IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NUMBER 524/88

LOWER COURT NUMBER 12272/86

In the matter between:

STANDARD GENERAL INSURANCE COMPANY LIMITED — APPELLANT

and

VERDUN ESTATES (PROPRIETARY) LIMITED — FIRST RESPONDENT

JAN SMIT — SECOND RESPONDENT

Coram: HOEXTER, NESTADT et MILNE JJA, FRIEDMAN et GOLDSTONE AJJA.

Date heard: 13 March 1990

Date delivered: 26 March 1990

J U D G M E N T

GOLDSTONE AJA:

Conradie J in the Cape Provincial Division of the Supreme Court dismissed with costs the claim of the appellant for payment the sum of R6877,78. The judgment of the Court a quo is reported in 1988 (4) SA 779 (C) as Standard General Insurance Co. Ltd v Verdun Estates (Pty) Ltd and Another. With leave of the Court a quo the appellant now appeals to this Court against the judgment and order.

The facts material to the appeal are not in dispute. On 10 September 1982, the second respondent, an employee of the first respondent, was driving a tractor which was owned by his employer. He was doing so with the knowledge and consent of his employer and within the course and scope of his employment.

The tractor was insured by the appellant in terms of the provisions of the Compulsory Motor Vehicle Insurance Act, No. 56 of 1972 (the Act). At the corner of Voortrekker and Van Riebeeck Streets, Prince Alfred Hamlet, Cape, the tractor collided with a motor vehicle driven by one Saayman. The collision was partly attributable to the fault of the second respondent who, to the knowledge of the first respondent, did not have a driver's licence.

As a result of the collision, Saayman sustained bodily injuries. Pursuant to the terms of the Act, Saayman claimed compensation from the appellant. The claim was settled on 21 November 1985, when the appellant paid to Saayman the amount of R11462,97. In the Court a quo, the appellant claimed payment from the respondents of the sum of R6877,78 representing 60% of the amount paid to Saayman. It is common cause that in respect of the collision the second respondent was 60% at fault.

All of the aforegoing appears from a written statement of facts submitted to the court a quo in terms of rule 33(1) of the Uniform Rules of Court.

The following further agreed facts are recorded therein:

"11.2 The MVA 13 form was lodged on behalf of Saayman on 9th August 1984, before the expiration of a period of two years from the collision;

11.3 In terms of Sections 24(1) and 25(2) of the Act, Saayman's summons was to have been served after expiry of 90 days from 9th August 1984 (ie. after 7th November 1984) but before 11th December 1984;

11.4 By letter dated 15th October 1984... the Plaintiff undertook not to plead prescription in respect of Saayman's claim until 31st March 1985;

11.5 The expiry date of the aforesaid undertaking was extended by letter dated 22nd February 1985 to 30th June 1985 and again by letter dated 30th May 1985 to 31st December 1985...;

11.6 On 21st November 1985 Saayman's claim was settled by the Plaintiff paying compensation to him in the sum of of R11462,97 without summons ever having been issued by Saayman;

11.7 The first and second defendants were not advised of nor were they parties to the undertaking or the extensions thereof mentioned in paragraphs 11.4 and 11.5 above;

11.8 Were it not for the said undertakings, Saayman's claim against the Plaintiff would, under the provisions of sections 24(1) and 25(2) of the Act, have become prescribed on 11th December 1984 and insofar as that Act may be applicable, on 10th September 1985 in terms of section 11(d) of the Prescription Act, No. 68 of 1969 (as amended);

11.9 Had it not been for the extension of prescription Saayman could and would have served a summons claiming compensation on the

Plaintiff before the period of prescription had run out."

In the statement of agreed facts the respective contentions of the parties are set out as follows:

"12. The Plaintiff contends that in terms of section 28(2)(a)(ii) read with section 28(1) of the Act, it has a right to recover the sum of R6877,78 (being a 60% portion of R11462,97) from the First Defendant and that it has a similar right against the Second Defendant in terms of section 28(1) and 28(3) of the Act.

