

118/74

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

{ APPELLATE Provincial Division)  
Provinciale Afdeling)

Appeal in Civil Case  
Appèl in Siviele Saak

PRESIDENT VERSEKERING (MAY) B.P. Appellant.

N. E. ELVEY. Respondent

Appellant's Attorney SIEBERT, H. Respondent's Attorney WEBBER, M.  
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate A. P. Kruger Respondent's Advocate G. B. J. van  
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on 18-3-1975  
Op die rol geplaas vir verhoor op

(W.P.A.) 359 10 11

Genoem: Batha, Jansen, Hofmeyr A.R.R.  
van Zyl et al. gen. v. t. Wn. A.R.R.

9-45 v.m. ————— 11-00 v.m.  
11-15 v.m. ————— 12-24 v.m.  
C. B. N.

*The Court dismisses the  
said appeal with costs*  
Judgment per [Signature]  
[Signature] Registrar

2/3/75 Bills taxed—Kosterekenings getakseer

Writ issued  
Lasbrief uitgereik

Date and initials  
Datum en paraaf

| Date<br>Datum | Amount<br>Bedrag | Initials<br>Paraaf |
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IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter of:

PRESIDENT VERSEKERINGSMAAT-  
SKAPPY BEPERK.

APPELLANT.

and

NAOMI ELIZABETH ELVEY

RESPONDENT.

Coram: Botha, Jansen, Hofmeyr, JJ.A., Van Zijl et  
Galgut, A.JJA.

Heard: 18 March 1975.

Delivered: 27 March 1975.

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J U D G M E N T.

Hofmeyr, JA.

The respondent claimed damages suffered by her in a collision between the motor vehicle in which she was being conveyed, and a motor vehicle insured, in terms of Act No. 29 of 1942, by the appellant and driven by I.A. Vos. The col-

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lision took place along the Main Bapsfontein/Bronkhorstspuit road on 27 August 1967. The driver of the first mentioned vehicle, L.C. Whipp, was killed in the collision. He was the respondent's then husband and her claims are (a) R3 200,00, for the loss of maintenance and support which the deceased was obliged to afford her and (b) R8 780,42 for bodily injuries sustained by herself.

The appellant pleaded to the merits but also filed a plea in bar to the effect that the respondent's claim had become prescribed in terms of the Motor Vehicle Insurance Act No. 29 of 1942. By consent the court a quo heard evidence and argument in connection with the plea in bar only.

The respondent replicated as follows to the appellant's plea in bar:-

- "1. On the 17th September, 1969 the Plaintiff represented by Edwin Broomberg entered into an oral agreement during a telephone conversation with the Defendant duly represented by its Claims Manager, that the Defendant waived the prescriptive period provided for in terms of the Motor Vehicle Insurance Act No. 29 of 1942 and agreed that the Plaintiff could bring this

action against it notwithstanding the lapse of two years as provided in terms of the said Act.

2. Alternatively to paragraph 1 hereof, on the 17th September, 1969 the Defendant duly represented by its Claims Manager, acknowledged the Defendant's liability to compensate the Plaintiff for the damages suffered by her. The said acknowledgment by the Defendant was made during a telephone conversation between the said Broomberg acting on behalf of the Plaintiff and the Claims Manager of the Defendant representing it.
3. In the premises the running of prescription was interrupted under the provisions of the Prescription Act No. 18 of 1943 as amended".

In the Witwatersrand Local Division CILLIE, J.P., dismissed the appellant's plea in bar on both grounds advanced in the respondent's replication hence the present appeal. Hereinafter the appellant is referred to as the defendant and the respondent <sup>as</sup> the plaintiff.

It was common cause at the trial that the plaintiff had to discharge the onus of proving on a balance of probability the allegations in her replication.

This is an appeal on the facts and at the hearing the question to be decided crystallized into an enquiry as to

whether or not the telephonic conversation alleged to have taken place on or about 17 September 1969 between Edwin Broomberg, the plaintiff's attorney, and the claims manager of the defendant company actually did take place.

The abovementioned Broomberg described this conversation as follows:-

"Apart from the matters which I have already mentioned to you, the critical conversation on this issue - I had said to the Claims Manager that I would have to be issuing summons fairly shortly because of prescription and he said to me that I should not issue summons, because there was no dispute on the merits, and in this context he confirmed - he by now had the copy of the Inquest Record, and he said to me: I agree with what you have told me about the findings, so he said: do not issue summons because it is only the matter of settling the quantum, and there appeared to be no difficulty - there should be no difficulty in settling the quantum".

