79/94

Case No 760/92 and 90/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

HENDRIK JAKOBUS SWANEPOEL — Appellant

and

CITY COUNCIL OF JOHANNESBURG — Respondent

and

PRESIDENT INSURANCE COMPANY LIMITED — Appellant

and

FRANCINA SUSARAH CORLINA KRUGER — Respondent

CORAM :BOTHA, HEFER, EKSTEEN JJA et NICHOLAS, OLIVIER AJJA

HEARD :17 MAY 1994

DELIVERED :27 MAY 1994

J U D G M E N T

HEFER JA/...

HEFER JA;

In terms of sec 2 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 an agreement entered into by the Republics of South Africa, Transkei, Ciskei, Venda and Bophuthatswana was ratified and incorporated into the law of South Africa as if it were an Act of Parliament. The agreement established a common fund (the Multilateral Motor Vehicle Accidents Fund - "the MMF") which was declared a juristic person within the territory of each of the contracting states. In terms of art 40 of the agreement the MMF and its appointed agents are obliged (subject to certain exclusions and limitations not presently relevant) to compensate any person whomsoever for any loss or damage which he has suffered as a result of bodily injury to himself, or the death or bodily injury to any other person, caused by or arising from the driving of a motor

vehicle anywhere within the area of jurisdiction of the member states, if the death or injury is due to the negligence or other unlawful act of the driver or owner of the vehicle in question.

The agreement was amended in several respects by Proclamation 102 of 1991 which came into operation on 1 November 1991 (the "effective date"). In the present appeals we are concerned with the amendment of arts 55 and 57 which brought about an extension of the period of prescription of claims for compensation. The main issue is whether the extended period is applicable to claims which arose before the effective date. In the case of President Insurance Company Ltd v Kruger the court a quo (THIRION J) in a judgment reported in 1994(2) SA 495 (D & CL) ruled that the extended period was indeed applicable but in the case of Swanepoel v City Council of Johannesburg ELOFF JP came to a different conclusion

in a judgment reported in 1994(1) SA 468 (W).

It must be pointed out at the outset that ELOFF JP's judgment is largely based on the decision of this court in Protea International (Pty) Ltd v Peat Marwick Mitchell & Co 1990(2) SA 566, and on what is referred to therein at 570 B-C as "a general rule of construction ... [that] the operation of a statute is prospective, to apply only after its enactment (in futuro) unless the legislator clearly expressed a contrary intention that the operation should be retrospective to apply prior to its enactment (in praeterito)." However, what required the attention of the court in that case was an amendment to the Prescription Act 68 of 1969 which affected the date on which prescription commenced in the context of a debt which had become due before the date of the amendment. The situation in the present cases is entirely different. We are not

concerned with the date of commencement of the prescriptive period nor, I may add, with the effect of the amendment on claims which had already become prescribed, nor with any other past event. Our sole concern is the effect of the amendment on claims which, although having admittedly arisen before, had not become prescribed on the effective date. Viewed in this manner it is difficult to understand the relevance of the so-called rule against retrospectivity. What arts 55 and 57 in their amended form in effect say, is that, depending upon whether a claim is lodged with an appointed agent in terms of art 62 or not, the right to claim compensation shall henceforth become prescribed either three or five years after the claim arose. Its effect is plainly prospective. But this does not entail that existing rights, simply because they accrued in the past, are not similarily affected;

the amendment relates, not to the date of the accrual before the effective date, but to the date of the expiry of the rights thereafter. The amending statute is not "a retrospective statute because part of the requisites for its action is drawn from time antecedent to its passing" (per Lord Denman in R v St Mary, Whitechapel 116 ER 811 at 814). This principle was adopted inter alia in R v Grainger 1958(2) SA 443 (A) at 446 and Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 at 812 A-F and 817 I - 818 A.

In any event we must bear in mind that

> "these rules of statutory exigesis are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought."

(per VAN WINSEN AJP in Parow Municipality v Joyce and McGregor (Pty) Ltd 1974(1) SA 161 (C) at 165H -

166A, cited with approval inter alia in Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture' 1990(2) SA 548 (A) at 559 H-J.) The aim of the interpretation of a statute is after all to discover the intention of the legislature by examining the language used in its general context including the scope and purpose and, within limits, the background of the legislation (Jaga v Dönges, NO and Another; Bhana v Dönges NO, and Another 1950(4) SA 653 (A) at 662 G ad fin). This is what I will now proceed to do.

Before the amendment the provisions relating to the prescription of claims were to be found in arts 55, 57, 58, 59 and 60 read with arts 62 and 63 of the agreement. Arts 55, 57 and 63 read as follows:

"Article 55

> Notwithstanding the provisions of any other law relating to prescription, ... the right

to claim compensation under Chapter XII from an appointed agent in respect of claims referred to in Article 13 (b) shall become prescribed upon the expiry of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the periods referred to in Article 63.

Article 57

Notwithstanding the provisions of Article 55, no claim which has been lodged under Article 62 shall prescribe before the expiry of a period of 90 (ninety) days from the date on which the appointed agent delivers to a claimant or his representative per registered post or by hand a notice to-

(a) object to the validity of the claim; or
(b) repudiate liability; or
(c) convey an offer of settlement of the claim to the claimant or his representative.

Article 63

No claim shall be enforceable by legal proceedings commenced by a summons served on the appointed agent-

(a) before the expiry of a period of ninety (90) days as from the date on which the claim was

sent or delivered by hand, as the case may be, to the appointed agent as provided for in Article 62; and

(b) before all requirements of the appointed agent, as set out in Article 48 (f), requested within a reasonable period after receipt of a claim have been complied with: Provided that if the appointed agent repudiates in writing liability for the claim before the expiry of the said period, the claimant may at any time after such a repudiation serve summons on the appointed agent."

