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G.P.-S.51994—1976-77—3 000 (P) J 219

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

(Appèl Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

FEDERATED EMPLOYERS' INSURANCE Co Ltd ..... *Appellant,*

versus

K. MAGUBANE ..... *Respondent*

Mr Pretorius @ 29/7/81 — Mr Schoeman @ 3/7/81

Appellant's Attorney / *Prokureur vir Appellant* Nauta & Van der Walt

Respondent's Attorney / *Prokureur vir Respondent*

Appellant's Advocate / *Advokaat vir Appellant*

Respondent's Advocate / *Advokaat vir Respondent*

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

DIKPA

Coram: Rumpff HR, Corbett, Kotzé, Jacobs & Van Heerden AR's

Appellant: B. Louw SC & R. Van [illegible]

Respondent: P. Levinsohn [illegible]

Appeal: B. Louw SC unsuccessful [illegible] C.A.V.

UITSPRAAK 26-2-82 Hof Nr 1 CA 9 45 en

see judgment for order

Writ issued / Lasbrief uitgereik	Bills taxed—Kosterekenings getakseer		
	Date / Datum	Amount / Bedrag	Initials / Paraaf
Date and initials / Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FEDERATED EMPLOYERS' INSURANCE COMPANY LIMITED ..... Appellant

and

KHONA MAGUBANE ..... Respondent

Coram: Rumpff CJ, Corbett, Kotzé, Trengove JJ and Van Heerden AJA.

Date of Hearing: 17 February 1981

Date of Judgment: 26 Feb. 1981

J U D G M E N T

CORBETT JA:

The respondent in this matter made application in the Durban and Coast Local Division, in terms of sec. 24 (2)(a)(ii) of the Compulsory Motor Vehicle Insurance Act, 56 of 1972 ("the Act") as amended, for leave to serve

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a summons in a proposed action under the Act against appellant, an authorized insurer in terms of the Act, after the expiry of the relevant period of prescription. The application was granted by the Court a quo. Appellant appeals against that decision directly to this Court, the necessary consent of the parties to this procedure having been lodged with the registrar of the Court a quo in terms of sec. 20(3) of the Supreme Court Act. At the hearing of the appeal application was made for condonation of the late filing of the notice of appeal. There was no opposition to the application and it was granted forthwith.

It appears from the application that on 21 June 1977 respondent, a labourer working for the South African Railways and Harbours Administration, was injured in a motor accident, involving a vehicle insured in terms of the Act by appellant. As a result of his injuries the respondent suffered damages. Towards the end of February 1978 respondent consulted the firm of Messrs Straw and Begemann, described in the papers as "public loss assessors and investigators" ("the firm"), and instructed the firm to lodge and pursue his claim for damages

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under the Act. A member of the firm investigated the claim and obtained information necessary in order to pursue it. There was a delay in obtaining the medical report which forms portion of the claim for compensation, which must be made on the prescribed form MVA 13 in terms of sec. 25(1) of the Act. I shall later detail the causes for this delay. As a result of the delay the MVA 13 claim form was delivered to appellant only on 19 June 1979, one day before the claim was due to become prescribed.

The effect of the due delivery of this claim was to suspend the running of prescription for a period of 90 days as from 19 June 1979 (see sec. 24(1)(a), read together with sec. 25(2) of the Act). According to appellant's counsel (and his calculation was not challenged by respondent's counsel) this meant that the period of prescription was extended to, and due to expire at, midnight on 16 September 1979. On 22 August 1979 the firm wrote a letter (annexure "F" to an affidavit filed in support of the application) to appellant referring

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to respondent's claim, pointing out that the 90-day period was due to elapse shortly and requesting appellant's response to the claim. To this appellant replied only on 18 September 1979, by a letter of that date which informed the firm that respondent's claim was repudiated outright. This letter was received by the firm on 22 September 1979. The member of the firm dealing with the matter then discovered that the claim had become prescribed. A letter (dated 3 October 1979) was sent requesting appellant to "condone" prescription, but this appellant refused to do: hence the application.