This evidence must be considered against the background of the following events:-

- (1) The fatal collision occurred 27 August 1967.
- (2) The plaintiff, through her attorney, submitted a M.V.A. 13 form in respect of her injuries ..... 24 July 1969.
- (3) Receipt of this form is acknowledged by the defendant ... 30 July 1969.

- (4) Intimation from defendant that form M.V.A.13 sent on 24 July 1969 was not acceptable since it did not furnish all the necessary information ..... 4 August 1969.
- (5) The request for further information dealt with, and an up-to-date Medical Report sent. Copy of Inquest Record i.r.o. of death of plaintiff's husband offered for convenience of the defendant ..... 13 August 1969.
- (6) Receipt of letter of 13 August acknowledged and appreciation expressed if the Record of the Inquest could be sent to enable defendant to have photostat made ..... 20 August 1969.
- (7) The plaintiff, through her attorney, submitted form M.V.A. 13 in respect of her claim for loss of support ..... 21 August 1969.
- (8) M.V.A. 13 form returned since it did not bear the required revenue stamps and was thus invalid. A certificate of late husband's employer with regard to his annual income requested. 26 August 1969.
- (9) The defendant informed that the plaintiff's husband was self-employed and ran a company of his own. The attorneys were experiencing great difficulty in obtaining information regarding his income ..... 12 September 1969.
- (10) A copy of the Inquest Record was sent on loan to the defendant ..... 17 September 1969.

- (11) The so-called critical telephonic conversation between above-mentioned Broomberg and the defendant's claims manager ..... between 17 September 1969 and 1 October 1969.
- (12) All possible information regarding the income and assets of the plaintiff's late husband was requested ..... 19 September 1969
- (13) In reply to the letter of 17 September 1969, the Copy of the Inquest is returned and the plaintiff's attorneys thanked for their assistance therein .. 1 October 1969.
- (14) The M.V.A. 13 form duly validated, sent back to defendant attorneys. Plaintiff's attorneys are having great difficulty in tracing the liquidator in the company of the plaintiff's late husband ..... 4 December 1969.
- (15) Defendant's Claims Manager advised plaintiff's attorneys that her claim had become prescribed. 10 April 1970.
- (16) The plaintiff's attorneys reacted to this assertion as follows:-

"We think you are mistaken as the position is that you were notified of this claim and after we had forwarded to you a copy of the Inquest Record it appeared that there was no dispute on merit and, for purposes of settling quantum, you re-

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quested us to obtain certain information which we were and are in the process of doing, having already furnished certain information to you. It was at your instance that summons was held over". . . . . 20 May 1970.

(17) The reply to this letter was as follows:-

"We refer to your letter of 20 May, 1970, and wish to advise you that your client's claim has become prescribed in terms of Section 11(2) of the Motor Vehicle Insurance Act of 1942 (Act 29 of 1942)". . . . . 9 June 1970.

(18) The Plaintiff's attorneys replied to this letter as follows:-

"We acknowledge receipt of your letter of the 9th June. We are aware of the fact that the Minister of Transport is reluctant to permit members of the Consortium to waive prescription. It seems to us that what has occurred in this matter is that you requested us to hold back the summons pending negotiations not with the intention of deliberately trapping us into prescription but your official concerned was probably unaware of the difficulty in waiving prescription.



Whatever the cause you must appreciate that we cannot stand by and allow our client to be prejudiced by your internal difficulties. It is our contention that you waived prescription in advance and the matter will no doubt be aired in Court but if it should be found on technical grounds that the claim has prescribed in terms of the Motor Vehicle Insurance Act our client intends to take action against your company for payment de bonis propriis of our client's full damages and costs".

16 June 1970

(19) The defendant replied that the contents of the letter of 16 June 1970 had been noted and that the matter was being referred by the defendant to the M.V.A.- Fund for consideration and the Fund's decision would be communicated to the plaintiff in due course

26 June 1970

(20) Letter of defendant to M.V.A.- Fund

26 June 1970

(21) M.V.A. Fund agreed with the defendant that the claim had become prescribed

3 July 1970

To complete the background to the "critical conversation" I should state that, since both the abovementioned

M.V.A. 13 forms had been filed before 26 August 1969, the last day of the two years prescription period, the plaintiff had another two months in which to issue summons, i.e. up to 26 October 1969. It is common cause that the summons was eventually issued out of time and that the claims would, but for the alleged conversation, have become prescribed.

A feature of this case is that no contemporary note of the "critical conversation" was made in the records of either the plaintiff's attorney or the defendant. It is one of the main submissions advanced on behalf of the defendant in support of its contention that no such conversation could have taken place. It is argued that no experienced attorney could have failed to make such a record in his file and failed also to confirm the conversation in a letter to the defendant. It is also contended that no official of the defendant's claims department, answering the telephone as the claims manager or on behalf of the claims manager, could have made the alleged statements. Reference is made to

instructions issued by the Motor Vehicles Assurance Fund enjoining insurance companies not to waive the defence of prescription against any claim under the Act without having referred the matter to the Fund. I should mention at this stage that no written instruction to this effect could be produced and that the instruction must have been of an informal nature.