13. The Defendants contend that because of the provisions of section 24(1) read with section 25(2) Saayman's claim against the plaintiff became prescribed on 11th December 1984 and that the Plaintiff's payment to Saayman on 21st November 1985 was therefore not made under section 21 of the Act. Insofar as it may be necessary to establish a basis for the payment, the Defendants contend that it was made pursuant to an agreement of which the extended

undertaking not to plead prescription formed part.

14. Were this Honourable Court to uphold the Plaintiff's contentions, the Defendants would be liable to pay the Plaintiff the sum of R6877,78 plus costs. Were the Defendant's contentions to be upheld, the Plaintiff's claims should be dismissed and judgment entered in favour of the Defendants, with costs."

As emerges from the written statement of facts, the appellant's claim is founded upon the statutory right of recourse created by the provisions of section 28 of the Act. Insofar as it is now relevant, it is there provided that:

"28(1) When an authorized insurer has paid any compensation under section 21 or 26 it may... recover from the owner of the insured motor vehicle in question, or from any person whose negligence or other unlawful act caused the loss or damage in question, so much of the amount paid by way of compensation as the third

party could, but for the provisions of section 27, have recovered from the owner or from the person whose negligence or other unlawful act caused the loss or damage, as the case may be, if the authorized insurer had not paid any such compensation."

This right of recourse, in the circumstances set out in section 28(2) and (3), only arises, therefore, where the insurer has paid compensation under section 21 or 26 of the Act. Section 26 provides for payment to suppliers of certain goods and services and is not now relevant. Section 21(1), insofar as it is material, provides that:

" An authorized insurer which has insured or is deemed to have insured a motor vehicle in terms of section 12, 13 or 14 shall, subject to the provisions of this Act, be obliged to compensate any person whatsoever (in this Act called the third party) for any loss or damage which the third party has suffered..."

On behalf of the respondents it was submitted that the claim under section

21, prior to payment by the appellant (as the authorized insurer) became extinguished by reason of the provisions of section 10(1) of the Prescription Act No. 68 of 1969 (the Prescription Act) read with section 24(1)(a) of the Act. It is there provided that:

"10(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

The relevant law, here the Act, provides in section 24(1)(a) that:

"24(1)(a) Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of paragraph (b) of this subsection, the right to claim compensation under section 21 from an authorized insurer shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended

during the period of ninety days referred to in section 25(2)."

There was some debate with counsel as to whether the terms of the Prescription Act are applicable to the Act or whether section 24 is a self-contained provision. The latter conclusion finds some support from the following dictum of Friedman J in Terblanche v SA Eagle Insurance Co. Ltd. 1983 (2) SA 501 (N) at 504 F-H where the learned Judge in considering the 1978 amendments to section 24(1) of the Act said:

" It is a rule of statutory interpretation that the Legislature is presumed to be acquainted with the state of the law (Steyn Die Uitleg van Wette 5th ed at 132). When it passed the amending Act, the Legislature must be presumed to have been aware that the common law relating to, inter alia, the suspension of prescription applied to s 24(1) as it then was; yet despite such awareness it passed s 24(1)(b) categorising two classes of persons who, in any event, enjoyed common law protection (ie minors and persons under curatorship) and one class who may or may not have (ie persons detained under the Mental Health

Act). In my view, it did so for the reason, and could only have done so for the reason, that it intended to bring about a change in the law as the Courts had interpreted it to be with reference to the old s 11(2) and to the new s 24(1) (prior to the amendment), that is to say, to now exclude the common law relating to all aspects of prescription from the prescriptive provisions of the MVA Act (see Erasmus v Protea Assuransiemaatskappy Bpk 1982 (2) SA 64 (N) at 69 F - H)."

In Erasmus v Protea Assuransiemaatskappy Bpk, Page J referred only to the provisions of section 24(1)(b) in relation to the suspension of prescription. He was not referring to the provisions of section 24(1) as a whole.

In my judgment the statement of law by Friedman J is too widely cast. In terms of section 16(1) of the Prescription Act the provisions of Chapter III thereof shall-

" save in so far as they are inconsistent with the provisions of any

Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act."

(Section 10 is to be found in Chapter III of the Prescription Act).