The judgment of FRIEDMAN J, who heard the matter in the Court a quo, has been reported (see Magubane v Federated Employers' Insurance Co. Ltd., 1980 (2) SA 878 (D)). Consequently it is not necessary for me to refer in detail to the reasons given by him for granting the application. Before dealing with the issues raised on appeal, however, it is convenient to examine the statutory provisions whereunder the Court is empowered to grant dispensation from the prescription of a claim under the Act.

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Basically the position is that the right to claim compensation under the Act becomes prescribed upon the expiration of a period of two years from the date upon which the claim arose, provided that during the period of 90 days following the delivery of a claim in terms of sec. 25 of the Act, the running of prescription is suspended (sec. 24(1) of the Act). The practical consequences of these provisions in the case of respondent's claim have already been stated. The powers of the Court to relieve a claimant, i.e. a third party, of the consequences of prescription are defined by sec. 24(2)(a), which in its present form reads as follows:

> "(2) (a) If a third party's claim for compensation 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 or, if he instructed any other person to comply with those provisions on his behalf, such person could not reasonably have been expected to comply with the said provisions before the date on which the claim became prescribed; or

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(ii) where the claim became prescribed after compliance by him with the said provisions, that by reason of special circumstances he or, if he instructed any other person to act on his behalf in this connection, such person 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."

Inasmuch as respondent's claim became prescribed after he had complied with the provisions of sec. 25 (1), i.e. the due delivery of a claim on prescribed form MVA 13, subsections (ii) and (iii) are the portions of sec. 24 (2)(a) relevant in the present case. Of these subsection (iii) was clearly satisfied; and the sole issue in the case is whether respondent established the special circumstances required by subsection (ii).

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The powers provided for by sec. 24 (2)(a) were first introduced into the Act by sec. 50 (1) of the Second General Law Amendment Act, 94 of 1974. Thereafter in 1978 sec. 24 (2)(a) was amended by the Compulsory Motor Vehicle Insurance Amendment Act, 69 of 1978. In its pristine form subsection (i) of sec. 24 (2)(a) did not contain the words ".... or, if he instructed any other person to comply with those provisions on his behalf, such person ....."; nor did subsection (ii) contain the words ".... or, if he instructed any other person to act on his behalf in this connection, such person.....". In each case the additional words were inserted by sec. 11 (1) of Act 69 of 1978.

Prior to its amendment in this way, sec. 24 (2)(a), and the correct interpretation thereof, had been considered by the courts on a number of occasions. Some of the decisions were not harmonious. Eventually the position was clarified by a decision of this Court, Webster and Another v Santam Insurance Co. Ltd., 1977 (2) SA 874 (AD). In this case it was held that

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although the power of the Court to authorize service of process, as defined in sec. 24 (2), was expressed in permissive terms, it was, in the circumstances prescribed for its exercise, mandatory in effect. Consequently the Court did not retain a residual discretion to grant or refuse the application in the event of the prescribed requisites being fulfilled. It is a necessary corrollary to this - and this appears clearly from the section - that unless these requisites are satisfied, the Court has no power to give relief under the section. Furthermore, in Webster's case (supra) KOTZÉ JA, who delivered the judgment of the Court, had the following to say in regard to the meaning of the words "special circumstances", as they appear in subsection 2 (a)(ii) - see p 882 E - H:

> "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 p 789H). By the use of that expression one would normally have

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> 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 sec. 24 (2)(a)(ii) of 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?"

On the facts in that case it was found by this Court that the late service of the summons was attributable to "lack of expedition, fault and negligence" on the part of certain members of the firm of attorneys appointed to act on behalf of the third party and that that neglect was "the effective reason" for the late service. The Court further held that, in considering whether the neglect of an attorney

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constitutes a special circumstance within the meaning of that phrase in sec. 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-a-vis his client. In that case the Court held that the attorney's neglect did constitute a special circumstance, warranting the granting of relief.

