Case no 222/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

Between:

MOGAMAT ABBASS Appellant

- and -

ALLIANZ INSURANCE LIMITED Respondent

CORAM: JOUBERT, BOTHA, VIVIER, EKSTEEN JJA et NICHOLAS AJA.

HEARD: 7 SEPTEMBER 1989.

DELIVERED: 21 SEPTEMBER 1989.

J U D G M E N T

VIVIER JA.

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VIVIER JA:

The appellant applied in the Cape Provincial Division for an order in terms of sec 24(2)(a)(ii) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 ("the Act") granting him leave to serve process upon the respondent despite the fact that his claim had become prescribed under sec 24(1) of the Act. The application was dismissed by MARAIS J and the appellant now appeals with the leave of this Court.

The relevant facts are not in dispute and may be summarised as follows. On 15 June 1981 the appellant sustained serious bodily injuries in a collision between a motor vehicle driven by himself and another motor vehicle driven by one Booysen. As a third party within the meaning of those words in sec 21 of the

Act, the appellant instructed a firm of attorneys to act on his behalf in claiming compensation from the respondent as the authorised insurer under the Act of Booysen's vehicle. In compliance with the provisions of sec 25(1) of the Act, the appellant's claim for compensation in an amount of R25 760-00, set out on the prescribed form MVA 13 and accompanied by the prescribed medical report, was duly lodged with respondent at some unspecified time after 17 December 1981. Apparently nothing happened thereafter until 15 April 1983 when respondent offered, without prejudice, to settle the appellant's claim for the sum of R2 858-16 and to make a contribution of R150-00 towards his costs.

A few days later, on 29 April 1983, the respondent further agreed that the appellant should be examined, at its cost, by an orthopaedic surgeon in order to

obtain an updated medico-legal report on his condition.

The appellant thereafter terminated the services of the attorneys who had up to that stage been acting for him, and on 11 May 1983 instructed the firm of Frank and Frank to act on his behalf. Mr Jack Stanley Frank ("Frank") of this firm handled the appellant's claim thereafter.

Allowing for the ninety day period of suspension of prescription referred to in sub-sections 24(1)(a) and 25(2) of the Act, the two year period of prescription laid down by the former of these sub-sections was due to expire on or about 15 September 1983 (the exact date is not relevant for present purposes). On 17 August 1983 Frank addressed a letter to the respondent confirming that arrangements had been made for the appellant to be medically examined at the beginning of September 1983, and requesting confirmation from

the respondent that it had taken the necessary steps "to extend prescription of the claim". The respondent replied by letter dated 29 August 1983 stating that it had arranged for "an extension of our right to plead prescription up to and including 29 February 1984". The updated medico-legal report was duly sent to respondent under cover of a letter dated 14 February 1984. The letter stated that the appellant was not prepared to accept the respondent's offer of settlement contained in its aforesaid letter of 15 April 1983, and that, since prescription of the claim was now imminent, steps were being taken to issue and serve the summons. On 20 February 1983 the appellant's combined summons was issued out of the Cape Provincial Division and Frank wrote on the front of his file: "20/2/84 issued summons and filed power of attorney". On the same day Frank

received a telephone call from respondent's representative, a Mr George, and he then informed the latter that summons was being issued that day and that it would be served on the respondent shortly. It was agreed that, pending settlement negotiations, it would not be necessary for respondent to defend the action and that, if the matter could not be settled, defendant would then be given a reasonable opportunity to defend. George also advised Frank of an increased offer of settlement which respondent was prepared to make in respect of the claim. Later the same day George again telephoned Frank and said that respondent did not want the summons to be served on it and that its increased offer of settlement was being made specifically on condition that the summons was not served on it. George said that he would take the necessary steps "to extend

prescription of the claim for about six months". Frank accordingly agreed to withhold service of the summons and the summons was not served. In a letter dated 21 February 1984 addressed to Frank the respondent confirmed the above telephonic conversations in the following words:

> "Kindly note that the MVA Fund has agreed that we do not plead prescription up to and including 31 August 1984.
> Furthermore, we wish to advise that we have reconsidered this matter on a without prejudice basis and tender settlement of this claim in the sum of R4 000-00.
> The above offer is on condition that you withhold your summons and should your client accept this offer, we will settle your bill of costs on a taxed or agreed basis."

