117a/87

GUARDIAN NASIONALE VERSEKERINGS-MAATSKAPPY BEPERK — Appellant

and

RUDOLPH STEPHANUS WEYERS — Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GUARDIAN NASIONALE VERSEKERINGS-MAATSKAPPY — Appellant

and

RUDOLPH STEPHANUS WEYERS — Respondent

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

et BOSHOFF, A J A

Heard: 17 August 1987

Delivered: 29 September 1987

J U D G M E N T

BOSHOFF, A J A:

The respondent was involved in a collision

which...../2

which caused him serious bodily injury and to be hospitalized for several months. The estimate of his damage is R132 390,62 and he alleges that the negligence of Mrs Venter, the driver of the other motor vehicle, was the cause of his injury. At common law he would have the claim against Mrs Venter but the Legislature, realizing that a claimant may find himself in the position that he cannot recover his damages from the person responsible for his injury, provided for the compulsory insurance of motor vehicles and obliged the authorized insurer to pay the damages. The respondent's claim arose under the provisions of the Compulsory Motor Vehicle Insurance Act no 56 of 1972,

(hereinafter...../2(a)

(hereinafter referred to as "the Act"), which, according to the material part of the long title, was enacted: "To provide for the compulsory insurance of certain vehicles in order to ensure the payment of compensation for certain loss or damage unlawfully caused by the driving of such vehicles..."

The respondent had lost his claim by the operation of prescription under the provisions of the Act and the sole issue in this appeal is whether the court a quo correctly found that he had established the special circumstances entitling him to relief.

For an intelligible appreciation of the facts

of...../2(b)

of the case it is first of all necessary to survey the scheme of the Act insofar as it relates to third party claims.

To ensure that motor vehicles are insured under the provisions of the Act, section 2, with excep-

tions...../3

tions not material for present purposes, makes it an offence to drive or permit any person to drive a motor vehicle on a public road or street or in any other place to which the public has access unless that motor vehicle is insured under the Act. An insurance company becomes an authorized insurer by agreement under the provisions of section 10 of the Act and such a company is then, in terms of section 12, obliged to insure motor vehicles after certain requirements have been complied with by an applicant for insurance. The insurance is effected by means of a written declaration of insurance in a prescribed form which the authorized insurer issues to the applicant; sec 12(2). When

issuing...../4

issuing the declaration of insurance, the authorized insurer must also issue to the applicant a duly completed token of insurance in a prescribed form for the relevant insurance period; sec 15(1)(a). Regulation 12(1) of the regulations framed and promulgated in terms of the Act prescribes the form of the token and that it should provide for the following particulars, namely, the insurance declaration number, the make and type of vehicle, the registration letters and number, the authorized insurer and the group reference number, overprinted with the last two digits of the number of the first portion of the calendar year and the last digit of the number of the second portion of the calendar year over

which...../5

which the insurance period extends. The owner of the motor vehicle in respect of which a token of insurance has been issued is guilty of an offence if he does not attach the token to the motor vehicle in the prescribed manner and does not keep it so attached throughout the duration of the insurance in connection with which it was issued; sec 16(1) and (3). A declaration of insurance or token of insurance is prima facie proof that a motor vehicle to which it relates has been duly insured by that insurer under the Act, see 15(4). In the context of the Act this, no doubt, is intended to mean that, for purposes of the application of the provisions of the Act, both the

declaration...../5(a)

declaration and the token are evidence against the authorized insurer until the contrary is proved.

The material portion of section 21 obliges an authorized insurer to compensate any person whatsoever (in the Act called the third party) for any loss or damage which the third

party...../6

party has suffered as a result of any bodily injury to himself caused by or arising out of the driving of the insured motor vehicle by any person whatsoever during the period over which the insurance extends, if the injury is due to the negligence or other unlawful act of the person who drove the vehicle or of the owner of the motor vehicle or his servant in the execution of his duty. The third party is not entitled to claim such compensation from the owner or from the person who drove the motor vehicle, or if that person drove the vehicle as a servant in execution of his duty, from the employer, unless the authorized insurer is unable to pay the compensation, sec 27.

The...../7

The liability of an authorized insurer is limited or excluded in certain cases which are not at the moment relevant; see sections 22 and 23.