The amendment of the subsection in 1978, as detailed above, has considerably altered the position where the failure to serve the process in question is attributable to the neglect of the attorney acting on behalf of the third party. Clearly, such a case would fall within the contingency postulated by the words "or, if he instructed any other person to act on his behalf in this connection" and it follows that the appropriate enquiry would then be whether by reason of special circumstances such person, i.e. the attorney, could not reasonably have been expected to serve the process. In a case of

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the attorney's neglect simpliciter, the answer to the enquiry must invariably be that there are no such circumstances. Apart from this, however, the amending Act of 1978 introduced the following definition (prefaced by the usual words "In this Act, unless inconsistent with the context"):

> " 'special circumstances' does not include any neglect, omission or ignorance".

This, too, would rule out an application based merely on neglect on the part of the third party's attorney. And the same considerations apply to any other person instructed by the third party to act on his behalf in the prosecution of the claim.

In regard to the meaning of the above-quoted definition, it was submitted by appellant's counsel that the words "omission" and "ignorance" should be restrictively interpreted and that the exclusion provided for by the definition should be confined to neglect, culpable omissions and culpable ignorance. I think that there is much to be said for this view of the meaning of the definition. Firstly, as counsel pointed out, the word

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"neglect" itself implies a measure of culpability. By the principle of noscitur a sociis the words "omission" and "ignorance", which are used in close association with, and as alternatives to, "neglect", should be interpreted as meaning only an omission or ignorance which is culpable. Secondly, to give, for example, the word "omission" a completely unrestricted meaning would have the result that an omission caused by circumstances wholly beyond the control ~~my~~ of the party concerned would automatically fail to qualify as a special circumstance. This can hardly have been the intention of the Legislature. Thirdly, the definition was obviously intended to be read and applied in conjunction with the provisions of sec. 24 (2)(a). There the emphasis is on what the third party, or other person instructed to act on his behalf, could not reasonably be expected to have done. This suggests that where the conduct of the third party or other person has been reasonable, i.e. non-culpable, relief may be granted. It

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would be anomalous if circumstances existed by reason of which it could be said that the third party or other person could not reasonably have been expected, for example, to serve the process in time, and yet, because those circumstances involved a non-culpable omission, no relief could be granted. I am, therefore, inclined to agree with counsel's submission (and see also the remarks of KUMLEBEN J in Dube v President Insurance Co. Ltd., 1979 (4) SA 420 (D)), but because of the view which I take of the facts in this case it is not necessary finally to decide this point.

Although the 1978 amendments have thus altered the position in certain respects, certain basic criteria as to what constitute special circumstances, as expounded in Webster's case (supra), remain valid and applicable. One of these is that the Court must be satisfied that the circumstances relied upon by the applicant are the cause of, or reason for, the failure to effect timeous service (see Webster's case, supra, at p 882 C; and see also Dube's case (supra) at p 425 D) .....

425 D)'. Without this causal connection it would not be possible for the court to find that by reason of such special circumstances the party concerned could not reasonably have been expected to serve process timeously. Another criterion is that in order to rank as special the circumstances must be unusual or unexpected'. And finally the court must be satisfied that because of such circumstances it could not reasonably be expected of the party concerned to effect timeous service. In other words his conduct, and particularly his failure to effect timeous service, must be critically examined in the light of the criterion of reasonableness.

With this in mind, I revert to the facts of the case. As I indicated earlier, the firm encountered problems and delays in obtaining the medical report required for completion of the MVA 13 form. It appears that after the accident respondent spent about three weeks in the King Edward V111 Hospital at Durban. On 31 October 1978 the firm wrote to the medical superintendent, enclosing a partially completed

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With this in mind, I revert to the facts of the case. As I indicated earlier, the firm encountered problems and delays in obtaining the medical report required for completion of the MVA 13 form. It appears that after the accident respondent spent about three weeks in the King Edward V111 Hospital at Durban. On 31 October 1978 the firm wrote to the medical superintendent, enclosing a partially completed

