G.P.-S.51994—1976-77—3 000 (P)

J 219 196/79

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

(APPELLATE ~~Provincial~~ Division)
(~~Provinsiale~~ Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

M EVANS *Appellant,*

versus

SHIELD INS CO LTD *Respondent*

Appellant's Attorney McINTYRE + VAN DER POST *Respondent's Attorney* SYMMINGTON + DE KOCK
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate *Respondent's Advocate*
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op

WLD

Coram: Jansen, Trollip, Corbett, Jansen, Galgut

Vir Appellant: D. Marais

Vir Respondent: A.M van Niekerk

Marais: 9h45 - 11h00, 11h15 - 11h45, 14h20 - 14h25

Van Niekerk: 11h45 - 12h45, 14h15 - 14h20

JUDGE CORBETT JUDGMENT 4.3.80 COURT NO 2 @ 9.45 AM
The appeal is dismissed with costs CAT

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

MAGDALEN EVINS ..... Appellant

and

SHIELD INSURANCE COMPANY LIMITED ..... Respondent

Coram: Jansen, Trollip, Corbett, Joubert JJA.
et Galgut AJA.

Heard: 13 November 1979.

Delivered: 4 March 1980.

J U D G M E N T.

JANSEN JA :-

I agree that the appellant's right of action is prescribed for the reasons given by TROLLIP JA and that the appeal should be dismissed with costs.

At this stage I wish to express no opinion as to the approach adopted by CORBETT JA. That

approach / ....

approach may, in my respectful view, require a re-evaluation of cases such as Green v Coetzee (1958 (2) SA 697 (W)) and Schnellen v Rondalia Assurance Corporation of S.A. Ltd (1969 (1) SA 517 (W)), as also of dicta such as found in Casely v Minister of Defence (1973 (1) SA 630 (A), 642 C-E) and Kruger v Santam Versekeringsmaatskappy Bpk (1977 (3) SA 314 (O), 318 D-G). It may even be desirable to re-examine the so-called "once and for all" rule and inquire whether in our law its application should not, in appropriate circumstances, be restricted (cf. C.F.C. van der Walt, Die Sommeskadeleer en die "Once and for All"-reël). In view of these difficulties I prefer, as TROLLIP JA does, to leave the whole matter open.

E.L. JANSEN, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MAGDALEN EVINS ..... Appellant

AND

SHIELD INSURANCE COMPANY LIMITED ..... Respondent.

Coram: JANSEN, TROLLIP, CORBETT, JOUBERT, JJ.A. et GALGUT, A.J.A.

Heard: 13 November 1979.

Delivered: 4 March 1980.

J U D G M E N T

TROLLIP, J.A.:

I agree that the appeal should be dismissed with costs, but for different reasons from those given in the judgment of CORBETT, J.A. The facts are fully set out in that

judgment .... /2

judgment and need not be repeated here, save for those that directly relate to my reasoning.

However sympathetic a view one may initially take of appellant's case, it is so evident to me that it must ultimately founder on the provisions of section 15(2) of the Prescription Act, No. 68 of 1969, that I prefer to base my judgment entirely on that obvious, insurmountable obstacle to the success of her case.

My reasons for taking that judicial short cut are very briefly these. Despite the cogency of the reasoning in the judgment of my brother CORBETT, I still remain somewhat uncertain whether appellant's claims for her bodily injuries and her loss of support constitute two separate rights of action under the common law and the Compulsory Motor Vehicle Insurance Act,

No. 56 of 1972 ("the CMVI Act"). I prefer to use the term "right of action" to "cause of action" because, I think, the former is strictly and technically more legally correct in the present context (cf. Mazibuko v. Singer 1979 (3) S.A. 258 (W) at p. 265 D-G). "Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's "debt", the word used in the Prescription Act. The term, "cause of action", is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of a claim before action thereon is commenced. But it is not used in either the CMVI Act or the Prescription Act. And its use in the present context may possibly lead to erroneous reasoning. For in claims in delict for damages under the common law or for compensation

under .... /4

under the CMVI Act, I am not sure that it necessarily follows that, because one factual basis differs from another in some respect or respects, separate or different rights of action arise; on the contrary, both cases may nevertheless beget only one right of action or debt, e.g. one for the plaintiff's entire patrimonial loss. The cases of Green v. Coetzer 1958 (2) S.A. 697 (W) and Schnellen v. Rondalia Assurance Corporation of S.A. Ltd. 1969 (1) S.A. 517 (W) - if they were correctly decided - are apposite illustrations of that. In the latter kind of cases problems, similar to those mentioned in the judgment of CORBETT, J.A., could also arise. For example, the plaintiff's bodily injuries (in the Green type of case) or his minor child's bodily injuries (in the Schnellen type of case) may not manifest themselves and necessitate treatment, expenditure, etc., until some time after the plaintiff's other loss or damage has

already .... /4(a)

already been caused by the wrongdoing in question. Such problems, if and when they should arise, would have to be resolved, for better or for worse for the plaintiff, by the ordinary relevant principles of the law. Cf. for example, Swanepoel v. S.A.R. and H. 1927 O.P.D. 267; Lanfear v. du Toit 1943 A.D. 59. I am also not sure what the correct position is under the CMVI Act. The anomalies mentioned by CORBETT, J.A., are aggravated thereunder by the short period of prescription enacted in section 24(1) - two years from "the date upon which the claim arose" - and the special peremptory, preliminary procedure laid down in section 25(1) for enforcing claims. Whatever the true position is under the common law perhaps this Act has, by section 21, read with sections 24(1) and 25(1), severed a third party's right of action into separate claims for (a) compensation in respect of bodily injury to himself, and (b) compensation for loss or damage resulting from the death of another. I

express no firm view on this aspect either. But if so then presumably claim (b) would only "arise" on the death of the latter from when the two year period of prescription enacted in section 24 would run, and the procedure laid down by section 25 for enforcing claims would have to be followed for each of claims (a) and (b), either simultaneously or otherwise, as the case may be. As I am not confident of the correct answers to any of the aforementioned problems, I prefer to leave them all open.

Hence I shall assume without deciding in favour of appellant, firstly, that she had a single, undivided right of action under the CMVI Act against respondent, the insurer of the vehicle, for compensation (i) in respect of her bodily injuries, and (ii) for loss of support through the death of her husband, both caused on 30 March 1972 by the negligent driving of Henning; and,

secondly .... /6

secondly, that the service of the first summons (No. 6391/1973) on respondent on 30 August 1973 duly interrupted the running of prescription under section 15(1) of the Prescription Act in respect of both elements (i) and (ii) of her right of action or (correspondingly) respondent's debt.

In my view it is quite clear that thereafter appellant divided and separated or split that right of action or debt into the two elements (i) and (ii). For she then took the following steps -

1. On 27 September 1976 she sent respondent a fresh (the second) MVA 13 form claiming for loss of support only.

2. On 26 January 1977 she issued and served on respondent the second summons (No. 966/1977) claiming for loss of support only.

3. On 24 February 1977 she gave notice of an intention to

amend .... /7

amend the particulars of her claim in the first action by deleting or excising therefrom all reference to the claim for loss of support.

4. Since respondent did not oppose that amendment, she duly amended her particulars of claim in the first action and filed the amended particulars on 22 March 1977.

