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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VICTOR WEBSTER — 1st Appellant

MARY BERNADETTE WEBSTER — 2nd Appellant

and

SANTAM INSURANCE COMPANY LIMITED — Respondent

Coram: TROLLIP, CORBETT, HOFMEYR, KOTZé et MILLER, JJ.A.

Heard: 18 February 1977

Delivered: 15 March 1977

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J U D G M E N T

KOTZé, J.A. :

An application for relief by the appellants in terms of the provisions of section 24(2)(a)(ii) of the Compulsory Motor Vehicle Insurance Act, No. 56 of 1972 (hereinafter referred to as "the Act") having been dismissed by HEFER, J., in the

Durban...../2

Durban and Coast Local Division, they now appeal direct to this Court by agreement.

The appellants sustained injuries as a result of a collision between two motor vehicles on 26 May 1973. As third parties, within the meaning of that phrase in section 21 of the Act, they instructed the legal firm of Justice Poswa and Company of Durban (hereinafter referred to as "the firm") on 22 July 1974 to act as their attorneys in a claim for damages against the respondent as the authorized insurer under the Act of one of the aforementioned vehicles. Pursuant to the said instructions the claims for compensation were duly delivered by hand to the respondent in terms of sub-section (1) of section 25 of the Act on 20 March 1975. Thus the running of prescription was suspended from the said date to 17 June 1975 (see the proviso to sub-section (1) of section 24 of the Act), and the two year prescriptive term laid down by the said sub-section expired on 23 August 1975. Summons commencing the action was served on the respondent two days thereafter,

i.e. on...../3

i.e. on 25 August 1975. It declined a request to waive its right to invoke prescription.

Although the judgment appealed against has been fully reported (see 1976(3) S.A. 348), the admitted or undisputed facts which attended the failure to effect timeous service of the summons can be concisely stated and are deserving of recapitulation. These emerge from affidavits filed in support of the application by Mr. Mbuli, Mr. Poswa and Mr. Ngcobo, respectively a clerk, the sole partner and a messenger of the firm. These facts are:

(a) Mr. Mbuli personally handled the appellants' claims.

(b) By letter dated 23 July 1975 and received by the firm on 28 July 1975, i.e. after expiry of the period during which prescription was suspended, the respondent repudiated the appellants' claims.

(c) Mr. Mbuli thereafter communicated with the appel-

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lants and procured their signature to the requisite powers of attorney to institute action on 2 August 1975.

(d) On 4 August 1975 Mr. Mbuli caused a brief to prepare the appellants' particulars of claim to be delivered to Counsel and diarised the matter for attention on 20 August 1975.

(e) On the lastmentioned date Mr. Mbuli telephoned Counsel's chambers and learnt that Counsel was professionally engaged at Empangeni.

(f) During the period 22 August 1975 (a Friday) to Sunday 24 August 1975 Mr. Mbuli attended to personal affairs at Nqamakwe, Transkei.

(g) On 22 August 1975, during the lunch hour, Mr. Poswa signed the summons which incorporated the particulars of claim bearing Counsel's signature and placed it in the outgoing correspondence tray from where, in terms of standing

instructions,..../5

instructions, it should have been removed and dealt with forthwith'.

(h) Pressure of delivery duties delayed Mr. Ngcobo's return to his office until 4 p.m. He considered that it would be in order to delay the issue of summons and its delivery to the Deputy Sheriff until Monday 25 August 1975'.

(i) On 25 August 1975 Mr. Mbuli instructed Mr. Ngcobo to arrange for the issue of summons and delivery thereof to the Deputy Sheriff for service. Mr. Mbuli held the mistaken belief that service on that day would be timeous. These instructions were carried out'.

Sub-section (2) of section 24 of the Act, as substituted by section 50 (1) of Act No. 94 of 1974, is designed to impose upon courts seized with jurisdiction in third party claims the task of relaxing in appropriate cases the stringency of the prescriptive provision contained in the preceding sub-section. The substituted sub-section provides:

"(2) (a) If a third party's claim for compensation

has...../6

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) where the claim became prescribed before compliance by the third party with the provisions of section 25 (1), that by reason of special circumstances he could not reasonably have been expected to comply with the said provisions before the date on which the claim became prescribed; or

(ii) where the claim became prescribed after compliance by him with the said provisions, that by reason of special circumstances he 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 authorized insurer by virtue of leave granted under this subsection."