MVA 13 form and requesting him to fill in the report form on the reverse thereof. No reply was received and on 5 December 1978 the firm addressed a reminder to the medical superintendent. The firm then received a reply dated 12 December 1978 stating that all attempts to trace the hospital numbers of the respondent had been unsuccessful and requesting the firm to furnish the numbers. Thereafter certain further communications passed between the firm and the hospital, but in the end, owing to the inability of the hospital to trace respondent's hospital records, it proved impossible to obtain a medical report from the medical superintendent. Consequently an orthopaedic surgeon, Mr G Schweitzer of Durban, was asked to examine respondent and to compile a medical report. The request appears to have been made on 23 May 1979. The earliest appointment which could be made with Mr Schweitzer was for 14 June 1979. He furnished his report under cover of a letter dated 14 June 1979. Eventually, as previously mentioned,

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the MVA 13 claim, including the medical report, was delivered to appellant on 19 June 1979.

Thereafter the matter was diarised for attention on 16 August 1979 and as a result of this the letter of 22 August 1979 (annexure "F") was written. No further action was taken by the firm until after receipt of appellant's letter of 18 September 1979, by which time prescription had run its full course. The reasons for this inactivity on the part of the firm are dealt with in the affidavit of Mary Jefferson, who was employed in the firm as a clerk/bookkeeper and whose duties related largely to the handling and processing of claims under the Act. Her affidavit must be considered in conjunction with one by David Pennington Straw, a partner in the firm.

In his affidavit Straw described fully a procedure which he and his partner Begemann had devised for the processing and lodging of third party claims. He claimed that this procedure was specifically designed "not only to be accurate, but also to prevent the intervention of prescription in any

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circumstances", that over the years many thousands of claims had been processed and that, until then, "few if any" had prescribed while being handled by the firm. The procedure involves the recording of a client's instructions on a specially designed form, the opening of a file cover, the allocation of a file number and a recording of the claim in a claims register. There are also standing, written instructions for the staff in regard to the handling of claims. As far as the danger of prescription is concerned, Straw mentions various procedural safeguards. Firstly, the prescription date and any extension thereof must be entered in the appropriate block on the file cover. Secondly there is a card-index system covering every day of the year over a period of five years and on this is recorded the claims which will become prescribed on that date. A clerk in the office is allocated the duty of pulling out a card each morning one month in advance, i.e. one month before the claims recorded on the card are due to

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prescribe. The clerk is then required to advise each partner of the claims being handled by him which are due to prescribe in one month's time. The partner then takes personal control of the file. Thirdly, the file is diarised periodically when instructions are received and the diarised date is entered on each occasion when this is done.

So much for the system: I now turn to what happened. This appears from the affidavit of Mary Jefferson. According to her the claim was originally handled by a Mr A J Livingstone, a member of the firm, with her assistance. Towards the end of February 1979 Livingstone left the firm and she took over his work, acting under the supervision of, and with the assistance of, Straw and Begemann. It is said that Livingstone's departure seriously affected "the organisation and distribution of the work formerly done by him". It was not possible for the firm to admit a new partner because of a statutory innovation which prohibited non-attorneys from instituting claims, and this caused the firm gradually to abandon its third party

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work.

Mary Jefferson's affidavit describes all the action taken by the firm in the investigation and prosecution of the claim, as already detailed. Coming to the critical period of a month before the period of prescription was due to expire, her affidavit reads:

> "Thereafter, the file was diarised to the 16th August, 1979, and after the diarised date, a letter was written dated 22nd August, 1979, to the respondent requesting its response to the claim. A copy of this letter is annexed hereto marked "F". Although the file was again diarised to the 27th August, 1979, it was overlooked and it did not come to my attention before the date of prescription. I am unable to offer an explanation why the file was overlooked."