5. Consequently, in the first, amended action appellant now claimed compensation for bodily injuries only, and in the second action, compensation for loss of support only.

6. These two separate actions followed their own distinct courses until the pleadings in each were closed. Thereafter, appellant applied for their consolidation for the purpose of the hearing. This was granted on 18 July 1978.

By thus embodying each of the aforementioned elements of the (assumed) single, undivided right of action or

debt .... /8

debt into a separate, distinct action, appellant effectively divided and separated or split that right of action or debt into its two elements (i) and (ii). Ordinarily, a creditor cannot divide and separate or split such a right of action or debt without the consent of the debtor (see Spies v. Hansford and Hansford Ltd. 1940 T.P.D. 1; Lief, N.O. v. Dettman 1964 (2) S.A. 252 (A) at p. 275 F-G). The reason is the possibility that it may render the debtor's position more burdensome by causing him prejudice, hardship, or inconvenience (see Spies's case at pp. 8/9). In so far as respondent's consent was required for what appellant did, it is manifest that such consent was tacitly given. That is to be inferred from the following. At no stage did respondent offer the slightest objection or opposition to such separation or splitting of the right of action or debt; on the contrary, it

accepted .... /9

accepted it and conducted its pleadings and defence on the basis that there were now separate claims for compensation for her bodily injuries and loss of support respectively; for example, respondent did not oppose the amendment to appellant's particulars of claim in the first action excising therefrom the claim for loss of support; indeed after it became effective, respondent amended its plea to accord therewith; and in the second action it put up the separate, distinct defence by way of special plea that the right of action or debt for loss of support had become prescribed.

I turn therefore to consider that special plea of prescription in the light of the above facts.

The relevant provisions of the Prescription Act are these -

"15(1). The running of prescription shall, subject to the

provisions .... /10

provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) ..... the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment.. ....."

Now, I have assumed in appellant's favour that her first summons duly interrupted the running of prescription under section 15(1) in respect of both elements (i) and (ii) of the right of action or debt, i.e., the claim in respect of her bodily injuries and loss of support respectively. Such interruption was, in terms of section 15(1), "subject to the provisions of subsection (2)". That first summons was "the process in question" mentioned in subsection (2). Thereafter, appellant, with respondent's tacit consent, divided and separated or split the right of action or debt into those two

elements...../11

elements (i) and (ii); she deleted or excised (ii) completely from that "process in question"; she successfully prosecuted her claim (i) under that process to final judgment; but she did not prosecute her claim (ii) for loss of support under that process to final judgment successfully or at all; indeed, she irrevocably abandoned its prosecution under that process.

Consequently, to use the terminology of subsection (2), the interruption of prescription in respect of claim (ii), effected by the service of the first summons, lapsed and the running of prescription in respect thereof should now not be deemed to have been interrupted thereby. Since that claim arose on 30 March 1972 it was prescribed under section 24 of the CMVI Act by the time the second MVA 13 form and summons were served. It follows that respondent's special plea of prescription to claim (ii)

in .... /12

in the second action was rightly upheld by the Court a quo. The learned Judge a quo came to a similar conclusion in the alternative - see 1979 (3) at p. 1144 C-F. I should add here that I express no view on the correctness or otherwise of Chauke v. President Insurance Co. Ltd. 1978 (2) S.A. 947 (W) there mentioned by the learned Judge.

I agree, therefore, that the appeal must be dismissed with costs.

W.G. TROLLIP, J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

MAGDALEN EVINS ..... appellant

and

SHIELD INSURANCE COMPANY LIMITED ..... respondent

Coram: Jansen, Trollip, Corbett et Joubert, JJA, et Galgut, AJA.

Date of appeal: 13 November 1979

Date of judgment: 4 March 1980

J U D G M E N T

CORBETT JA

On the afternoon of 30 March 1972 the appellant (plaintiff below) was being conveyed as a passenger in a motor vehicle being driven by her husband (to whom she was married in community of property), when a collision occurred with a vehicle being driven by one Henning. This happened within the district of Alberton. As a result

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of this collision appellant sustained serious bodily injury and her husband was killed. Subsequently appellant instituted action in the Witwatersrand Local Division against respondent (defendant below), as authorized insurer of Henning's motor vehicle in terms of the Compulsory Motor Vehicle Insurance Act, 56 of 1972 ("the Act"), claiming compensation in terms of sec. 21 of the Act for loss and damage suffered and to be suffered by her by reason of the bodily injuries which she had sustained and as a result of being deprived of her husband's maintenance and support. In her particulars of claim appellant claimed an amount of R29 681,64 in respect of compensation for bodily injury and R13 141,41 for loss of support. It was, of course, alleged that the collision was caused by the negligence of Henning.

By the time the matter came to trial certain issues had been settled by agreement between the parties. It had been agreed that the damages suffered by appellant in respect

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of bodily injury amounted to R15 000 and that the collision had been due to the negligence of Henning. It was accordingly common cause that appellant was entitled to judgment on her claim for compensation for bodily injury in the sum of R15 000. This was granted by the Court a quo. In regard to the claim for loss of support (which for reasons to be detailed was being pursued at the trial stage by way of a separate action, the two actions having been consolidated for the purpose of the hearing) the trial Court (KING J) upheld a special plea of prescription and dismissed the claim. The Court also made certain orders as to costs. The judgment and orders of the Court a quo have been reported: see Evins v Shield Insurance Co. Ltd., 1979 (3) SA 1136 (W).

Appellant noted an appeal to this Court against the dismissal of her claim for loss of support and against the orders as to costs. It appears from the judgment of the Court a quo that the orders for costs purported to record what had been agreed to by counsel in the event of the plea

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of prescription succeeding. Before the hearing of the appeal, however, we were informed by way of a letter addressed to the Registrar of this Court by appellant's attorneys of record that the parties had agreed that the orders of the Court a quo in regard to costs did not correctly reflect the original agreement between counsel in regard thereto, that this matter had been settled between the parties and that the original orders as to costs would not be a separate issue in the appeal. Copy of a memorandum setting forth what had been agreed to as to costs was placed before this Court for its information.

At the hearing counsel were also agreed that should this Court find in appellant's favour on the prescription issue (which would settle the question of liability, negligence having been admitted), it would not be required to compute and award the damages for loss of support. We were asked, in that event, to remit this aspect of the matter to the trial Court for adjudication. Thus the only issue on appeal

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is whether the trial Court was correct in upholding the defence of prescription.

The relevant facts of the case and the trial Court's reasons for coming to the conclusion to which it did on the issue of prescription appear fully from the reported judgment of KING J, referred to above. It is, therefore, not necessary for me to recount these matters in detail and for sake of brevity I shall, where appropriate, merely refer to the relevant passage in the reported judgment.

In order to highlight the circumstances giving rise to the plea of prescription I shall tabulate in their chronological order the essential facts. These facts are not in dispute.

(1) The accident occurred and appellant's husband (Mr Evins) was killed on 30 March 1972.