Articles 58, 59 and 60 were to the effect that, where a claim had become prescribed under art 55, the claimant was entitled to apply to court for relief which could in "special circumstances" be granted in the form of leave to comply with the provisions of art 62 (where those provisions had not been complied with) or to serve process for the

enforcement of a claim before a date determined by the court. In proceedings commenced by a summons served by virtue of leave so granted a plea of prescription could not be sustained.

These provisions plainly derived from sections 14 and 15(2) of the Motor Vehicle Accidents Act 84 of 1986 which was in operation immediately before, and which was suspended by the Act with which we are presently dealing. Sections 14 and 15(2) were severely criticized in Ngantweni v National Employers' General Insurance Co Ltd 1991(2) SA 645 (C) at 648 F - 649 I. They often led to confusion in determining the date on which claims became prescribed (cf Honey: MVA Practice under Act 84 of 1986 at 103-111), the principal source of uncertainty being the provisions of sections 14(2) (corresponding broadly to art 57 of the agreement) and the proviso to section 14(1)(a) (corresponding broadly to art 55)

read with sec 15(2) (corresponding broadly to art 63) relating to the suspension of prescription. A spate of applications under art 58 ensued which were often unsuccessful by reason of the definition of "special circumstances".

What may perhaps be regarded as the main achievement of the Proclamation is the simplification of the provisions relating to prescription. The amended arts 55 and 57 then read as follows:

" Article 55

> Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of ... [Article] 57, the right to claim compensation under Chapter XII from an appointed agent in respect of claims referred to in Article 13(b) shall become prescribed upon the expiry of a period of three years from the date upon which the claim arose.

Article 57

> Notwithstanding the provisions of Article 55, no claim which has been lodged under Article 62 shall prescribe before the expiry of a period of five years from the

date on which the claim arose. "

It will be noticed that there is no longer provision for the suspension of prescription. Art 63 was also amended and still contains a prohibition against the institution of legal proceedings within 120 days from the date of delivery of the claim to an appointed agent and before the requirements of art 48(f) have been complied with. But prescription is not suspended as it previously was in terms of the now repealed proviso to art 55. Arts 58, 59 and 60 were also repealed with the result that, once a claim has become prescribed, the court may not grant relief. This was probably seen to be justified by reason of the extension of the prescriptive period. In his judgment in the case of President Insurance Co Ltd v Kruger at 505 A-B THIRION J said, and I entirely agree, that "[the] object of the amendments to articles 55, 57 and 63 was to give the third party

ample time within which to file his claim and institute action before his claim becomes prescribed. It was because the legislator considered that the amendments have achieved that object that he repealed articles 58, 59 and 60; the reasoning being that the need for such extraordinary relief no longer exists".

In order to decide whether the amended provisions were intended to apply to claims which arose before the effective date we must, of course, first examine the language. It is interesting to note that, when Act 56 of 1972 (which Act 84 of 1986 repealed and replaced) was amended by Act 69 of 1978, the amending Act expressly provided that the new prescriptive provisions would not apply to claims that had arisen in the past. A similar provision does not appear in the Proclamation; on the contrary, the amended articles 55 and 57 do not

distinguish between claims that arose before and those that arise after the effective date; art 55 speaks clearly and generally of "the right to claim compensation ... in respect of claims referred to in art 13(b)", and art 57 of "no claim which has been lodged under art 62".

Counsel for President Insurance submitted that a departure from the plain language is justified because claimants would be deprived of their rights and would in some cases be prejudiced if the amended provisions were to apply to claims that arose before the effective date. Such a result, he argued, could not have been intended. I do not agree. It is correct that the right to relief in terms of arts 58, 59 and 60 would be irretrievably lost, but I have indicated that its loss is compensated for by the extended periods in arts 55 and 57 which was the very reason why the court's assistance was no longer

deemed necessary. It is also correct that, in cases of inordinate delay in complying with art 62 and the requirements of art 48(f) or in conveying an offer of settlement in terms of art 57(c), (the illustrations presented to us of the prejudice that claimants may suffer) the total prescriptive period before the amendment might have extended beyond five years. However, to say that such cases must have been contemplated is purely speculative. It seems much more likely that the intention was to rid the agreement once and for all of the provisions that had caused great uncertainty and a considerable amount of undesirable litigation, taking into account the purpose of the legislation as enunciated in Aetna Insurance Co v Minister of Justice 1960(3) SA 273 (A) at 286 E-F and many subsequent decisions. I find it inconceivable that it could have been contemplated that the old system would, despite its shortcomings,

continue to exist side by side with the new one until all claims which arose in the past have been disposed of. There is no logical nor any other discernible explanation for such a scheme.

In my view THIRION J's conclusion is the correct one.

The result is as follows:

1. The appeal in President Insurance Company Ltd v Kruger is dismissed with costs including the costs of two counsel.

2. The appeal of Swanepoel v City Council of Johannesburg is upheld with costs. The court a quo's order is set aside. Substituted for it is the following:

(a) "It is declared that the Applicant's Third Party claim against the Respondent arising from a motor vehicle accident which occurred on 5

May 1990 involving the Applicant and a motor vehicle owned by the Respondent is governed by the Schedule to the Multilateral Motor Vehicle Accidents Fund Act, No. 93 of 1989, as amended by Proclamation No. 102, 1991, and that the Applicant's claim accordingly prescribes upon the expiry of a period of three years from the date upon which his claim arose in terms of Article 55 of the amended Schedule.

(b) The respondent is directed to pay the costs of the application including the costs of two counsel."

J J F HEFER JA.

BOTHA JA)
EKSTEEN JA) Concur
NICHOLAS AJA)
OLIVIER AJA)