The reported decisions of provincial and local divisions in which section 24(2)(a) has been considered (some of which have been collected by DIDCOTT, J., at p. 789 A of Kunene v. Union National South British Insurance Co. Ltd. and others, 1976(4) S.A. 782 (D) and to which may be added Singh v. A.A. Mutual Insurance Association Limited, 1976(4) S.A. 257 (N), Santam Versekeringsmaatskappy Bpk. V. Snyman, 1976(4) S.A. 145 (T), Mapela v. Marine and Trade Insurance Co. Ltd., 1977(1) S.A. 568 (S.E.) and Nogaya v. Shield Insurance Co. Ltd., 1977(1) S.A. 570 (S.E.)), are not harmonious. So, for instance, in Coetzer and another v. Santam Versekeringsmaatskappy Bpk., 1976(2) S.A. 806 (T), FRANKLIN, J., held at

p. 814 G-H...../8

p. 814 G-H that section 24(2)(a)(ii) confers "a wide and unfettered discretion" which requires examination of "all the circumstances of the case" whilst on the same day it was decidéd in Chiliza v. Commercial Union Assurance Co. Ltd., 1976 (1) S.A. 917 (D) at 920 B-C that "the Court's powers ... are circumscribed. There is no power in the Court to grant relief, in its discretion, on general, equitable grounds." The latter view clearly appears to be the correct view as subsection (2) defines in express terms within what limits the power is exercisable: where by reason of special circumstances the third party could not reasonably have been expected to serve a process (i.e. summons) by which the running of prescription could have been interrupted. Although couched in permissive terms - "the court may grant leave to the third party to ... serve process ... on the authorized insurer" - section 24 confers a power which, in my view, the court is obliged to exercise if the prescribed requisites are established. In this regard it should be borne in mind that, because the application for

relief...../9

relief in order to be cognizable at all, must be made within ninety days of the claim becoming prescribed, and security for the costs of the application has to be furnished (see sub-section (2)(b)(ii)), the granting of relief would not in the majority of cases cause irreparable or undue hardship to authorized insurers. Moreover the object of the Legislature is "to give the greatest possible protection to third parties" (Aetna Insurance Co. v. Minister of Justice, 1960(3) S.A. 273 (A) at 286 E-F). Hence it seems likely that the power to authorize the service of process was intended by the Legislature to be mandatory in the circumstances prescribed by it. (As to the importance of the general scope and object of such a power, see Noble and Barbour v. South African Railways and Harbours, 1922 A.D. 527 at 540; South African Railways v. New Silverton Estate, Ltd., 1946 A.D. 830 at 842). The permissive form of the language is, in the context of the provision here at issue, not of particular significance since, as TINDALL, J.A., points out at the page last cited, it is the "usual courteous mode

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of the legislature in giving a direction to a court of justice".

In holding that the section reposes an unfettered discretion in the Court, FRANKLIN, J., placed considerable reliance upon the judgment of VAN WINSEN, J., in Stokes v. Fish Hoek Municipality, 1966(4) S.A. 421 (C) at pp. 425-6 where, in dealing with a similar statutory provision, the lastmentioned learned Judge held that the Court did have a discretion and he inter alia mentioned as a possible circumstance relevant to the exercise of that discretion "the merit or lack of merit of the applicant's case". But there the wording of the provision differed sufficiently from the wording in question here to render Stokes's case distinguishable. Moreover the "special circumstances" contemplated by section 24(2)(a) appear to me to be confined to the reasons for failing to comply with section 25(1) of the Act and for failing to interrupt prescription - considerations unrelated to the merits of a third party's claim. I come, therefore, to the conclusion that, on a proper construction of section 24(2)(a) of the Act, the Court does not retain

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a residual discretion in the event of the prescribed requisites being fulfilled.

An accurate and comprehensive delineation of what would constitute "special circumstances" by reason of which a third party "could not reasonably have been expected to serve any process" before the vital date is obviously impracticable. Much would depend upon the facts of each particular case. It has been pointed out, rightly in my view, that by employing the expression "special circumstances" the Legislature used an elastic expression of wide connotation (cf. Kunene's case, supra, at 789 H). By the use of that expression one would normally have in mind unusual or unexpected circumstances, and there is no apparent reason why the Legislature should have intended it to bear a different or more stringent meaning. The requisite for relief in terms of section 24(2)(a)(ii) of

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the Act would thus be a finding by the Court that by reason of unusual or unexpected circumstances the third party could not reasonably have been expected to serve a process in time to interrupt prescription. It follows from this that the Court must be satisfied that such circumstances are the cause of (or the reason for) the failure to effect timeous service. Accordingly the question which the Court would have to answer affirmatively in order to determine whether the duty arises to exercise the power of authorising service within an extended period might appropriately be formulated as follows: Were there unusual or unexpected circumstances because of which the third party could not reasonably have been expected to serve the summons before the date on which the claim became prescribed?

