116/87

PRESIDENT INSURANCE COMPANY LIMITED Appellant

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HELEN RETSOS Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PRESIDENT INSURANCE COMPANY LIMITED Appellant

and

HELEN RETSOS Respondent

Coram: RABIE, A C J , CORBETT, BOTHA, NESTADT, JJ A

et BOSHOFF, A J A

Heard: 18 August 1987

Delivered: 29 September 1987

J U D G M E N T

BOSHOFF, A J A :

On 16 June 1983 Helen Retsos, the

respondent...../2

respondent, was struck down in Voortrekker Road, Alberton, by a motorcar which was insured by the President Insurance Co , the appellant under the provisions of the Compulsory Motor Vehicle Insurance Act No 56 of 1972, hereafter referred to as the Act. She suffered serious bodily injury. During that same month she, as a third party within the meaning of the phrase in section 21 of the Act, instructed Dimosthenis Christides, a qualified attorney, who was then a professional assistant with the legal firm Huftel and Klawansky in Germiston, to prepare and lodge a MVA claim on her behalf with the appellant.

On...../3

On 6 June 1985 the MVA 13 claim form and medical report with annexures thereto were duly lodged by the firm on respondent's behalf with the appellant. The files relating to MVA claims were left under the control of the legal secretary Mrs Joyce Constance Irene Nadin. During June 1985 Christides was admitted as a partner in the firm Farbers in Johannesburg and he moved to Johannesburg. Mrs Nadin from then on worked under the supervision of Barry Farber in Germiston. He was a partner in the Germiston firm as well as the Johannesburg firm. On 8 October 1985 Christides assisted the firm in Germiston in the motion ~~court~~ and visited the office which he had previously occupied. In the office he came across certain files which had been left on a desk.

Out...../4

Out of curiosity he perused the files and found the file relating to the respondent's claim amongst them. He was shocked to learn that the file had not been attended to. He immediately telephoned the appellant's offices and spoke to a Mr Swart. Mr Swart looked into the matter and telephoned back to tell him that the claim had become prescribed. He then wrote to the appellant asking it to waive prescription. By letter dated 22 October 1985 it refused to do so.

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The respondent thereupon applied to the Witwatersrand Local Division for an order granting her leave, by virtue of the provisions of section 24(2)(a)(ii) of the Act, to serve her combined summons for the enforcement of her third party claim against the appellant within 60 days from the date of the order. The court granted the order and ordered the respondent to pay the costs of the application, excluding the costs of opposition which were to be paid by the appellant.

The court refused the appellant leave to appeal with costs but such leave was subsequently granted by this court.

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At the hearing of the appeal application was made for condonation of the late filing of the notice of the appeal. There was no opposition and the application was granted.

The position basically 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 timeous delivery of a claim in terms of section 25(1) of the Act, the running of prescription is suspended by virtue of section 24(1) read with sec 25(2). The powers of the court to relieve a claimant third party of the consequences of prescription are defined

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by section 24(2)(a) which 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

(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

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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 the respondent's claim became prescribed after she had complied with the provisions of section 25(1) i e due delivery of a claim on the prescribed

form...../9

form MVA 13, subsections (ii) and (iii) are the portions of section 24(2)(a) relevant to the present case. The appellant was not prepared to waive its right to invoke prescription and the sole issue which the court a quo had to decide was whether the respondent had established the existence of special circumstances within the meaning of the expression in subsection (ii).

It is to be noted that the circumstances had to be the reason why it could not have been reasonably expected that the process be served timeously and, also, that the circumstances had to be special. Whether or not any particular set of circumstances complies

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with these requirements must obviously depend on the facts peculiar to each case. It would consequently be impracticable, indeed impossible, to attempt to formulate an accurate and comprehensive definition of the phrase "special circumstances" as used in this context. In the case of Webster and Another v Santam Insurance Co Ltd 1977(2) SA 874(A) at p 882 E-G this court accepted and acted on the basis that special circumstances are circumstances which are unusual and unexpected; see also Commercial Union Assurance Co of S A Ltd v Johannesburg City Council 1983(1)

SA 226 (A) at p 232 G-H and Coetzee v Santam Versekerings-maatskappy Bpk 1985(1) SA 389 (A) at p 394 B-C. The expression "special circumstances" is an elastic concept capable of such a wide meaning that the legislature thought fit to place some limitation on it. Section 1(1) of the Act provides that unless inconsistent with the context it does not include any neglect, omission or ignorance. This court has held that in the context of section 24(2)(a) the legislature intended the words neglect, omission or ignorance to refer to neglect, omission or ignorance due to negligence, see Oelofse v Santam Versekerings-maatskappy Bpk 1982(3) SA 882(A) at p 891 D-H; Mamela v Constantia Insurance Co Ltd 1983(1) SA 218(A) at p

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225 C-E; Commercial Union Assurance Co of SA Ltd v Johannesburg City Council (supra) at p 232 E-G; Coetzee v Santam Versekeringsmaatskappy Bpk (supra) at p 394 D-F.