(2) On 8 May 1973 appellant delivered to respondent a claim for compensation arising out of the accident on the form (MVA 13) prescribed in terms of sec. 25

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of the Act and the Motor Vehicle Insurance Regulations 1972. In this form, which was duly signed, appellant properly set out all the required information in regard to her claim for compensation for bodily injury to herself and attached the required medical reports and other documents. As regards the claim for loss of support, however, the claim form was not properly completed. Although a claim for loss of support in the sum of R13 141,41 was included among the listed items of compensation, no information whatever was given in substantiation of this claim. In fact various paragraphs in the form requiring information relevant to such a claim were crossed out with the superscription "N/A" (not applicable). I shall refer to this form as "the first MVA 13 form".

(3) On 30 August 1973 appellant caused to be served on respondent a combined summons (which was allocated the case number 6391/73) setting out the claims for compen-

/sation.....

sation for bodily injury and loss of support referred to earlier in this judgment. I shall refer to this as "the first summons".

(4) On or about 20 September 1973 respondent filed a request for further particulars to appellant's particulars of claim which canvassed matters relating to both claims. These particulars were furnished on or about 22 October 1973.

(5) On or about 10 June 1974 respondent filed a plea joining issue on various matters, including the question as to whether proper notice of appellant's claims had been given in the prescribed form.

(6) On 27 September 1976 appellant delivered to respondent a further MVA 13 form (hereinafter referred to as "the second MVA 13 form"), in which notice of a claim for loss of support only (in an amount of R14 000) was given. This form was duly completed and contained all the required information and the necessary post

/ mortem.....

mortem report in connection with a claim for loss of support.

(7) On 26 January 1977 appellant issued a further combined summons (allocated case number 966/1977) in which only a claim for loss of support in the sum of R20 000,00, arising out of the collision on 30 March 1972, was pursued. The particulars of claim contain a recital of the basic facts in relation to the delivery of the first claim form, the service of the first summons and the delivery of the second claim form. I shall refer to this combined summons as "the second summons".

(8) On 25 February 1977 appellant gave notice to respondent of a proposed amendment to the first summons by the deletion from the particulars of claim of all reference to the claim for loss of support. This was not opposed and in due course the amendment became effective in terms of the Uniform Rules of Court.

/ (9) .....

(9) After the usual further particulars had been requested and furnished in regard to the particulars of claim in the second summons respondent filed a special plea and a plea over thereto. The special plea alleged that appellant's claim was prescribed in terms of sec. 24(1) of the Act in that the claim (for loss of support) arose on 30 March 1972 and the proceedings relating to case no. 966/1977 were instituted only on or about 26 January 1977.

(10) On 18 July 1978 and on the application of appellant an order of court was granted consolidating the actions instituted under cases nos. 6391/73 and 966/77 and directing that the actions be proceeded with as one action.

Before considering the various arguments raised in support of and against the plea of prescription, it is necessary to make some reference to the statutory requirements relating to notice of a claim for compensation under

/ sec.....

sec. 21 of the Act and to the prescription of claims under that section:

Section 21 itself obliges an authorized insurer which has insured or is deemed under the Act to have insured a motor vehicle to compensate any person (known as the "third party") for any loss or damage which the third party has suffered as a result of —

(a) any bodily injury to himself,

(b) the death of or any bodily injury to any person,

caused by or arising out of the driving of the insured motor vehicle, if the injury or death is due to the negligence or other unlawful act of, inter alios, the driver of the motor vehicle. A necessary procedure in the recovery of compensation under sec. 21 is the delivery of a claim form in terms of sec. 25 of the Act. The relevant portions of this section read as follows:

/ (1) .....

" (1) A claim for compensation under section 21 shall be set out in the prescribed manner on a prescribed form which shall include provision for a medical report or reports in regard to the cause of the death or the nature and treatment of the bodily injury in connection with which the claim is instituted, and shall be sent by registered post or delivered by hand to the authorized insurer.....

(2) No such claims shall be enforceable by legal proceedings commenced by a summons served on the authorized insurer before the expiration of a period of ninety days as from the date on which the claim was sent or delivered by hand, as the case may be, to the authorized insurer as provided in subsection (1)."

In the definitions section of the Act (sec. 1) "prescribed" is defined to mean "prescribed by regulation". Under the regulations, already referred to, provision is made for such a form and it is designated form MVA 13 (reg. 16).

Section 25 thus contemplates, inter alia, the setting out of a claim for compensation under sec. 21 in an MVA 13 form and the submission (either by registered post or by delivery by hand) of that claim form, together with other required documents, to the authorized insurer at least 90

/ days.....

days prior to the commencement of any legal proceedings (by the service of summons) to enforce payment of the claim. It has been held by this Court that sec. 25 was enacted mainly for the benefit of authorized insurers and that the purpose of the section is to ensure that before being sued for compensation an authorized insurer will be informed of sufficient particulars about the claim and will be given sufficient time to be able to consider the claim and decide whether to resist, settle or compromise it before any costs of litigation are incurred (see Nkisimane and Others v Santam Insurance Co. Ltd., 1978 (2) SA 430 (AD) at p 434 F-G and the cases there cited). It was further held in Nkisimane's case (supra, at p 434 H) that the requirement in sec. 25 to the effect that a claim must be submitted to the authorized insurer before the commencement of legal proceedings is peremptory and requires exact compliance; otherwise the purpose of the section will be frustrated. In regard, however, to the contents of the claim form (which sec. 25 (1) requires to be

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set out in the manner prescribed by the regulations) the Court held (in Nkisimane's case at p 435 A - G) that this requirement is directory and that substantial compliance therewith is both necessary and sufficient. Ordinarily the minimum amount of information that will have to be supplied in the claim form to constitute substantial compliance with these statutory requirements relates to the identity of the claimant, to the accident and the injuries and loss caused thereby, to the identification of the insured motor vehicle involved in the accident and to the computation of the amount of compensation claimed (Nkisimane's case, supra, at pp 435 H to 436 A).

As to the general effect of non-compliance with sec. 25 (1) and (2) there are a number of ways in which a claimant for compensation may fail to comply with its peremptory requirements. He may fail altogether to submit an MVA 13 form before serving his summons. He may submit a form which does not substantially comply with the requirements of

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the section and the regulations. He may, having duly submitted his claim form, fail to allow the requisite 90 days before serving his summons. In this latter event it is clear that such premature service, being contrary to the provisions of sec. 25 (2) of the Act, could not effectively commence legal proceedings for the enforcement of the claim; or, to put it slightly differently, if a summons is served before the expiration of the period of 90 days the claim is unenforceable by legal proceedings commenced thereby. It was so decided by this Court in relation to the provisions of sec. 11 bis of the repealed Motor Vehicle Insurance Act, 29 of 1942, which were in essence the same as the provisions of sec. 25 (1) and (2) of the Act (save that under sec. 11 bis the period was 60 days); and this decision, SANTAM Insurance Company Ltd. v Vilakasi (1967 (1) SA 246 (AD)), is clearly applicable to sec. 25 (1) and (2). The same principle would apply in case of the other types of non-compliance with sec. 25 (1) and (2) such as the failure to

/ submit.....

submit a claim form, or the submission of a claim form which did not substantially comply with the statutory requirements, prior to the service of summons. In each case the claim would not be enforceable by legal proceedings commenced - or purporting to have been commenced - by service of the summons. It may be noticed further that non-compliance with sec. 25 (1) and (2) does not affect the validity of the issue of the summons but merely renders ineffective the service thereof as a procedural step for the commencement of proceedings in terms of sec. 25 (2). Consequently a summons which has been issued prematurely or without the submission of a properly completed claim form may be re-served after the provisions of sec. 25 (1) and (2) have been duly complied with. (See Marine and Trade Insurance Co. Ltd. v Reddinger, 1966 (2) SA 407 (AD), also decided in relation to sec. 11 bis of the old Act but clearly applicable to sec. 25 (1) and (2) of the Act; Vilakazi's case (supra) at p 252 E.)