When, as the result of the driving of an insured motor vehicle any person other than the driver of that motor vehicle has been injured, the owner and the driver, if he is not the owner, of the motor vehicle must (if reasonably possible, within fourteen days after the occurrence) furnish the authorized insurer with certain stated particulars of the occurrence, sec 20(1). Subsection (2) and (3) of section 20 make it an offence for the owner of the motor vehicle to fail to provide, at the request of the person who has suffered any loss

or...../8

or damage, the prescribed proof of insurance of the motor vehicle and a copy of any information furnished in terms of subsection (1).

A claim for compensation must be set out in the prescribed manner on a prescribed form which must include provision for a medical report or reports completed by the prescribed person or persons in regard to the nature and treatment of the bodily injury in connection with which the claim is instituted and for the prescribed supporting proof and particulars, sec 25(1). (Regulation 16 of the aforemention regulations prescribes the form in which a claim has to be lodged in terms of section 25(1) of the Act and is described

as...../9

as form MVA 13.) No such claim is 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 to the authorized insurer. If the authorized insurer repudiates in writing liability for the claim before the expiration of the said period, the third party may at any time after such repudiation serve the summons, sec 25(2).

The right to claim compensation becomes prescribed upon the expiration of a period of two years from the date upon which the claim arose and prescription is suspended for a period of ninety days in the circum-

stances...../10

stances referred to in section 15(2); see sect 24(1)(a). This in effect reduces the statutory period of prescription of three years in respect of a debt ex delicto; see section 11 (d) of the Prescription Act no 68 of 1969. Section 24(2)(a) of the Act, however, gives a third party an opportunity to approach the court for relief where a claim has become prescribed. If the court is satisfied, upon application of the third party,"(i) where the claim has become prescribed before compliance by the third party with the provisions of section 25(1) (i e before the form MVA 13 is sent), that by reason of special circumstances he or, if he instructed any other person to comply with those provisions on his

behalf...../11

behalf, such person could not reasonably have been expected to comply with the 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 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," (my underlining) the court may grant leave to the third party

to...../12

to comply with the provisions and serve process in any action for the enforcement of the claim before the date determined by the court or, as the case may be, to serve such process before a date so determined.

Some protection is given to the authorized insurer in that in terms of section 24(2)(b) the court may not grant such an application unless (i) the application is made within a period of ninety days after the date on which the claim became prescribed, and (ii) the third party has given security to the satisfaction of the court for the costs of the authorized insurer in connection with the application.

Subsection...../13

Subsection (2) of section 24 defines in express terms within what limits the power to grant relief to a third party is exercisable. Where by reason of special circumstances the third party could not reasonably have been expected to comply with the provisions of section 25(1) before the date on which the claim became prescribed or to serve any process by which the running of prescription could have been interrupted before that date, section 24 confers a power which the court is obliged to exercise; see Webster and Another v Santam Insurance Co Ltd 1977(2) SA 874(A) at p 881 G to 882.A.

The Act takes away the common law right of the third party to claim damages from the person whose

negligence...../14

negligence caused him the injury, and reduces the period of prescription but it is certainly correct to say that the intention of the legislature, as revealed in the Act read as a whole and as expressed in section 24(2)(a) in particular, was to give the greatest possible protection to third parties; c/f Aetna Insurance Co v Minister of Justice 1960(3) SA 273(A) at p 286 E-F. This protection, no doubt, has to be balanced against the protection which the Act also affords authorized insurers.

The Act does not define "special circumstances" but does place some qualification on the kind of special circumstances contemplated in the section. They must be special circumstances by reason of which a third party

could...../15

could not reasonably have been expected to comply with section 25(1) or to serve the process timeously. In the Webster case the court came to the conclusion that the legislature intended the phrase to refer to "unusual or unexpected circumstances because of which the third party could not reasonably have been expected to do" what he was required to do timeously, p 882 E-H.

When that case was decided section 24(2)(a)(i) and (ii) dealt with the position where a third party himself could not by reason of special circumstances reasonably have been expected to do what section 25(1) required him to do or to serve any process timeously. The above underlined words "or, if he instructed any other person to

act...../16

act on his behalf in this connection, such person" were inserted only subsequently by subsections (1)(b) and (c) of section 11 of Act no 69 of 1978.) The appellants in Webster's case instructed a legal firm to act as their attorneys in a claim for damages against the respondent, an authorized insurer. The claims for compensation were duly delivered to the respondent in terms of section 25(1) but the summons was not served timeously with the result that the claims became prescribed. The court found that the late service was to be attributed to the lack of expedition, fault and negligence of the sole partner and his staff. The crucial question to be decided was whether such lack of expedition, fault and negligence could be regarded as

unusual...../17

unusual or unexpected circumstances because of which the appellants could not reasonably have been expected to serve the summons or have it served timeously. The court decided the question in the affirmative for the following reasons at p 883 G-in fin:

> "A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual, and a fortiori to the lay client it would be a most unusual and unexpected occurrence. Consequently, in considering

whether...../18

> whether the neglect of an attorney 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 recognize that such neglect by an attorney may frequently be a special circumstance on its own vis-à-vis his client."