Mr Potgieter on behalf of the respondent challenged the correctness of the order of the court a quo substantially on the ground that the circumstances found and relied upon by the court were not "special circumstances" of the kind contemplated in and required by section 24(2)(a).

The important dates to bear in mind are the following. The respondent's claim arose on 16 June 1983.

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The respondent had instructed Christides to act on her behalf in June 1983. He was employed by the firm Huftel and Klawansky in Germiston as a professional assistant from January 1982 to December 1984. Barry Farber was evidently then introduced as a partner and the name of the firm was changed to Huftel, Klawansky and Farber. Christides continued with this new firm as a professional assistant from January until he was admitted as a partner on 1 March 1985. In May 1985 he was also admitted as a partner in the firm in Johannesburg , in which firm Barry Farber at that time was also a partner. During June 1985 he took up office

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in Johannesburg. From that time onward Farber was in charge of the firm in Germiston. On 6 June 1985 the MVA 13 claim was sent to the appellant under cover of a letter purporting to have been signed on behalf of the firm Huftel, Klawansky and Farber. On 16 July 1985 the firm acknowledged receipt of a letter from the appellant in which certain information in connection with the claim was evidently requested. On the same date the firm by letter requested the respondent to telephone Mrs Nadin. On 13 August 1985 the firm, following up the letter of 16 July 1985, sent to the appellant under cover of a letter a copy of a statement

dealing...../15

dealing with "the incidents and merits" of the accident in which the respondent was injured. The last day for service of the summons fell during the first half of September 1985. On 8 October 1985, as stated above, Christides fortuitously discovered the file of the respondent's claim amongst other files which had been left on a desk in his old office and which were clearly not receiving any attention.

Nadin entered the firm's employ as a legal secretary during about June 1984 and worked under the supervision of Christides until he moved to Johannesburg and from then on she was responsible to Farber until she left the firm

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on 20 September 1985. The files which related to MVA claims were under her control, including the file of the respondent's claim.

The evidence shows that as from June 1985 neither Christides nor Farber dealt with the respondent's claim and that the last time the matter received attention was the 13th August 1985 when Nadin sent to the appellant the statement dealing with "the incidents and merits" of the accident in which the respondent was injured.

The respondent, in applying for relief to serve her summons, relied on the supporting affidavits of Christides, Nadin and Farber. The affidavits did not

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specifically allege that the firm was instructed, but merely referred to the fact that Christides received the instructions. He obviously received the instructions on behalf of the firm by which he was employed and the evidence shows that he in fact dealt with the matter through the firm.

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The special circumstances relied upon were basically the neglect and omission of Nadin in the performance of her duties. According to Christides he had designed a system which was adopted by Nadin under his supervision and carried out by her with instructions to report to him. The system was one of diarising and noting various dates relating to the meeting of procedural requirements relevant to MVA claims. The various files relating to such claims were to be perused on at least a weekly basis and to be considered particularly

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was regard to the lodging of the claims, and instituting of action with a view to avoid the claims becoming prescribed. The system was successfully operated under his supervision and various claims were lodged and settled with the insurers. Nadin worked as his legal secretary for one year and he always found her to be exceptionally reliable and meticulous in her work. When he moved to Johannesburg in June 1985 the files relating to MVA claims were left under her control, but under the supervision of Farber.

Nadin in her affidavit explained the duties

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she had to perform in connection with claims, how the system operated to ensure that the necessary steps were taken timeously and in what respects she was responsible for the failure of the system as far as the respondent's claim was concerned. She stated as follows:-

"As...../21

"5. As already indicated one of my major duties in regard to third party claims was to ensure that all the required steps were taken in good time.