/ Those.....

Those being the consequences of non-compliance with sec. 25 (1) and (2), the next point is what effect, if any, service of a summons, which has not been preceded by the procedure laid down in sec. 25 (1) and (2), has upon the running of prescription in respect of the claim which the summons seeks to enforce. Section 24 (1) of the Act provides —

> "(1) The right to claim compensation under section 21 from an authorized insurer shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the period of ninety days referred to in section 25 (2)."

In terms of sec. 24 (2) the court is given the power, in effect, to extend this period in certain circumstances, but this subsection has no application in the present case. With sec. 24 (1) must be read the provisions of Chapter III of the Prescription Act, 68 of 1969 and more particularly sec. 15 thereof, which deals with the judicial interruption of prescription (see President Insurance Co. Ltd. v Yu Kwam,

1963 (3) SA 766 (AD); Santam Versekeringsmaatskappy v Roux 1978 (2) SA 856 (AD), at p 863 G). Chapter III deals with the prescription of "debts", i.e. the extinction of a debt by prescription after the lapse of a period of time (see sec. 10 (1)), and the relevant portions of sec. 15 read as follows:

> "(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
>
> (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
>
> (3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone

the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) .....

(6) For the purposes of this section, 'process' includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

In Vilakasi's case (supra) this Court also considered whether service of a summons claiming compensation under the old Motor Vehicle Insurance Act, 29 of 1942, which had been issued and served prematurely, i.e. before the expiry of the 60-day period, interrupted the running of prescription in terms of sec. 6 (1) (b) of the Prescription Act, 18 of 1943 (the predecessor of Act 68 of 1969). In Act 18 of 1943

/ "extinctive....

"extinctive prescription" was defined as "the rendering unenforceable of a right by the lapse of time" (sec. 3 (1)) and in sec. 6 (1) (b) it was provided:

> " (1) Extinctive prescription shall be interrupted by —
>
> ..... ;
>
> (b) service on the debtor of any process whereby action is instituted; ....."

Applying this provision to the case of the service of a summons which in terms of sec. 11 (bis) of Act 29 of 1942 was premature, HOLMES JA, in delivering the majority judgment in Vilakasi's case (supra), stated (at p 253 H):

> "In my opinion it is clear that the service referred to in sec. 6 (1) (b) must be a service whereby action is instituted as a step in the enforcement of the claim or right. The underlying reason why such a service interrupts prescription is that the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim. That effect is absent where, as here, the claim is statutorily unenforceable by proceedings commenced by a summons served prematurely."

/ Accordingly.....

Accordingly it was held that service of a summons under these circumstances did not bring about an interruption of the running of prescription.

Although there are substantial differences in the wording of the present Prescription Act, 68 of 1969 (as a comparison of the relevant portions of secs. 3 (1) and 6 (1) (b) of Act 18 of 1943 on the one hand and secs. 10 (1) and 15 of Act 68 of 1969 on the other hand will readily demonstrate), I am nevertheless of the view that the ratio decidendi of Vilakasi's case (supra) is applicable to the case of a premature service of summons which falls to be considered under sec. 25 of the Act and sec. 15 of Act 68 of 1969. In my opinion sec. 15 (1), read together with sec. 15 (6), contemplates the service of a process (in this instance a summons) whereby legal proceedings are effectively commenced for payment of the debt in question; and consequently the service of a summons, which in terms of sec. 25 of the Act is premature and, as stated above, could not effectively commence legal

/ proceedings.....

proceedings for enforcement of the claim for compensation, would not interrupt the running of prescription. The same position would clearly obtain where the non-compliance with sec. 25 took the form of a failure to submit a proper claim prior to the service of summons. This was obviously the view of TROLLIP JA in Nkisimane's case (supra) when, with reference to the fact that an effective sanction for such non-compliance was provided in secs. 25 (2) and 24 (1) of the Act, he stated (at p 434 H):

> "They (i.e. these sections) in effect enact that, unless the requirement is complied with, the claim cannot be enforced by legal proceedings, the running of prescription is not suspended, and the claim will ultimately become prescribed. Consequently counsel were right in treating this requirement as being peremptory".

To sum up the position thus far, I am of the view that where a claimant for compensation in terms of sec. 21 of the Act issues and serves a summons on the authorized insurer claiming such compensation without having submitted

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to the authorized insurer, in terms of sec. 25 (1) of the Act, a proper claim for compensation, the service of that summons will not effectively commence legal proceedings for the enforcement of the claim and will not interrupt the running of prescription in terms of sec. 24 (1) of the Act. This seems to be reasonably clear and I did not understand counsel for either party to dispute the general soundness of these propositions. The real problem in the present case, however arises from the facts that appellant initially claimed (a) compensation for her own bodily injury, and (b) compensation for loss of support arising from the death of her husband in a single combined summons (the first summons); and that in relation to (a) the first MVA 13 form properly set out the claim, whereas in relation to (b) it did not, there being in the case of the latter no question of even substantial compliance. (This is conceded by appellant.) What effect, therefore, did the service of the first summons

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have upon what I shall, neutrally, call portion (b) of appellant's claim? This brings me to the crux of the case and to the arguments of appellant's counsel.

Put shortly, appellant's case is (i) that in this case the wrongful act of the driver of the insured vehicle, Henning, vested in the appellant one single right to sue for all the loss or damage caused to her by such wrongful act, whether such loss or damage resulted from her own personal injuries or the injuries or death of another person; (ii) that her claim for compensation for bodily injury and her claim for loss of support were accordingly part and parcel of a single cause of action; (iii) that consequently the first summons interrupted prescription for appellant's entire claim, since there can be no piecemeal prescription of a debt and no interruption of prescription of only portion of a debt (citing Erasmus v Grunow, 1978 (4) SA 233 (O), at p 245 F - G); (iv) that, inasmuch as the running of prescription in respect of the claim for loss of support

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had been judicially interrupted by the service of the first summons, this claim was not prescribed when the second summons was served; (v) that by that stage a proper claim form (the second MVA 13 form) had been duly submitted; and (vi) that consequently the claim for loss of support was enforceable in terms of sec. 25 of the Act and had not become prescribed. Substantially the same argument was advanced by appellant's counsel in the Court a quo. The trial Judge rejected it on two grounds. These were, firstly, that the claim for loss of support was "a right distinct from the right to claim damages arising out of bodily injuries where both the bodily injuries and the death are caused by the same negligent act" (Judgment, p 1143 C); and, secondly, that, even if this conclusion be incorrect, appellant's claim for loss of support was not interrupted by service of the first summons because she did not successfully prosecute this claim under this process to final judgment, as required by sec. 15 (2) of the Act (Judgment, p 1144 D - F).