It was stated that the new offer was open for acceptance for a period of 30 days. Frank did nothing about the offer, so that, in the event, the matter was not settled,

nor was the summons served by the date stipulated by respondent viz 31 August 1984. In an affidavit filed in support of the application Frank said that his failure to have the summons served was initially due to the fact that he was under considerable pressure of work. Thereafter he was away from his office on leave for about a month towards the end of May 1984. His firm was moving offices at the end of August 1984 and much time was spent preparing for the move. These circumstances so preoccupied his mind and time that he was unable to attend to the appellant's claim and to investigate the quantum of the claim in order to attempt to settle the matter. He received a letter dated 12 July 1984 from the appellant's previous attorneys concerning payment of their fees and he replied thereto in a letter dated 7 August 1984. He had the appellant's file before

him when he dictated the reply, and saw his note on the file that summons had been issued. This misled him into the mistaken belief that the summons had in fact been served since he had by then forgotten or overlooked the arrangement to withhold service of the summons. It was only on 20 October 1984 that, upon going through the file again, he discovered that the summons had indeed not been served and that the extended period during which respondent had undertaken not to plead prescription had expired. He thereafter unsuccessfully attempted to persuade the respondent to waive prescription. Respondent did, however, waive compliance with the provisions of sec 24(2)(b)(i) which require an application to be brought within a period of ninety days after the date on which the claim became prescribed.

Sec 24(2)(a) of the Act deals with two types of situations: subsec (i) provides for the case where the claim for compensation has become prescribed before compliance by the third party with the provisions of sec 25(1); and subsec (ii) deals with the situation where, after compliance with the said provisions, the claim has become prescribed because any process could not be served on the authorised insurer in time to interrupt prescription. The relevant portion of sec 24(2) provides as follows :

> "24(2)(a) If a third party's claim for compensation has become prescribed under subsection (1) of this section and a court having jurisdiction in respect of such claim is satisfied, upon application by the third party concerned -
>
> (i) .....

(ii) where the claim became prescribed after compliance by him with the said provisions, that by reason of special circumstances he or, if he instructed any other person to act on his behalf in this connection, such person could not reasonably have been expected to serve any process, by which the running of prescription could have been interrupted, on the authorized insurer before that date; and

(iii) that the authorized insurer is not prepared to waive its right to invoke the prescription,

the court may grant leave to the third party to comply with the said provisions and serve process in any action for enforcement of the claim on the authorized insurer in accordance with the provisions of section 25(2) before a date determined by the court, or, as the case may be, to serve such process on the authorized insurer before a date so determined.

(b) The court shall not grant an application referred to in paragraph (a) unless -

(i) the application is made within a period of ninety days after the date on which the claim became prescribed; and

(ii) the third party has given security to the satisfaction of the court for the costs of the authorized insurer in connection with the application.

(c) A plea of prescription in terms of subsection (1) shall not be upheld in any action in which the relevant process was served on an authorised insurer by virtue of leave granted under this subsection."

It will be seen that there are five requisites for relief under sec 24(2)(a)(ii). Firstly the applicant for relief must show that his claim for

compensation "has become prescribed under subsection (1) of this section". The reference is to the statutory period of prescription laid down in sec 24(1) viz the two year period from the date on which the claim arose, taking into account the ninety day period of suspension referred to in subsections 24(1)(a) and 25(2). The words have no reference to any extended period of prescription to which the parties may have agreed.

The second requirement for relief is that, by reason of special circumstances, the applicant for relief or his attorney could not reasonably have been expected to serve process interrupting prescription on the authorised insurer "before that date". The date referred to is the same as "the date on which the claim became prescribed" in subsec 24(2)(a)(i) and is clearly the date when the statutory period of prescription laid

down in subsec 24(1) expired. Thirdly the applicant must show that the authorized insurer is not prepared to waive its right to invoke "the prescription" (subsec 24(2)(a)(iii)). Again the reference is clearly to the prescriptive period prescribed in subsec 24(1). The fourth requisite is laid down in subsec 24(2)(b)(i) viz that the application for relief must be made within a period of ninety days "after the date on which the claim became prescribed". There is no indication that the date referred to in this subsection is any other than the date earlier referred to in subsec 24(2) i e the date on which the statutory period of prescription expired. The fifth requisite for relief is that the third party must furnish the security prescribed in subsec 24(2)(b)(ii). It seems clear from the first four requisites

that subsec 24(2) is concerned only with one period of prescription i e the statutory period provided for by subsec 24(1), and that it does not provide for any relief in respect of any privately agreed prescriptive period which differs from the statutory period.
It follows that the dicta in Modise v Incorporated General Insurances Ltd 1985(4) SA 650 (B GD) at 654I-655C to the effect that the parties may substitute a period of prescription of their own choosing for the statutory period prescribed in sec 24(1) without affecting the applicability of sec 24(2), cannot be supported.

