THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 168/98

In the matter between :

DAVID ISRAEL LIEBERMAN Appellant

and

SANTAM LTD Respondent

Before: VIVIER, MARAIS, ZULMAN, STREICHER JJA and FARLAM AJA

Heard: 18 MAY 2000

Delivered: 29 MAY 2000

Special Plea of prescription misdirected. Appellant's cause of action not based upon the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 but upon a new agreement between the parties

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J U D G M E N T

VIVIER JA

VIVIER JA:

[1] This is an appeal against the judgment of the Court *a quo* upholding a special plea of prescription.

[2] On 13 October 1989 a collision involving two motor vehicles occurred in Main Road, Green Point near Cape Town. The appellant and one Melissa Meyer ("Meyer") were passengers in one of the vehicles which was driven by one Christoff Norwie ("Norwie"). The driver of the other vehicle was one Ian Carter-Smith ("Carter-Smith"). Both the appellant and Meyer sustained bodily injuries and suffered damages as a result of the collision. On 3 October 1991 the appellant duly lodged a claim for compensation with the respondent as the duly appointed agent in terms of Article 62, read with Article 40, of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("the Act"). It was subsequently agreed between the parties that the respondent would not plead prescription

on or before 30 November 1994.

[3] Meyer had in the meantime instituted an action for damages against the respondent in terms of the Act in respect of the injuries sustained by her as a result of the said collision. This action was settled in terms of a written agreement concluded on 19 September 1994 ("the agreement") which was made an order of Court. In clause 1 of the agreement the respondent undertook to pay Meyer the sum of R25 000-00 in respect of its liability arising from Norwie's negligence (for which the respondent's liability was limited under the Act). In respect of its liability arising from Carter-Smith's negligence (which was not limited under the Act), the respondent admitted in clause 2 that it was liable for 50% of such loss or damages as may be agreed between the parties or ordered by the Court. Clause 3 of the agreement provided that the provisions of clauses 1 and 2 would, *mutatis mutandis*, be binding on the respondent so that he would likewise be entitled

to payment of R25 000-00 in respect of Norwie's negligence and 50% of such loss or damages as may be agreed between him and the respondent or ordered by the Court in respect of his claim arising from the negligence of Carter-Smith. In terms of clause 4 of the agreement the respective attorneys of the appellant and the respondent warranted that they were authorised to bind their clients in terms of the agreement which would, *mutatis mutandis*, constitute an agreement and order of court in respect of the "pending action" between the appellant and the respondent.

[4] The respondent duly paid to the appellant the sum of R25 000-00 in respect of Norwie's negligence. In respect of Carter-Smith's negligence the parties were unable to reach agreement on the *quantum* of the appellant's damages and the appellant consequently, on 18 October 1995, instituted action in the Cape Provincial Division against the respondent. The summons was served on the same day. In this action the appellant claimed

50% of the amount of R2 130 631-00 being the loss or damages he alleged he had suffered as a result of his injuries.

[5] The respondent filed a special plea of prescription to the particulars of claim alleging that the appellant's claim arose from the Act and that in terms of Article 55 read with Article 57 of the Schedule to the Act the claim had become prescribed since more than five years had elapsed from the date upon which the claim arose.

[6] The appellant excepted to the special plea as not disclosing a defence to the claim on the ground that the claim was not brought in terms of the Act but was based on the agreement which constituted a novation of the original claim under the Act and which was not subject to the prescriptive periods under the Act but was governed by the provisions of the Prescription Act 68 of 1969 ("the Prescription Act") in terms of which it had not become prescribed. The exception to the special plea was dismissed by

Selikowitz J on the ground that it was not clear on the papers before him that the parties had intended to discharge the respondent's obligations under the Act by the creation of new obligations.

[7] The appellant thereupon filed a replication to the special plea in which it was alleged, for the first time, that on or about 10 November 1994 the parties had concluded a verbal agreement in terms whereof the respondent had undertaken not to plead prescription to a summons issued and served before 31 December 1995. Based on this undertaking, it was alleged that the respondent was estopped from pleading that the claim had become prescribed, alternatively that the respondent had waived the right to plead prescription. In the further alternative the appellant alleged that the agreement constituted an express or tacit acknowledgment of liability by the respondent which had the effect of interrupting the running of prescription in terms of sec 14(1) of the Prescription Act.

[8] At the trial on the special plea before **Van Zyl J** the evidence was confined to the alleged undertaking of 10 November 1994 not to plead prescription. The learned Judge found against the appellant on this issue and this finding has not been challenged on appeal.

[9] **Van Zyl J** held that the agreement was not a novation or compromise and that it did not affect the respondent's original obligation under the Act, save for the issue of negligence. He also held that the agreement did not constitute an express or tacit acknowledgment of liability in terms of sec 14(1) of the Prescription Act. The special plea of prescription was accordingly upheld and the appellant's claim dismissed with costs. With the leave of the Court *a quo* the appellant appeals to this Court.