The court in the result concluded that in that case the appellants could not be identified with the negligence of the firm and its servants. The neglect consequently constituted a special circumstance vis-à-vis the appellants.

It was against this background that the above underlined words were subsequently included in subsections

(2)(a)(i)...../19

(2)(a)(i) and (ii) of section 24. The Legislature at the same time and in section 1(1) of the same Act introduced into the definition section of the Act the following provision:

> "In this Act, unless inconsistent with the context - 'special circumstances' does not include any neglect, omission or ignorance;"

This "negative definition" does not purport to change the concept of special circumstances as being unusual or unexpected circumstances. It merely, in effect, stipulates that unusual or unexpected circumstances do not include neglect, omission or ignorance.

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In the case of Federated Employers' Insurance Co Ltd v Magubane 1981(2) SA 710 (A) at p 716 D- 717 A, Corbett, J A expressed the view that the words "neglect, omission or ignorance" in the context of section 24(2)(a) meant neglect, omission or ignorance of a culpable nature but, because of his view of the facts of that case, found it unnecessary to finally decide the point. In subsequent cases in this court it was decided that they in fact meant neglect, omission or ignorance due to negligence, Oelofse v Santam Versekeringsmaatskappy Beperk 1982(3) SA 882 (A) at p 891 D-H, Mamela v Constantia Insurance Co Ltd 1983(1) SA 218(A) at p 225 C-E, Commercial Union Assurance Co of SA Ltd v Johannesburg

City...../21

City Council 1983(1) SA 226 (A) at p 232 G-H, and

Coetzee v Santam Versekeringsmaatskappy Bpk 1985(1)

SA 389 (A) at p 394 B-C.

Since the basic criteria as to what constitutes special circumstances remain the same, there are two questions to be decided in the instant case. Firstly, whether the respondent has established unusual or unexpected circumstances and, secondly, whether neglect, omission or ignorance due to negligence was included in the unusual or unexpected circumstances.

Hoffman was instructed to act on behalf of the respondent and these questions have consequently

to...../22

to be decided in relation to Hoffman.

Hoffman is an experienced attorney who has been specializing in third party matters for 17 years. Van Niekerk, the claims manager of the appellant, in his affidavit describes him as follows:

> "Die firma Dyason, Odendaal en Van Eeden hanteer al Santamversekering Beperk se MVA-werk in die Transvaalse Afdeling en meneer Hoffman is een van die besondere bekwame lede van hierdie firma wat spesifiek met MVA-werk belas is, jarelange ondervinding daarin opgedoen het en met reg as 'n spesialis op hierdie gebied beskou kan word."

Hoffman wrote to the station commander of the South African Police for the third party particulars

of...../23

of the motor vehicle which Mrs Venter drove at the time of the collision and was furnished with the particulars which were included in the accident report prepared by the police. The respondent was in hospital and his wife, who had instructed Hoffman on his behalf, subsequently confirmed the particulars which Hoffman had obtained from the station commander.

Hoffman acting on this information sent the form MVA 13 to the insurance company which, according to his information, was the authorized insurer. His information turned out to be incorrect, and the respondents claim had become prescribed in the meantime.

The...../24

The information was evidently obtained from the token of insurance on the motor vehicle involved in the accident which, unbeknown to Hoffman, was no longer valid because the period in respect of which it was issued had expired.

Hoffman alleges that these circumstances constitute special circumstances entitling the respondent to relief inasmuch as the following facts are all unusual and unexpected as far as he is concerned:

(i) the displaying of a token on a motor vehicle in respect of insurance which is no longer valid and

(ii) the furnishing by the police of information in respect of a token which is no longer valid.

