certain undesirable practices in the commencement and operation of the business of insurance. The most notable

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\(^{29}\)Section 13 (2)(a) of the old Order.

\(^{30}\)See ss 10 and 11.

\(^{31}\)Section 12.
change is that there is no longer any need for a direct contract of insurance between the insurer and the insured. The cover is effected by means of fuel purchase. Similarly, the new Order has removed certain inconsistencies in the area of definitions.

By and large however, the new Order remains webbed in the common law positions of the outgoing Order, particularly on the issue of the right to recover. The procedures relating to the making of claims are also similar. It is therefore clear that despite its precision, the new Order is not radically different from the old. It also leaves a lot of unanswered questions which must be attended to immediately, especially on the right to recovery by victims of foreign-registered and diplomatic vehicles, women married in and out of community of property, and children and passengers in family vehicles. Other persons who need attention are victims of detached trailers and agricultural implements as well as those who die or are injured in hit and run accidents.