It follows, in my opinion, that the provisions of the Prescription Act which are consistent with the provisions of section 24 of the Act are applicable in relation to the interpretation and effect thereof: see President Insurance Co. Ltd. v Yu Kwam 1963 (3) SA 766 (A) at 777 D-E; Santam Versekeringsmaatskappy Bpk v Roux 1978 (2) SA 856 (A) at 863 G; SA Mutual Fire and General Insurance Co. Ltd. v Eyberg 1981 (4) SA 318 (A) at 326 F - 328 A.

In Grey v Southern Insurance Association Ltd 1982 (3) SA 688 (E) at 691 H - 692 C Mullins AJ said the following:

" In my view Mr Kroon, who appeared for the respondent, is correct when he submitted that the date upon which a debt becomes prescribed, once that date is established, remains immutable, and that any relief from the normal consequences of the expiry of such prescriptive period which a claimant might be able to obtain, eg by agreement, or by leave of the Court where competent, would not affect that date...

...

... I am satisfied that the waiver by a debtor of the right to plead prescription does not alter the date upon which the debt became prescribed. In fact, ex hypothesi, such a waiver assumes the expiry of the prescriptive period."

I agree with that statement. See too, Kriel v President Versekerings-maatskappy Bpk en 'n Ander 1981 (1) SA 103 (T). It is also consistent with the following passage in the recent judgment of Vivier JA in Abbass v Allianz Insurance Ltd 1990 (1) SA 86 (A) at 90 I-J:

"... s 24(2) is concerned only with one period of prescription, ie the statutory period provided for by s 24(1), and... it does not provide for any relief in respect of any privately agreed prescriptive period which differs from the statutory period."

Appellant's counsel submitted that on a proper interpretation of the Prescription Act, a prescribed debt is not extingiushed, but it becomes "voidable" at the instance of the debtor. He relied upon the provisions of section 17 of the Prescription Act for the proposition that extinctive prescription does not operate ipso iure and has to be invoked and pleaded by the debtor. Section 17 provides as follows:

"17(1) A court shall not of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

It is accordingly submitted on behalf of the the appellant that the true legal effect of an undertaking given before the expiry of the period of prescription not to plead it, is to prevent the debtor from bringing about the extinction of the debt by invoking prescription. It does not extend the period of prescription but rather prevents it from being brought into operation for as long as the debtor is precluded by his undertaking not to invoke it. It follows, so the submission concludes, that if an authorized insurer does not invoke prescription and pays compensation to a third party after the period of prescription has expired, such payment is one under section 21 of the Act.

There are two kinds of statutes of limitations. In the one, the debt, action or remedy is merely barred. This is generally known as "weak" prescription. In the other, the debt, action or remedy is extinguished. This is generally known as "strong" prescription: see De Wet and Yeats, Kontraktereg en Handelsreg 4th ed. at 256 - 258. An example of weak prescription is to be found in the 1943 Prescription Act (No. 18 of 1943). In section 3(1) "extinctive prescription" is said to be "the rendering

unenforceable of a right by the lapse of time". And, in section 3(5), it is provided that a debt prescribed by extinctive prescription, inter alia, may be set off against a debt which came into existence after the lapse of the period of prescription and is sufficient to support a contract of suretyship. That section goes on to provide that after the lapse of thirty years a debt shall cease to be capable of being set off or of supporting a contract of suretyship. It follows that under the 1943 Prescription Act the lapse of the periods set forth in section 3(2) resulted in "weak" prescription, whereas the lapse of thirty years resulted in "strong" prescription.

The Prescription Act, if one has regard to section 10(1) thereof, appears to have introduced throughout the concept of "strong" prescription. It is expressly stated that after the lapse of the period which in terms of the relevant law applies in regard to the prescription of a debt, such debt "shall be extinguished". And, as was pointed out by Corbett JA (as he then was), in Evins v Shield Insurance Co. Ltd 1980 (2) SA 814 (A) at 842 E - F, the lapse of the period of prescription "extinguishes" the debt

and therefore also the right of action vested in the creditor.