Later in her affidavit she states that after the despatch of Annexure "F" the file was again placed in the filing cabinet and was diarised. She further alleges that —

> "The resultant confusion arising from the departure of Mr LIVINGSTONE and from the gradual abandoning of third party work caused the file in this matter to be temporarily misplaced as a result of which the file did not

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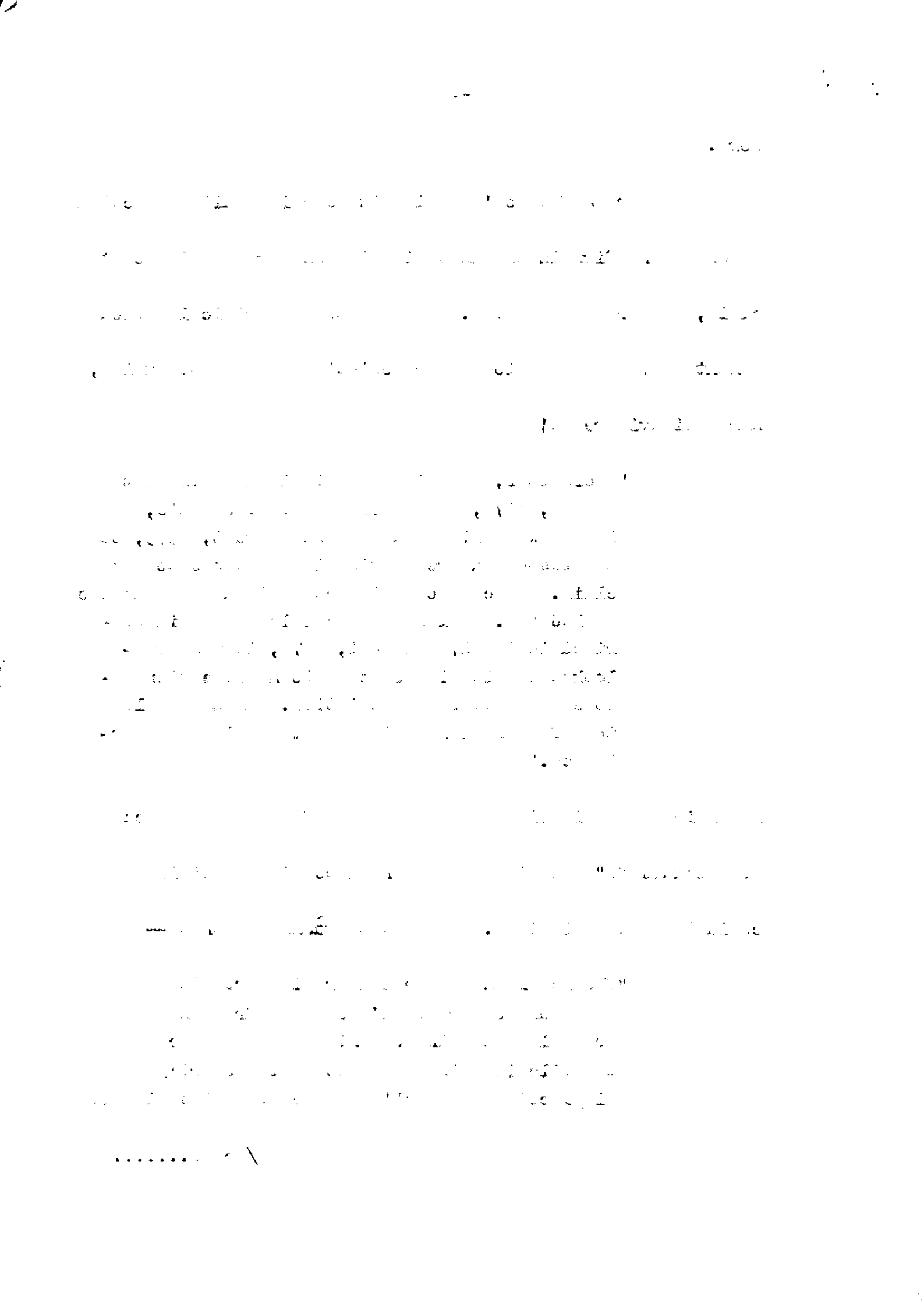

> come to my attention before the date of prescription. The respondent wrote a letter dated 18th September 1979, which reached STRAW AND BEGEMANN on the 22nd September 1979. The file was immediately drawn: it was discovered that the matter had prescribed one or two days earlier."