It is cardinal to the argument of appellant's counsel that appellant's claim for compensation for bodily injury and her claim for compensation for loss of support constituted a single cause of action. The concept of a cause of action - and the question whether different claims constitute parts of a single cause of action or separate causes of action - are of particular significance in regard to the application of the so-called "once and for all" rule and also in connection with the related questions of res judicata and prescription. The "once and for all" rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract (see Kantor v Welldone Upholsterers, 1944 CPD 388, at p 391; Custom Credit Corporation (Pty.) Ltd v Shembe, 1972 (3) SA 462 (AD), at p 472 A - D). Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action (see Cape Town Council

v Jacobs, 1917 AD 615, at p 620; Oslo Land Co. Ltd. v The Union Government, 1938 AD 584, at p 591; Slomowitz v Vereeniging Town Council, 1966 (3) SA 317 (AD), at p 330; Custom Credit Corporation (Pty.) Ltd. v Shembe, supra, at p 472). This rule appears to have been introduced into our practice from English law (see Coetzee v SAR & H, 1933 CPD 565, at p 574; Prof. C F C van der Walt, "Die Somme-skadeleer en die 'Once and For All'- Reël" (doctoral thesis), pp 304, 329, 378-9). Its introduction and the manner of its application by our courts have been subjected to criticism (see Van der Walt, op. cit., pp 425-85), but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.

Closely allied to the "once and for all" rule is the principle of res judicata which establishes that where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties,

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or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the exceptio rei judicatae vel litis finitae. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions (Caney, Law of Novation, 2nd ed., p 70). The principle of res judicata, taken together with the "once and for all" rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e. loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action (Cape Town Council v Jacobs, supra, at p 620; cf. Kantor v Welldone Upholsterers, supra, at p 390-1). The claimant

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must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter. Similarly, the defence of lis alibi pendens is designed to prevent the institution of a second action between the same parties in respect of the same subject-matter and based upon the same cause of action while another such action is already pending (see Wolff NO v Solomon, (1898) 15 SC 298).

The concept of a cause of action is also of particular importance in regard to the prescription of claims for damages in delict. If a cause of action for such damages has accrued and the prescriptive period has run, the claimant's right of action is prescribed and he is precluded by prescription from suing for damages arising from the same cause of action even though the loss giving rise to the claim for damages occurs or becomes manifest after the prescriptive period has run (cf. Oslo Land Co. Ltd. v Union Government

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supra). It is different if the claim for damages flows from a distinct cause of action (which is not prescribed) or if the wrong is a continuing one which in effect gives rise to a series of rights of action arising from moment to moment (see Oslo Land Co. case, supra, at p 589; Slomowitz v Vereeniging Town Council, supra). Another aspect of the concept of a single cause of action in the realm of prescription relates to the amendment of the plaintiff's claim as originally pleaded by him. Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages (see Wigham v British Traders Insurance Company Ltd., 1963 (3) SA 151 (W);

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Schnellen v Rondalia Assurance Corporation of SA Ltd., 1969 (1) SA 517 (W); Lampert-Zakiewicz v Marine and Trade Insurance Co. Ltd., 1975 (4) SA 597 (C), at p 601-2).

What then for the purposes of all these rules, and more particularly in the sphere of delictual claims for damages (other than those based on the actio injuriarum), constitutes a single cause of action? It has been held that, where a plaintiff has in the same accident sustained bodily injury and damage to property, the claims for damages relating thereto constitute one indivisible cause of action; and that consequently the final adjudication by a competent court of a claim in respect of the damage to property precludes, by reason of res judicata, a subsequent claim by way of a common law action for damages relating to the bodily injury (Green v Coetzer, 1958 (2) SA 697 (W)). The reasoning upon which this decision was based was, briefly, that the claim for damage to property is based on the lex Aquilia and the claim for bodily injury on the Aquilian action as

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developed and extended in the Netherlands; that the object of the Aquilian claim under the developed law was to compensate the injured party not for the particular losses or injuries suffered by him but for his damnum, i.e. the whole loss sustained by him in his property, in the sense of a universitas or complex of legal relations, rights as well as duties; that, consequently, bodily injury and damage to property resulting from the same wrongful act, both being part of the same damnum, gave rise to only one cause of action; and that, therefore, the plaintiff having sued and obtained judgment on that cause of action for damages in respect of the damage to property, was prevented by res judicata from pursuing the same cause of action in a subsequent action to recover damages for bodily injury.

Again, in Schnellen v Rondalia Assurance Corporation of SA Ltd. (supra), it was held that, for the purposes of an application to amend a plaintiff's pleading, a claim for

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compensation for bodily injury sustained by the plaintiff (the claim this time being in terms of the Motor Vehicle Insurance Act of 1942) and a claim (also under this Act) by the plaintiff for compensation for medical expenses incurred by him in respect of his minor son, who was injured in the same accident, constituted parts of a single cause of action. And similarly it has been accepted by our courts that a plaintiff who suffers bodily injury has, both at common law and under the Motor Vehicle Insurance legislation, a single cause of action in respect of the damages claimable by him, whether such damages relate to actual patrimonial loss or constitute a solatium for pain and suffering, disfigurement, disability, etc. (see Kruger v SANTAM Versekeringsmaatskappy Bpk., 1977 (3) SA 314 (O), at p 318, and 1978 (3) SA 656 (AD); Santam Versekeringsmaatskappy v Roux, supra, at p 870 C - D).

I come now to the basic issue in this case, viz. whether the plaintiff's claim for compensation in respect of bodily injury and her claim for compensation for loss

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of support arising as they did from the same collision, also constituted parts or facets of the same, indivisible cause of action. There is, so far as I am aware, no authority in our law directly in point (certainly none was quoted to us); and, despite the arguments of appellant's counsel to the contrary, I do not find the decisions in Schnellen's case (supra) and Green v Coetzer (supra) particularly relevant. I say this for the reasons which follow.

At common law the dependant's action for damages for loss of the support of the breadwinner is a peculiar remedy. Its evolution and nature were summarized by HOLMES JA in Legal Insurance Company Ltd. v Botes (1963 (1) SA 608, at p 614 B - G) as follows:

> "The remedy was unknown to Roman Law, in which no action arose out of the death of a freeman, and consequently the Aquilian action was not available. It had its origin in Germanic custom, in which the reparation of 'maaggeld' was regarded as a conciliation to obviate revenge by the kinsmen of the deceased, and it was divided

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> among the latter's children or parents or other blood relatives. The Roman-Dutch Law modified the custom by regarding the payment as compensation to the dependants for loss of maintenance. The Roman-Dutch jurists felt that this could be accommodated within the extended framework of the Roman Aquilian action by means of a utilis actio. The remedy has continued its evolution in South Africa - particularly during the course of this century - through judicial pronouncements, including judgments of this Court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss 'caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and sui generis - but it is effective."

(See also discussion by Prof. Feenstra of Leiden University in 1972 Acta Juridica, p 227.) An essential and unusual feature of the remedy is that while the defendant incurs liability because he has acted wrongfully and negligently (or with dolus) towards the deceased and thereby caused the

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death of the deceased, the claimant (the dependant) derives his right of action not through the deceased or from his estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefor. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner. These principles are trite and require no citation of authority. They demonstrate the basic differences between this remedy and that given to a plaintiff who has suffered bodily injury or sustained damage to his property as a result of the wrongful and negligent (or intentional) conduct of the defendant. In the latter case the action lies for a wrongful act committed in respect of the plaintiff's person or property and with culpa (or dolus) vis-à-vis the plaintiff.