Section 10(2) and (3) of the Prescription Act provides as follows:

"(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has become extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt."

As was pointed out by O'Donovan J in Kuhne and Nägel AG Zurich v APA Distributors (Pty) Ltd 1981 (3) SA 536 (W) at 538 G - H, section 10(3) "is a deeming provision designed to protect the recipient of payment of a debt which has been totally discharged by effluxion of time". In the case of weak prescription such a provision would not be necessary.

In my opinion, the provisions of section 17 of the Prescription Act do not detract from the effect brought about by section 10, ie. the extinguishing of the debt. A reason for providing that a court shall not of its own motion take notice of prescription and that it must be pleaded by the party relying on it may well have been introduced to cater for the eventuality of some form of interruption of prescription having occurred. A court would usually be ignorant thereof. Whatever the reason, I would agree with Van Heerden J in Lipschitz v Dechamps Textiles GmbH and Another 1978 (4) SA 427 (C) at 430 H, that section 17 is a procedural and not a substantive provision. In any event, as was held by O'Donovan J in Kuhne and Nagel AG Zurich v APA Distributors (Pty) Ltd (supra) any inference arising from the provisions of section 17 must yield to the clear words of section 10(1).

As Saayman duly made a claim upon the appellant in terms of section 25(1) of the Act, in terms of the proviso to section 24(1), prescription was suspended during the period of ninety days referred to in section 25(2). I agree, therefore, with the learned Judge a quo that the effect of section

10(1) of the Prescription Act is that the liability of the appellant under section 21 of the Act became extinguished after the expiry of the period of two years and ninety days after the date upon which the cause of action arose.

The question which now arises is whether a payment made in discharge of an obligation to pay compensation under section 21 of the Act which has become extinguished by prescription is nevertheless a payment made under section 21. That, in terms, is what is required by the provisions of section 28(1) upon which the appellant relies for its right of recourse against the respondents.

Section 21 obliges an authorized insurer which has insured or is deemed to have insured a motor vehicle under the provisions of the Act -

> " subject to the provisions of this Act... to compensate any person whatsoever (in this Act called the third party) for any loss or damage which the third party has suffered... "

It follows, in my opinion, that a payment is made in terms of the Act only where it is made within the time periods provided for in section 24, ie. within the period of two years and ninety days referred to in section 24(1) or within such longer period as a court may allow in terms of section 24(2). Where a court allows such longer period it is true that the debt has become extinguished by prescription. Nevertheless, the payment when made will have been made pursuant to an order in terms of the provisions of the Act. The authorized insurer would then have been obliged to make such payment in terms of section 21(1) of the Act.

In the present case, however, the authorized insurer agreed to waive the effect of prescription outside of the provisions of section 24 of the Act. It did so subject to a condition, ie. the issue of summons prior to the dates referred to respectively in each of the letters being Annexures A, B and C to the written statement of facts. The payment when made on 21 November 1985, was made some three years and two months after it arose, ie. after it had become extinguished by prescription and in circumstances

where no order was made by a court in terms of section 24(2) of the Act. The payment was therefore not made under section 21 and cannot be recovered under section 28: compare Springbok Timber and Hardware Co. (Pty) Ltd. v National Employers' Mutual General Insurance Co. Ltd 1970 (1) SA 346 (A) especially at 351 E - 352 F. The Court a quo was accordingly correct in dismissing the appellant's claim with costs. In reaching this conclusion it has not been found necessary to consider the judgments dealing with the effect of a waiver of prescription on claims made under section 2(6)(c) of the Apportionment of Damages Act, No. 34 of 1956. They are distinguishable and not helpful in the resolution of the problems raised by the facts of this case. I refer in this regard to Thwala v Santam Insurance Co. Ltd and Another 1977 (2) SA 100 (D), Reis v AA Mutual Insurance Association Ltd 1981 (1) SA 98 (T), and Naidoo v Santam Insurance Ltd and Another 1986 (1) SA 296 (N).

The appeal is dismissed with costs.

GOLDSTONE AJA

HOEXTER JA)
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NESTADT JA)
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) CONCUR
MILNE JA)
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FRIEDMAN AJA)