I find these explanations somewhat vague and to some extent contradictory. Be that as it may, what they clearly point to is a human error and the inevitable inference, in the absence of further explanation, is that the error was a culpable one. This, too, was the view of the Judge a quo, who concluded (see p 883 G) —

> "That there was negligence or neglect on the part of some clerk seems to me to be probable. That such negligence or neglect was a cause or indeed may have been the most immediate cause of the failure to serve the summons in this case timeously is also probable."

One arrives, therefore, at the situation that the reason why there was a failure to effect timeous service

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of process in this matter was because there was a negligent oversight by the member of the firm deputed to handle the matter. In other words, there was a clear and direct causal connection between the negligent oversight and the failure to effect service. On appeal it was accepted by respondent's counsel (correctly, in my view) that the firm was another person instructed by the third party (respondent) to act on his behalf, within the meaning of the relevant words in sec. 24 (a)(ii). (A contrary argument was advanced in the Court a quo, but not persisted in before us.) Accordingly if one were to pose the question as to whether there were unusual or unexpected circumstances by reason of which the firm could not reasonably have been expected to serve a summons timeously (cf. Webster's case, supra, at p 882 H), in my opinion, the answer must inevitably be in the negative. As I have already indicated, if a party is negligent about the matter of service, it can hardly be said that he could not reasonably be expected to have effected service. Moreover, such neglect is specifi-

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cally excluded by the new definition of special circumstances, referred to above.

The Judge a quo nevertheless held that even where there is an omission or neglect or ignorance it is necessary to examine the circumstances in which and against which they arose; and if those circumstances themselves constitute special circumstances the application may still succeed (see p 883 A). On the facts of the case he found that (i) the events prior to the submission of the MVA 13 form and the difficulties in obtaining a medical report, and (ii) the fact that the firm had devised a system for handling claims "which over considerable years had proved itself to be infallible", constituted special circumstances. On appeal respondent's counsel adopted the reasoning of the Court a quo and did not suggest any other grounds for finding special circumstances.

With respect I am unable to agree with this reasoning. I do not think that, where the direct and immediate cause of the

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failure to serve the summons timeously is the neglect of the third party or the person instructed to act on his behalf, it is permissible to find special circumstances in background factors or circumstances. To do so flies in the face of the wording of the subsection and the definition. In any event, however, I am of the view that in the present case there was insufficient causal connection between the circumstances relied on by the Court a quo and the failure to serve the summons timeously. As regards the events prior to the submission of the MVA 13 claim form, these admittedly resulted in there being only one day upon which the summons could validly be served, viz. 16 September 1979 (the period of 90 days having ended at midnight on 15 September and no service being permissible before then - see sec. 25 (2) of the Act), but this had nothing to do with the reason why it was not served timeously. The reason was that the member of the firm responsible completely overlooked the matter for a whole month. In fact one would have expected the limited time for effecting service to have been a factor which would have caused the person dealing with

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the matter to be especially vigilant.

The so-called infallible system was also, in my opinion, unrelated to the real cause of the failure to serve the summons. In truth there was nothing particularly special about the system and, it would seem, once the file had been drawn to a partner's attention one month before the expiry of prescription, by means of the card index system, it was up to the partner, or whoever was handling the matter, to diarise the matter, consult the diary and keep the matter constantly under his supervision and control. At this stage the system depended entirely on the human element and it is here that the critical neglect occurred. The failure to take the necessary action was due to this neglect.

For these reasons, I hold that respondent's application did not satisfy the requirements of sec. 24 (2)(a)(ii). It follows that the Court a quo should not have granted the application.

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The appeal is allowed with costs and the order of the Court a quo is altered to read:

"Application dismissed with costs".

M M CORBETT

RUMPFF CJ)
KOTZÉ JA)
TRENGOVE JA) CONCUR
VAN HEERDEN AJA)