Counsel for the appellant accepted in his main argument before this Court that sec 24(2) only applied to the statutory period of prescription. He submitted, however, that upon a proper construction of the negotiations

between the parties, no more was agreed upon than that the respondent would until 29 February 1984, and thereafter until 31 August 1984 waive its right to invoke the statutory prescriptive period, and that there was no question of any prescriptive period other than the statutory period having been agreed upon between the parties. Consequently, so the argument proceeded, all that the appellant needed to show to entitle him to relief in terms of sec 24(2)(a)(ii) was that it could not reasonably have been expected that process should be served within the statutory prescriptive period. It was submitted that by reason of the waiver agreement reached between the parties in terms whereof it was no longer necessary to serve the appellant's summons by 15 September 1983, appellant's attorneys could not reasonably have been expected to serve any process

by which the running of prescription could have been interrupted, within the statutory period. It is irrelevant that process could reasonably have been served during the extended period.

It will be recalled that in the letters of 17 and 19 August 1983 the parties agreed that respondent's right to plead prescription would be extended to 29 February 1984, and that, after the statutory prescriptive period had expired on 15 September 1983, the respondent on 21 February 1984 further allowed the appellant until 31 August 1984 to serve the summons. I shall assume in appellant's favour that no more was agreed upon in granting the extensions than that respondent would waive its right to invoke the statutory prescription.

While it is no doubt true that the appellant's attorneys could not reasonably have been expected to

serve the summons within the statutory prescriptive period, this was not sufficient in itself to ground a case for relief under sec 24(2)(a)(ii) of the Act. It was necessary in addition to satisfy the court in terms of sub-para (2)(a)(iii) that the respondent was not prepared to waive its right to invoke "the prescription". It is true that that paragraph appears to contemplate a waiver given after the date on which the claim becomes prescribed. But it does not, in terms, exclude a waiver given in anticipation of imminent prescription. And there is no reason why it should be construed as doing so. Indeed it is, and was, well known that a claimant and an insurance company would often agree in advance to an extension of the "right to plead prescription". That is something to be encouraged as being calculated to facilitate the settlement of

claims. In any event the waiver of 21 February 1984 was given after the date on which the claim became prescribed.

If, therefore, the appellant had applied, within a period of ninety days after the date on which the claim became prescribed (as required by subsec (2)(b)(i)), the application for relief under subsec (2)(a)(ii) could not have been granted, because the appellant would not have been able to satisfy the Court that the respondent was not prepared to waive its right to invoke "the prescription" i e the statutory prescriptive period which expired on 15 September 1983. The passage of time has not improved the appellant's position. It is quite clear that the respondent's refusal to waive prescription related to the extended periods and not to the statutory period of prescription

which expired on 15 September 1983.

If, therefore, the appellant is to have any remedy at all, it can only be on the basis that his attorneys could not reasonably have been expected to serve the summons during the extended periods agreed upon. In view of the conclusion which I have reached that sec 24(2) applies only to the statutory period of prescription, that line of argument is not open to the appellant. It is accordingly not necessary to consider whether special circumstances, within the meaning of those words in sec 24(2)(a), existed during the extended periods.

The application was accordingly correctly refused by the Court a quo. In order to reach this conclusion it has not been found necessary to deal with the cases in the Provincial Divisions to which

this Court was referred during argument viz Kriel v President Versekeringsmaatskappy Bpk en 'n Ander 1981(1) SA 103(T); Grey v Southern Insurance Association Ltd 1982(3) SA 688 (ECD) and Vilikazi v National Employers' General Insurance Co Ltd 1985(4) SA 251(C).

The appeal is dismissed with costs.

W. VIVIER JA.

JOUBERT JA)
BOTHA JA) Concur.
EKSTEEN JA)
NICHOLAS AJA)