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In order to determine whether at common law the claim for damages by a plaintiff for bodily injury and the claim for damages by the same plaintiff for loss of support caused by the death of the breadwinner (where both the bodily injury and the death result from the same accident) are separate causes of action or simply facets of a single cause of action it is necessary, in my view, to determine in the first place, what the essential criterion of a cause of action is.

The meaning of the expression "cause of action", as used in various statutes defining the jurisdiction of courts or providing for the limitation of actions and in other contexts, has often been considered by the courts. In McKenzie v Farmers' Co-operative Meat Industries Ltd. (1922 AD 16) this Court held that, in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, "cause of action"

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> ".... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved". (Per MAASDORP JA at p 23.)

And in Abrahamse and Sons v SA Railways and Harbours (1933 CPD 626), a case concerning the prescription of a claim against the Railway Administration, which turned on the question as to when the plaintiff's cause of action arose, WATERMEYER J stated:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action".

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(See also Coetzee v SA Railways & Harbours 1933 CPD 565, at pp 570 - 1; Slomowitz v Vereeniging Town Council, supra, at p 330 A - F.)

In the case of an Aquilian action for damages for bodily injury (and here I use the term Aquilian in an extended sense to include the solatium awarded for pain and suffering, loss of amenities of life, etc., which is sui generis and strictly does not fall under the umbrella of the actio legis Aquiliae: Government of RSA v Ngubane, 1972 (2) SA 601 (AD) at p 606 E - H) the basic ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of culpa or dolus, on the part of the defendant, and (c) damnum, i.e. loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or facta probanda) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action

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arises. In the usual case of bodily injury arising from a motor accident this concurrence would take place at the time of the accident. On the other hand, in the case of an action for damages for loss of support the basic ingredients of the plaintiff's cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) damnum, in the sense of a real deprivation of anticipated support. The facta probanda would relate to these matters and no cause of action would arise until they had all occurred.

From this analysis it is evident that, although there is a measure of overlapping, the facta probanda in a bodily injury claim differs substantially from the facta probanda in a claim for loss of support. Proof of bodily injury to the plaintiff is basic to the one; proof of death

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of the breadwinner is basic to the other. Proof of a right to support and the real expectation that, but for the breadwinner's death, such support would have been forthcoming is basic to the one, irrelevant to the other. It is evident, too, that even where both claims flow from the same accident, the cause of action in each case may arise at a different time. As I have said, the cause of action in respect of bodily injury will normally arise at the time of the accident, i.e. when the bodily injury and the consequent damnum are inflicted; in the case of the cause of action for loss of support, this will arise only upon the death of the deceased, which may occur some considerable time after the accident. Until such death there is, of course, no wrongful act qua the plaintiff; only a wrongful act qua the person who is later to become the deceased.

Consequently, applying (as I think I should) the ordinary and well-accepted legal meaning of cause of action, I am of the view that at common law a plaintiff's claim for

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damages for bodily injury is a cause of action quite separate and distinct from that which the same plaintiff may acquire against the same defendant for loss of support, even though both causes of action derive from a common occurrence. Moreover, I am fortified in this conclusion by a consideration of the anomalies that could occur were the two claims to be regarded, in the circumstances postulated, as being merely parts or facets of a single, indivisible cause of action. I need merely mention a few examples of these to demonstrate the point.

(1) Suppose that an accident occurs in which the plaintiff (wife) suffers immediate bodily injury and damnum and her husband (upon whom she was dependent for support) is seriously injured and dies a year later. If what I shall for convenience call the single cause of action theory be adopted, then many problems arise. At the time of the accident there accrued to the plaintiff a cause of action for bodily injury and,

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her husband being still alive, she derived no right of action then for loss of support. (In fact the position might be that at that stage there was not even any prospect of her husband dying.) Presumably prescription of her claim for damages for bodily injury (unless delayed for some special reason) would then commence to run. Upon her husband's death, however, her cause of action would acquire a new dimension; it would be augmented by a claim for loss of support. When would prescription in respect of this augmented cause of action commence to run? If from the date of the accident, then how could it be said that the entire cause of action (which would include as one of the facta probanda the death of the plaintiff's husband) had accrued at that stage. If from the date of the husband's death, then how is the running of prescription in respect of the bodily injury claim for the previous year to be treated? Is it wiped

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out? And if so on what principle? Or is it to be suggested, contrary to what was decided in Erasmus v Grunow en 'n Ander (supra, at p 240 E - F) that different portions of the cause of action have different periods of prescription?

(2) Suppose that instead of dying one year later the husband dies three years later and that in the interim the plaintiff has proceeded to final judgment by a competent court in respect of her claim for bodily injury. Postulating the single cause of action theory, can the defendant then successfully raise the plea of res judicata in a subsequent action for damages for loss of support? And, on the supposition that both claims constituted a single cause of action, and bearing in mind the once and for all rule, as applied particularly in the Oslo Land Company case (supra), why should such a plea not be successful?

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because in each case the claim is, as it were, based upon the *damnum* suffered by the plaintiff which is to be measured by the difference between the *universitas* of his rights and duties as it is after the wrongful act and what it would have been if the act had not been committed. It is true that the *universitas* concept does underlie the Aquilian action and that according to current theories (see also *Dippenaar v Shield Insurance Co. Ltd.*, 1979 (2) SA 904 (AD), at p 917 B - D) the plaintiff's patrimonial loss is measured by the diminution of that *universitas*, but it does not follow, in my view, that because in the same occurrence a defendant causes a diminution of the plaintiff's *universitas* in two ways that there is necessarily one cause of action. It depends on whether these different forms of diminution are traceable back to a single wrongful act. In the type of case under consideration there are, in my view, two distinct wrongful acts: in the

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one case it is the wrongful and negligent infliction of bodily injury to the plaintiff and in the other case it is the wrongful and negligent killing of the breadwinner, the person upon whom the plaintiff was dependent for support. This distinguishes Schnellen's case (supra) and Green v Coetzer (supra), in which there was held to be but one wrongful act, and it is therefore, unnecessary to consider the correctness of these decisions (assuming that it were open to this Court to do so).

For these reasons, therefore, and having regard to the criterion for determining a cause of action, the historical development of the claim by dependants as an action sui generis and the above-mentioned anomalies, I am satisfied that at common law a plaintiff's claim for damages for bodily injury constitutes a separate cause of action from that which accrues to him (or her) by reason of the death of the breadwinner, even though the bodily injury

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and death result from the same occurrence and the same defendant is legally responsible for both. The next question is whether the position is any different where these damages arise not at common law but in terms of sec. 21 of the Act.