6. In order to ensure that this was done, the firm operated a system which consisted of the following -

6.1 On the relevant file, a list of items was stipulated with provision for a date next to each item. In the particular case of the applicant, such a list was in fact affixed and I entered dates next to the entry 'Date of Accident' and the entry 'M V A 13 to be lodged by'. There is also provision made for certain other entries, such as 'Summons to be issued by'. That entry was left blank. .....

6.2 In...../22

6.2 In addition a further list was utilised to ensure an additional check on the meeting of dates in regard to M V A matters. This list was kept in my office and contained certain relevant dates which were inspected on every business day to ensure that whatever function was required by that date was in fact performed. ..... The applicant's matter is reflected on the list as well as inter alia the date 6th June 1985, namely the date on which the M V A 13 form was lodged with the Respondent.

7. The firm did not at the time deal with many M V A matters. At the time we only dealt with ten of these type of matters.

8. The system that I was instructed to follow was to inspect the relevant list every business day to ensure that whatever had to be done by certain dates, was in fact done. As it appears from the list, I did not in fact enter the date by which summons had to be issued - I always found

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it an easy matter to add on 90 days to the date by which the M V A 13 form was lodged.

9. It now appears that neither a summons was issued by the relevant date (being about the 6th September 1985) nor was an extention obtained for prescription.

10. It is clear to me that I failed to look at the list at the time that I should have done so and also that I did not inspect the file at the time I was supposed to do."

She then proceeded to explain what gave rise to her neglect and omissions as follows:-

"11. On reflection I am able to find an explanation for this failing. I wish herein to fully explain to the Court what gave rise to this omission on my part.

12. It appears that the relevant time was during the month of August and the beginning of September 1985.

13. As already stated, I left the employ of Huftel, Klawansky & Farber towards the

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end of September 1985 (the exact date was 20th September 1985.)

14. Towards the end of my period of employment with Huftel, Klawansky & Farber, and particularly during August and September 1985, I was suffering from severe personal difficulties which manifested themselves in personal strain and emotional distress which certainly influenced my working ability detrimentally. I never discussed my personal difficulties and the fact that it was in fact prejudicial to my coping with my duties with Mr. Farber, (my then principal). Nor did I discuss it in this sense with Mr Christides. There is no doubt that neither Mr. Farber nor Mr Christides would have been aware of the fact that these personal problems of mine were affecting my working capability.

15. The said personal problems were related to matrimonial difficulties existing between my husband and myself.

16. My husband and myself separated in November 1984.

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21. The..../25

21. The most distressing period, emotionally, for myself was certainly the period from July 1985 to September 1985, the time when my husband had now moved to Swaziland.

22. I was experiencing extreme emotional distress as principally, my problem was that I could not manage to maintain two children on my salary and the R300,00 per month that my husband paid towards maintenance. The difficulty was that I had to decide to remain living under these pressing circumstances or to return to my husband in Swaziland, something which I was in fact unwilling to do.

23. All along, my husband begged me to return to him.

24. I certainly found these factors to influence me in my work environment and felt terribly depressed during the time August to September 1985.

25. Mr Christides leaving the Germiston office to go to the Johannesburg office, increased the pressure of work on me personally and with the frame of mind I was in at the moment I found it extremely difficult to cope adequately.

26. There...../26

26. There is no doubt in my mind whatsoever that my failing to notice that a summons had to be issued by the particular date in the matter of the Applicant, or obtaining an extension of prescription was solely the result of the depressing emotional difficulties experienced at the time as well as my lessened ability to cope with increased pressure of work at that time. The lessening of my ability is also a direct result of my personal problems suffered at the time."

In spite of the fact that according to Christides Farber was in charge of the firm in Germiston and that the files relating to MVA claims were left under the control of Nadin but under the supervision of Farber after he had left for Johannesburg, Farber in his affidavit made no mention of anything he had done in connection

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with the respondent's claim or to ensure that MVA claims were enforced timeously. He did not even give any indication whether he was aware of the existence of the respondent's claim or of the system which was supposed to have been in operation in respect of MVA claims under his supervision. He merely confirmed the contents of the affidavit of Nadin and Christides.