Other considerations in support of its case were, for example, that Broomberg could not remember the name of the person to whom he had spoken; that Broomberg was mistaken as to the date on which the abovementioned conversation took place and that his recollection regarding the contents of the conversation could therefore have been faulty; that the four persons who were working in the defendant's claims department at the time, viz. Oelofse, le Grange, Linde and Stoop, either denied Broomberg's allegations or stated that they could not remember such a conversation; and that the person who allegedly spoke

to Broomberg was presumably not thinking of any dates and could therefore not consciously have waived any rights of prescription.

These and other submissions made on behalf of the defendant were carefully considered by the judge a quo and he came to the conclusion that Broomberg was a "forthright man". The judge commented further upon his evidence as follows:-

"It is conceded that Mr. Broomberg is not a deliberate liar, and I think that that is quite clear from the facts before the Court. There is nothing in his conduct nor in his behaviour afterwards, nor in any letter he had written, which indicates that he had not had the conversation. In fact it appears to the Court that all his acts are what one would have expected from a person who had such an agreement with the insurance company".

It is convenient to cite at this stage also, the opinion of the judge a quo regarding the defence witnesses.

He is recorded as having expressed himself as follows:-

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"I do not think that this means that the witnesses, or at least one witness, on the other side were not speaking the truth; the fact of the matter is that this was a period of some change in the company; there was a change in the management of the claims department. It seems to the Court quite possible that in telephoning, Mr. Broomberg asked for the Claims Manager; the person who then spoke to him must be considered to have been the Claims Manager. The Claims Manager, I may add, at this stage would have had the right on behalf of the company to make a request such as this, because he is the person who in many cases settles, without any further reference, actions and claims by claimants against the company. It is possible that he might have spoken to a person whom he thought was the Claims Manager, and this person might, without realising that the period was so close, have said: "Do not issue your summons yet; give us an opportunity of considering the facts that have been placed before us".

I cannot find any fault with these conclusions.

It is beyond dispute on the probabilities that, since the record of the inquest (which, be it stated in passing, Broomberg had attended about a year earlier) had on request been supplied to the defendant, the merits of the case must have been discussed between Broomberg and some responsible member of the defendant's claims department. If this is so, the

probabilities are overwhelmingly in the plaintiff's favour that a conversation of the nature alleged by Broomberg did in fact take place. In this connection it is significant that this issue is studiously avoided in the defendants letters referred to herein as items 15 and 17 and that the defendant should have left the serious assertions in the letters referred to as items 16 and 18 unanswered and uncontradicted in the correspondence before the Court. The defendant, furthermore, neglected to refer to these assertions or to deal with them in its letter of 26 June 1970 to the M.V.A. Fund (item 20). If these letters (items 16 and 18) were in the defendant's file, which had apparently been submitted to the Fund, they were treated with astonishing nonchalance.

The judge a quo was clearly justified in rejecting Mr. Kruger's contention that the occurrence of the critical conversation had not been proved upon a balance of probabilities.

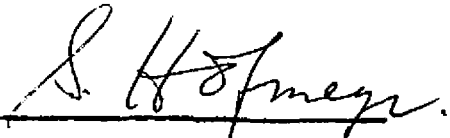
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On the basis that the conversation in fact took place, it was argued that Mr. Broomberg could have been mistaken as to the exact contents of the conversation. There was however, nothing improbable in the terms of the conversation. The contents fitted in perfectly with the background facts recorded earlier in this judgment and with all the probabilities. There was in my opinion therefore, no room for a finding that Mr. Broomberg could have been mistaken as to the contents of the conversation.

It was conceded by Mr. Kruger that if Broomberg's version of the conversation was correct, he would have been justified in accepting that the person to whom he spoke had actual or ostensible authority to bind the defendant and that it was the intention of the defendant to waive its rights of prescription. There can be no doubt, furthermore, that Broomberg thereafter conducted the plaintiff's case on the basis that the defendant had waived the defence of prescription in terms of Act 29 of 1942.

Accepting, as I do, that the learned judge a quo was justified in holding that the plea in bar failed, on the first ground advanced by the defendant, it is unnecessary to deal with the second ground.

In the result the appeal is dismissed with costs.

  
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HOFMEYR, JA.

Botha, JA.  
Jansen, JA.  
Van Zijl, AJA.  
Galgut, AJA. Concur.