To a great extent the Act represents an embodiment of the common law actions relating to damages for bodily injury and loss of support where the bodily injury or death is caused by or arises out of the driving of a motor vehicle insured under the Act and is due to the negligence of the driver of the vehicle or its owner or his servant. Then in place of, and to the exclusion of, the common liability of such persons is substituted the statutory liability of the authorized insurer. Sections 21, 23 (a) and 27 indicate that the statutory liability of the authorized insurer is no wider than the common law liability of the driver or owner would have been but for the enactment of the Act (indeed in certain instances it is narrower - see secs. 22 and 23 (b)) and that this

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statutory liability is dependent upon the existence of a state of affairs which would otherwise have given rise to such a common law liability (Workmen's Compensation Commissioner v SANTAM Bpk., 1949 (4) SA 732 (C), at p 740; Rohloff v Ocean Accident & Guarantee Corp. Ltd., 1960 (2) SA 291 (AD), at p 297 E - G). The negligence upon which liability under sec. 21 hinges is the culpa of the common law and, save in certain specified instances, the compensation claimable under sec. 21 is assessed in accordance with common law principles relating to the computation of damages. In one significant respect, however, the Act brings about an innovation. Whereas at common law a person who suffered bodily injury (which would now fall under sec. 21) and also damage to property in a motor accident could - and according to Green v Coetzer (supra) was obliged to - claim damages in respect of both aspects from the responsible party in one action, now, save where the wrongdoer is a "self-insurer" (see section 3 of the Act), he must perforce bring separate actions, one against the party liable at common law for the damage to

his property and one against the authorised insurer in respect of his bodily injury.

It was submitted by appellant's counsel that under sec. 21 of the Act the third party is given one single, indivisible right of action to recover all loss, however resulting, caused by the negligence or other unlawful act for which the insurer is responsible. If I am correct in the conclusion that at common law a claim in respect of bodily injury and a claim for loss of support owing to the death of the breadwinner are to be regarded as separate and distinct causes of action, then I do not think that, in embodying, in certain circumstances, these two causes of action in sec. 21 the Legislature intended thereby to alter the common law position and fuse them into one. There is no clear indication of such an alteration and accordingly it must be presumed that no such alteration was intended (cf. Motor Insurers' Association of SA v Schuurman and Landsaat, 1961 (1) SA 486 (AD), 491 A - B).

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I am accordingly of the view that, in regard to the issues as to whether there are two causes of action or one, the position is no different under sec. 21 of the Act from what it would have been under the common law.

I return now to the basic submissions contained in the argument of appellant's counsel, as set forth above. For the reasons stated I hold that, contrary to his argument, the wrongful acts of the driver of the insured vehicle vested in appellant two distinct causes of action, one in respect of her bodily injuries and one in respect of the death of her husband. Consequently the first summons contained two causes of action, but insofar as it purported to prosecute the one cause of action, the claim for loss of support, it was ineffective - because of non-compliance with sec. 25 of the Act - and did not interrupt prescription. Although Act 68 of 1969 views prescription from the point of view of the debtor in providing that a "debt" shall be extinguished by prescription after the lapse of a period of time, it is clear that the "debt" is

necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt. (Cf. Erasmus v Grunow en n Ander, supra, at p 245 E.) Where a creditor has two rights, or causes, of action then there are two corresponding debts. When it comes to the judicial interruption of prescription in terms of sec. 15, then if the process seeks to enforce two debts (or causes of action) it will only interrupt prescription in respect of both, if it is effective as a means of commencing legal proceedings in respect of both. If it is effective only in respect of one, then this will not enure for the benefit of the creditor in respect of the other (cf. Park Finance Corporation (Pty.) Ltd. v Van Niekerk, 1956 (1) SA 669 (T), at p 673 A - C). Once it is held, as I do, that in the present case the first summons did not interrupt prescription in respect of the claim for loss of support (which constituted a separate

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cause of action), the remainder of the argument of appellant's counsel, as set forth under (iii), (iv), (v) and (vi) above, falls to the ground. I might add, too, that it was not disputed that if the first summons failed to interrupt prescription in respect of the claim for loss of support, this claim had become prescribed and that the special plea was well-founded.

This conclusion renders it unnecessary for me to consider the alternative basis upon which the Court a quo decided the case (see judgment p 1144 C - F) and which proceeded on the assumption that appellant had only one cause of action for both the bodily injuries suffered by her and the support lost by reason of the death of the breadwinner.

The appeal is dismissed with costs.

M.M. CORBETT.

JOUBERT JA) CONCUR
GALGUT AJA)

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPÈLAFDELING)

In die saak tussen:

JAN HENDRIK CHALMERS Appellant

en

DIE STAAT

CORAM: RUMPFF, HR, MULLER, AR, et BOTHA, Wn. AR

VERHOORDATUM: 16 November 1979

LEWERINGSDATUM: 22 November 1979

U I T S P R A A K

BOTHA, Wn. AR :-

Die appellant is in Maart 1976 deur n regter en assessore in die Oranje-Vrystaatse Provinsiale Afdeling skuldig bevind aan verkragting, en op 6 Mei 1976 is hy gevonnis tot 10 jaar gevangenisstraf,

waarvan/.....

waarvan 3 jaar opgeskort is op gewone voorwaardes.
Op 1 Mei 1979 het n ander regter van die Suiderde Afdeling n buitentydse aansoek van die appellant om verlof om te appelleer gekondoneer, en aan die appellant verlof toegestaan om na hierdie Hof in hoër beroep te kom teen beide sy skuldigbevinding en sy vonnis.

Die aanklag teen die appellant het voortgespruit uit gebeurtenisse wat plaasgevind het gedurende die laat aand van 15 Oktober 1975. Die klaagster in die saak was n jong dame wat destyds 21 jaar oud was en wat enkele maande voor die voorval in die huwelik getree het. Op die betrokke aand was haar man op nagskof by die myn waar hy werksaam was, en was sy alleen by die huis. Haar getuienis van wat gebeur het hoef slegs in hooftrekke weergegee te word. Sy het in haar bed gelê en lees. Om ongeveer 10.45 nm. het sy gehoor dat iemand in die kombuis die hoofskakelaar van die ligte afskakel. Sy

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het besef dat iemand toegang tot die huis moes gekry het, maar in haar kamer was daar geen geskikte wegkruipplek vir haar nie en sy het ook geen wapen tot haar beskikking gehad nie. Byna onmiddellik nadat die ligte afgeskakel is, het 'n man, wat later geblyk het die appellant te wees, bo-op haar op die bed kom lê. Hy het haar hard in die gesig geklap en 'n koord styf om haar nek gebind. Sy het later vasgestel dat dit die koord van haar elektriese ketel in die kombuis was. Daarna het die appellant die komberse van haar afgetrek en die damesbroekie waarin sy geklee was ook afgetrek. Toe het hy begin om geslagsgemeenskap met haar te hê. Na 'n rukkie het sy hom gevra om die koord om haar nek te verwyder aangesien dit haar seermaak. Hy het dit gedoen, maar eers nadat hy haar 'n eed laat sweer het dat sy niks sou doen om haar teë te sit nie. Hy het voortgegaan om met haar gemeenskap te hou. Dit het oor 'n lang tydperk gestrek. Besonder= hede van wat hy gedoen het en vir haar laat doen het hoef

nie vermeld te word nie. Later het hy opgestaan, sy klere aangetrek (hy was naak toe hy bo-op haar kom lê het), en die ligte aangeskakel. In daardie stadium het hy vir haar aangedui wie hy is. Hy het gedreig dat hy sou terug kom en haar vermoor indien sy haar man of die polisie sou laat kom. Toe is hy weg, by die eetkamer-venster uit; dit is waar hy oorspronklik ook toegang tot die huis verkry het. Dit was toe byna middernag. Die klaagster het n ruk lank gelê en wag totdat sy gedink het dit is veilig vir haar om op te tree, en toe het sy telefonies in aanraking gekom met amptenare by haar man se werksplek. Een van hulle het na haar huis gekom en op haar versoek haar na haar man geneem.