On all the evidence it is abundantly clear that neither Farber nor Christides did anything about the respondent's claim from at least the 6th June 1985 when the claim was lodged until the file was discovered by Christides on the 8th October 1985, that is to say, about one month after the date when the summons had to

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be served to prevent the claim from becoming prescribed. Nadin's major duty in regard to third party claims was, as indicated above, to ensure that all the required procedural steps were taken in good time. To this end she had to note the relevant dates on the files relating to such claims and also to keep a list in her office of relevant dates which she had to inspect every business day. The various files were to be perused on at least a weekly basis. This was to be done under the supervision of Christides and later Farber. She admittedly failed in her duty (a) to note on the respondent's file the date when the summons had to be served, (b) to peruse the file on at least a weekly basis, (c) to inspect the list in her office every business day, and

(d) to...../29

(d) to report to either Christides or Farber in respect of her duties. Because of her inattention to her duties she, on her part, did not take any steps to bring the file of the respondent's claim to the notice of Farber or to draw his attention to the fact that the summons had to be served before 6 September 1985.

The court a quo dealt with all this evidence as follows. Christides was the person who was handling the claim. He, and Farber in his absence, either consciously or sub-consciously relied on Nadin in the ordinary course of events to bring the matter to their attention. In the particular circumstances this could hardly be considered as constituting negligence.

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The circumstances which affected Nadin's "working ability", viz her emotional distress and the additional work with which she had to cope after Christides had left Germiston, could, when considered in their cumulative effect, be regarded as special circumstances. Even if Nadin was negligent, her negligence would not preclude the granting of relief to the applicant if her attorney (Farber) was not negligent. As to the attorney, he was not negligent since he could not reasonably have foreseen that Nadin "would fail to look at the list and check the applicant's file". It follows that the attorney could not reasonably have been expected to issue the summons before the date on which the applicant's claim

became...../31

became prescribed. Thus the reasoning of the court a quo.

Mr Solomon on behalf of the respondent in effect supported the reasoning of the court a quo and relied on the conduct of Nadin as constituting the special circumstances which respondent had to establish. In my view the reasoning does not see Nadin's neglect and omission in the correct perspective if regard is had to the purely secretarial nature of her duties. The Legislature envisages in section 24(2)(a) that a third party may instruct somebody else to act on his or her behalf to pursue and enforce a third party claim against an authorized insurer. In the instant case the firm to which Christides was attached was instructed by the

respondent...../32

respondent and entrusted with this responsibility. Christides, while he was working in the firm in Germiston, was the person responsible for the handling of third party claims. This responsibility involved the duty to ensure that all procedural steps were taken timeously. In order to assist him with the performance of this duty, he devised the aforesaid system which Nadin had to operate under his supervision, and while he was attached to the firm in Germiston the system was successfully operated,that is to say, until June 1985. After he left the firm in Germiston, Farber was the member of the firm who was to be responsible for the handling of third party claims, and Nadin was to operate the

system...../33

system under his supervision. It is, however, reasonably clear from all the evidence that was placed before the court a quo that nothing whatsoever was done by Farber in connection with the pursuance or enforcement of third party claims. There was, in fact, nothing in the evidence which indicates that Farber knew about the third party claims and the system that was being operated in the office by Nadin. He clearly did not supervise the operation of the system and did nothing himself to ensure that the procedural requirements in connection with third party claims were complied with timeously. When Nadin left the firm on 20 September 1985, Farber did not know that the respondent's claim

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still required the attention of the firm and, worst of all, he did not know that the claim had become prescribed. For all we know he did not even know of the existence of the claim.

The conclusion is inevitable that after Christides had left the firm, the firm in the person of Farber negligently failed to give the respondent's claim any attention and, if he was aware of the system which Nadin was operating, negligently failed to supervise the operation of the system and thereby allowed the claim to become prescribed. Nadin undoubtedly was remiss in performing her secretarial duties, but the reason for her remissness can hardly have any

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bearing on Farber's responsibility and duty as far as the respondent's claim was concerned. If anything her remissness served to emphasise the importance of supervision by the person bearing the responsibility of ensuring compliance with the procedural requirements of the Act. The culpable neglect on the part of Farber cannot, of course, constitute special circumstances.

In view of all the aforegoing I am of the opinion that the court a quo erred in granting the respondent's application.

In the result the following order is made:

(1) The appeal succeeds with costs;

(2) The order of the court a quo is deleted and the following order is substituted therefor: "Application dismissed with costs."

(3) The...../36

(3) The order for costs made against the appellant in the application for leave to appeal in the court a quo is set aside and there is substituted therefor an order ordering the respondent to pay the costs of the application.

(4) The appellant is ordered to pay the costs of the application for condonation of the late filing of the notice of appeal.

ACTING JUDGE OF APPEAL

RABIE, A C J)
CORBETT, J A)
BOTHA, J A) concur
NESTADT, J A)