[10] The agreement, insofar as it was made applicable to the appellant, was certainly a most unusual one. It fixed the respondent irrevocably with liability for whatever damages could be agreed or be proved to have been

suffered and precluded the appellant from claiming more. It provided for the appellant to obtain a court order in his favour for the payment of money before he had even issued summons. It resulted from the respondent's clear intention to settle the appellant's claim at the same time and on the same terms as Meyer's action in order to avoid costs. For purposes of the settlement no distinction was made between Meyer's action and the appellant's claim which was treated as if summons had already been issued. So, for example, clause 4 provided for the agreement to constitute "an agreement and order of court in respect of the pending action" between the appellant and the respondent. In the agreement the respondent admitted liability and undertook to pay the claims of both Meyer and the appellant, not only in respect of the negligence of Norwie but also in respect of Carter-Smith's negligence. The agreement contained a full and final settlement in respect of the claims based on Norwie's negligence, the respondent

undertaking to pay the maximum amount of R25 000-00 payable under the Act to both Meyer and the appellant. If the respondent had subsequently failed to pay the amount of R25 000-00 to the appellant there can be no doubt that he could have recovered that amount in terms of the agreement.

In respect of the appellant's claim based on Carter-Smith's negligence clause 3 expressly stated that the appellant was entitled to payment of a sum equal to 50% of such loss or damages in respect of Carter-Smith's negligence as may be agreed between the parties or ordered by the Court. From the references in clause 3 to the appellant's claim arising from Carter-Smith's negligence and in clause 4 to the "pending action" it is clear that the loss or damages contemplated were those provided for in the Act.

[11] Counsel for the respondent submitted that the references in the agreement to the appellant's claim under the Act meant that the original obligation arising under the Act remained intact as the respondent's only

obligation and that it was unaffected by the agreement save for the element of negligence. I do not agree. On a proper construction of the agreement it is clear, in my view, that it created a new contractual foundation for a valid and enforceable obligation to pay which existed independently of any previous obligation under the Act. According to the express wording of the agreement a new obligation was created i e to pay 50% of such losses and damages in respect of Carter-Smith's negligence as might be agreed between the parties or ordered by the Court. This is not the language of parties who were merely settling the issue of negligence and I find it inconceivable that the respondent would have undertaken such an obligation to pay had it merely intended to agree that Carter-Smith was 50% to blame for the collision. In view of the express acceptance of liability for such damages and the undertaking to pay, it was thereafter no longer open to the respondent to deny liability. The new obligation created by the agreement

was to pay 50% of such loss or damages as the Act provided for. In other words the obligation to pay was fixed, the only outstanding issue being the quantification of the obligation which had to proceed along the statutory lines.

[12] I have already said that the intention of the parties in concluding the agreement was to effect an overall settlement of the claims of both Meyer and the appellant leaving only the issue of the quantum of the claims in respect of Carter-Smith's negligence for agreement or determination by the Court. For this reason the agreement was made an order of Court. It is not necessary to express any view about the appropriateness of such an order being made in respect of a party who was not yet before the Court, albeit with his consent. What is important is that the parties dealt with the matter as if the appellant's original claim were already before the Court and equated it in that respect with Meyer's claim which was in fact before the Court,

going so far as to procure a Court order in respect of it. At the time of the agreement and the Court order the appellant's claim under the Act was due to become prescribed in approximately 2½ month's time. I find it difficult to accept that the parties could ever have intended that prescription would continue to run against appellant and not against Meyer in respect of the original claim while they were attempting to settle the quantum in terms of the agreement and Court order, which raises the question whether a plea of prescription to the original action was potentially still available as against the appellant. It is not necessary for present purposes to decide whether the agreement compromised the original obligation arising under the Act in respect of Carter-Smith's negligence in the sense that it extinguished it or to decide to what extent it altered that obligation. It is sufficient to say that the agreement provided the appellant with a contractual basis upon which to found a cause of action for payment which he was free to invoke if he so

chose. In my view the appellant was entitled to found his claim upon the agreement and it is clear from his particulars of claim that his cause of action is based upon the agreement. The contractual obligation to pay 50% of the agreed or proved damages represented a new debt. That it had its roots in the old may be historically so but that does not derogate from the fact that it was a fresh obligation and that prescription could not begin to run against a claim to enforce it before it arose.

[13] Counsel for the respondent submitted that the agreement to pay 50% of the loss or damages cannot be enforced as it conflicts with Article 43 of the Schedule to the Act which provides for an undertaking to be given in certain circumstances. I do not agree. An agent is not obliged to give a certificate and may elect not to do so when settling a claim. This is what happened in the present case.

[14] For the reasons given I am of the view that the plea of prescription

was misdirected. The appellant's cause of action as pleaded was the agreement which was governed by the provisions of the Prescription Act. It is common cause that such a claim had not become prescribed by the time summons was served. The Court *a quo* accordingly erred in upholding the plea of prescription. It follows that the issue of the interruption of prescription does not arise.

[15] Counsel for the appellant asked us to make a special order as to costs in the Court *a quo* in the event of the appeal succeeding. The appellant had apparently, subsequent to the institution of the present proceedings, commenced an action for damages for professional negligence against his attorney. At the trial of the special plea the attorney testified for the appellant on the issue of the alleged agreement not to plead prescription. According to counsel for the appellant the attorney insisted that the portion of the trial dealing with the alleged agreement not to plead prescription be

conducted by his own team of legal representatives, which resulted in the costs of two sets of legal representatives being incurred. There is no justification for ordering the respondent to pay for two sets of counsel and attorneys. If a conflict of interest was feared different legal representatives to conduct the whole trial on the special plea could have been employed. Instead of which the appellant retained his original attorney at whose instance another set of legal representatives was employed to protect his personal interest.

[16] In the result the appeal is allowed with costs. The order of the Court *a quo* is set aside and there is substituted an order in the following terms:

"The special plea of prescription is dismissed with costs."

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W VIVIER JA

AGREE:

MARAIS JA
ZULMAN JA
STREICHER JA
FARLAM AJA