Namens die appellant is dit in hoofsaak voor ons betoog dat daar nie bewys bo redelike twyfel was dat die klaagster nie toegestem het dat die appellant met haar gemeenskap kon hou nie. Daar steek niks in hierdie betoog nie. Die klaagster het in haar

getuienis verduidelik dat sy vreesbevange was as gevolg van die appellant se aanvanklike gewelddadige optrede teenoor haar, toe hy haar geklap het en die koord styf om haar nek gedraai het. Sy sê dat daar geen manier was waarop sy haar kon teensit of weerstand kon bied nie. Haar huis staan op 'n afgeleë plek, weg van die naaste ander huise. In ieder geval was sy te bang om te gil omdat sy gedink het die appellant sou haar net verdere leed aandoen. Daarbenewens het daar in haar gedagte opgekom 'n artikel deur 'n polisie-offisier wat sy kort vantevore gelees het, waarin vrouens aangeraai is om in sulke omstandighede liewer toe te gee as om hulle lewens in gevaar te stel. Uit die klaagster se getuienis is dit volkome duidelik dat daar aan haar kant slegs 'n on= willige onderwerping aan die gewelddadige aanranding op haar was en geen sprake van toestemming tot gemeenskap nie.

Dit is aangevoer dat die klaagster se getuienis nie bevredigend en duidelik was in alle wesenlike opsigte

nie/.....

nie, en voorbeelde is aangehaal van beweerde teenstrydig=
hede en vaaghede in haar getuienis. Die aspekte van
haar getuienis waarna verwys is, het egter sonder uit=
sondering betrekking op onbenullige besonderhede wat
geensins die klaagster se geloofwaardigheid kan affekteer
nie, soos presies waar en wanneer sy die koord van die
ketel gevind het nadat die appellant weg is, of die
appellant enige van sy klere in haar kamer aangetrek het,
en so meer. Dit kan nouliks verwag word van 'n jong
dame wat 'n ondervinding deurgemaak het soos dié van die
klaagster om sulke beuselagtighede akkuraat in die
herinnering terug te roep. Die verhoorhof, wat terdeë
bewus was van die versigtigheid waarmee 'n klaagster se
getuienis in 'n saak van hierdie aard benader moet word,
het 'n sterk indruk gekry dat die klaagster 'n geloofwaardige
getuie was, dat sy 'n fyn, beskaafde vrou is, en van so 'n
karakter dat sy nooit sou toegestem het tot geslagsverkeer
met 'n wildvreemde man in die omstandighede wat daardie aand

geheers/.....

geheers het nie. 'n Bestudering van die oorkonde skep geen twyfel hoegenaamd oor die korrektheid van die verhoorhof se indruk van die klaagster nie.

Verder is aangevoer dat daar nie bevredigende stawing was van die klaagster se getuienis nie. Daar was wel stawing van getuies wat haar na die voorval gesien het en opgemerk het dat sy emosioneel ontwrig was en dat sy merke op haar nek gehad het, maar dit is onnodig om daarop in te gaan, omdat hierdie betoog namens die appellant die belangrikste aspek van die saak wat teen die appellant tel, uit die oog verloor, en dit is naamlik die feit dat hy self geen getuienis afgelê het nie. Die versuim van die appellant om onder eed die getuienis van die klaagster te betwis het tot gevolg dat daar in die omstandighede van hierdie saak geen grondslag bestaan vir 'n redelike moontlik= heid dat die klaagster toegestem het tot gemeenskap nie.

'n Alternatiewe betoog namens die appellant was dat daar 'n redelike moontlikheid bestaan dat die appellant

onder die bona fide indruk verkeer het dat die klaagster toegestem het tot gemeenskap. Hierdie betoog is ook onhoudbaar, want in die afwesigheid van getuienis van die appellant self is die indruk waaronder hy verkeer het n kwessie van blote bespiegeling wat geen grondslag het in die getuienis nie. Inderdaad was daar voor die Hof a quo getuienis van buite-geregtelike uitlatings van die appellant wat nie inpas by die beweerde indruk waaronder hy verkeer het nie. Eerstens het hy n verklaring voor n landdros afgelê, waarin hy erken dat hy die klaagster se huis binnegesluip het, die ligte afgeskakel het, die koord uit die kombuis geneem het, en die klaagster op haar bed vas= gedruk het in die donkerte. Hy beweer wel dat toe hy die klaagster gesê het hy wil gemeenskap met haar hê, sy geantwoord het "Nou kom dan",

maar/.....

maar die suggestie dat hy kon dink dat sy in daardie omstandighede haar nie net onderwerp het aan sy geweld nie maar toegestem het tot gemeenskap is so vergesog dat dit nie oorweging verdien nie. In die tweede plek het die appellant na sy inhegtenisneming n brief uit die gevangenis aan die klaagster geskryf waarin hy onder meer sê:

> "Ek was van die duiwel besete .....
> ek was op die verkeerde pad en met
> verkeerde maats te doen gekry .....
> ek weet dit is verkeerd wat ek gedoen
> het en dat ek jou karakter geskend het
> maar ek sal daarvoor vergoed al is dit
> in die gevangenis al is dit ook waar."

Die skuldige gewete wat hieruit straal is onversoenbaar met die moontlikheid dat die appellant gedink het dat die klaagster n vrywillige medewerker was tot die bevrediging van sy wellus.

Die appellant se skuldigbevinding is gevolglik onaanvegbaar.

Wat die vonnis betref, is dit betoog dat die verhoorregter te veel klem gelê het op die weersinswekkende aard van die appellant se optrede en te min aandag gegee het aan die persoonlike omstandighede van die appellant. Die betoog is ongegrond. Die verhoorregter het tydens sy vonnisoplegging in groot besonderhede die tersaaklike faktore ontleed wat 'n rol gespeel het by die bepaling van 'n gepaste vonnis en ek kan geen rede vind om te dink dat hy enige faktore oorbeklemtoon het, of ander te gering geskat het, of dat hy enige mistasting begaan het nie. Die appellant is wel 'n jong man (toe hy die oortreding begaan het was hy 20 jaar oud), maar hy het reeds 'n hele aantal vorige veroordelings op sy kerfstok gehad waarby oneerlikheid 'n rol gespeel het, ofskoon nie geweld nie. Dit was duidelik uit die gegewens wat die verhoorregter tot sy beskikking gehad het dat die appellant 'n jong man met sterk misdadige neigings was en dat dit noodsaaklik was, in 'n

poging/.....

poging om deur onderwerping aan streng dissipline oor 'n lang tydperk die rehabilitasie van die appellant te bewerkstellig, om hom vir 'n aansienlike tyd gevangenis toe te stuur.

Daar is gevolglik geen gronde om in te meng met die vonnis wat die appellant opgelê is nie.

Die bevel van die Hof is dat die appèl teen die skuldigbevinding sowel as die vonnis van die hand gewys word.

A S Botha

BOTHA, Wn. AR

RUMPFF, HR)
MULLER, AR) - Stem saam