It is apparent (see pp. 350-351 of the official

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report) that in the Court a quo HEFER, J., largely attributed the late service of the summons to the unexplained delays of the appellants which preceded the grant of the powers of attorney on 2 August 1975 and he considered that it would be wrong to limit the enquiry to the period after the said date. In doing so, I am of the view that the learned Judge erred.

It depends entirely upon the circumstances of the case on which particular period or stage during the running of prescription the Court ought to focus its attention in order to ascertain (i) the reason for the third party's failure to furnish timeously his written claim for compensation in terms of section 25(1), or if he did so, (ii) the reason for his failure to serve or have served any process timeously to interrupt prescription and whether the reason or reasons constitute "special circumstances".

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In the particular circumstances of the present case the vital period would appear to be precisely the period after 2 August. As at that date three weeks remained in which the summons could have been served. The appellants were still well within the authorized period. There may have been a variety of reasons for delaying the service of summons until that relatively late stage. One possible such reason may have been the respondent's delay of more than four months in repudiating the claim after it was delivered. It is by no means imprudent to withhold the grant of a power of attorney to institute action and to avoid the consequent costs until it is clear that the authorized insurer does not intend to meet the claim. The Act permits a period of two years within which to institute action and, in the light of this circumstance, a third party could hardly be faulted and expected to explain his delay if he grants the formal power of attorney three weeks before the

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prescriptive date. The learned Judge a quo should, in my view, have concentrated on the period between 2 and 23 August 1975 as all-important and he should, on the admitted and undisputed facts, have attributed the late service of the summons to the lack of expedition, fault and negligence of Mr. Mbuli, Mr. Ngcobo and perhaps to a lesser extent of Mr. Poswa during this vital period. That neglect was the effective reason for the late service. The crucial question, therefore, which remains is whether on the facts of this case such lack of expedition, fault and negligence can be regarded as unusual or unexpected circumstances because of which the appellants could not reasonably have been expected to serve the summons or have it served before or on 23 August 1975.

I consider the answer to this question to be in the affirmative for the reasons that follow. A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable

reliance...../16

reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual, and a fortiori to the lay client it would be a most unusual and unexpected occurrence. Consequently in considering whether the neglect of an attorney constitutes a special circumstance within the meaning of that phrase in section 24(2)(a) of the Act, the correct approach should always be to regard it as a relevant factor and to recognise that such neglect by an attorney may frequently be a special circumstance on its own vis-à-vis his client. To hold without qualification, as was done in Snyman's case, supra, at p. 149 A-B, that a client is bound by the negligence of his legal adviser is, in my respectful view, wrong. To do so is tantamount to giving to the words "the third party" and "he" in section 24(2)(a)(i) and (ii) of the Act the extended meaning of "the third party and his attorney", and so to increase the burden which

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the third party is called upon by the section to discharge. "He" in section 24(2)(a)(i) and (ii) clearly means "he" (the third party) and not "he and his attorney". It may well be that to attribute to a client the negligence of his attorney would be justifiable in cases where he (the client) is partly to blame through his supineness or otherwise for his attorney's dilatoriness. There is, however, no need to express an opinion in regard to this question in the present case as the appellants cannot be identified with the negligence of the firm and its servants. In this case the summons could, but for the neglect of Mr. Mbuli, Mr. Ngcobo and Mr. Poswa, have been served on 23 August 1975. The said neglect accordingly constitutes a special circumstance vis-à-vis the appellants because of which they could not reasonably have been expected to serve the summons on or before 23 August 1975 and relief should accordingly be granted.

In regard to the question of costs I have referred above to the lack of harmony in the various divisions in regard

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to the proper interpretation of section 24(2)(a)(ii) of the Act which underlines the difficulties attendant upon its construction. Because of that and all the circumstances I am of the view that the respondent acted reasonably in having opposed the application in the Court a quo, and that the respondent should therefore be paid the costs of its opposition. No suggestion was made that those costs should be borne de bonis propriis by the firm in stead of by the appellants. The costs of appeal ought to follow the result.

The following order is made:

(a) The appeal is upheld with costs and the applicants are granted leave in terms of section 24(2)(a) of Act No. 56 of 1972 to serve upon the respondent before 5 April 1977 a fresh combined summons in substitution of that dated and served upon the respondent on 25 August 1975;

(b) The applicants are to pay the costs of the

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respondent in the Court a quo.

G.P.C. KOTZé
Judge of Appeal

TROLLIP J.A.)
CORBETT J.A.)
HOFMEYR J.A.) concur
MILLER J.A.)