As...../25

As indicated earlier in this judgment, it is an offence to drive or permit a person to drive a motor vehicle on a public road unless it is insured. It is also an offence not to attach the token of insurance to the motor vehicle. The token is prima facie proof that the motor vehicle is insured. It is therefore contemplated in the Act that a third party injured as a result of the driving of the motor vehicle would ascertain from the token the relevant information to identify the authorized insurer. The police have an interest in the enforcement of these provisions which create the offences and they dealt with it in the accident report. It can certainly not reasonably be expected

that...../26

that they would record in this way information of an invalid token. The respondent was hospitalized as a result of the collision and could therefore not personally have obtained the required information from the token. Apart from the token and apart from asking the owner of the motor vehicle, there is for a third party no other way of ascertaining the identity of the authorized insurer, that is to say if the vehicle was in fact insured. Hoffman could consequently not have been faulted for approaching the police for this information.

In his affidavit Hoffman states:-

"In die 17 jaar waarin ek spesialiseer as 'n prokureur in derdeparty aangeleenthede

kan...../27

kan ek my nie aan een geval herinner waar ek te doen gehad het met 'n situasie dat die naam van 'n versekeringsmaatskappy verkeerd deur die polisie afgeskryf is nie. By hoë uitsondering het ek al gevind dat syfers omgeruil is of dat die aanvangsyfer van die nommer as 'n letter aangegee word, byvoorbeeld 'n "s" in plaas van die syfer "5". So 'n fout sou in hierdie geval geen probleem veroorsaak het nie, aangesien die eis dan by die korrekte versekeraar ingedien sou wees. Ek kan my ook nie 'n geval herinner waar 'n onverstreke skyfie op 'n ander voertuig as die versekerde voertuig gebruik is nie. Ek het wel by een vorige geleentheid te doen gehad met 'n geval waar 'n verstreke skyfie se besonderhede op 'n polisieongeluksverslag aangebring was. In daardie geval het my kliënt, die bevoegde versekeraar, daardie feit saam met my opdrag onder my aandag gebring en by een ander geleentheid het ek te doen gehad met 'n vervalste skyfie van die ROYAL SWAZI INSURANCE COMPANY."

Hoffman...../28

Hoffman is supported in this regard by his partner, Cornelis Pieter Marais, who has for almost 19 years, with the exception of 5 years, been involved with third party claims. For the past 12 years he has been doing the work of Santamversekering Beperk.

In his affidavit, he states:-

"Ek dra persoonlik kennis van een geval waar 'n versekeringsverklaringnommer se laaste 6 syfers nie in die korrekte volgorde op die padverkeerongeluksverslag aangebring was nie. Ek kan my nie van een geval herinner waar die besonderhede op 'n padverkeerongeluksverslag verwys het na 'n versekeringsverklaring wat nie meer van krag was nie of dat die versekeraar se naam verkeerd aangedui was nie. Ek het in my praktyk verneem van vervalste

versekeringstekens.../29

versekeringstekens, maar nooit persoonlik daarmee te doen gehad nie. Ek sou foutiewe inligting op die padverkeerongeluksverslag sonder twyfel beskou het as 'n ongewone onverwagse verskynsel.

6.

Ek beskou dit nie as altyd gebruiklik om 'n afskrif van die versekeringsverklaring van die versekeraar wat op die padverkeerongeluksverslag aangedui word, aan te vra nie. Daar is inderdaad geen statutêre plig op so 'n versekeraar om sodanige afskrif aan 'n voornemende eiser of sy regsverteenwoordiger te verskaf nie. Ek het persoonlik by verskeie geleenthede eise ingedien op grond van inligting vervat in die padverkeerongeluksverslag of deur die polisie verstrek, sonder om 'n afskrif van die versekeringsverkaring aan te vra, en het nog nooit enige probleme in hierdie verband ondervind nie."

On all this evidence the incorrect information

obtained...../30

obtained from the police, as confirmed by the respondent's wife, constituted unusual or unexpected circumstances.

The question remains whether these circumstances included neglect, omission or ignorance that was culpable.

Van Niekerk who has been a claims manager for 5 1/2 years states in his affidavit that it would have appeared from the digits overprinted on the token that the insurance was invalid at the time of the collision. According to him it would also have been apparent from the first number in the insurance declaration number and Hoffman, as an experienced attorney, should have noticed it if he had paid proper attention to the matter.

Hoffman...../31

Hoffman never saw the token and if the policeman who saw the token and took the insurance declaration number overlooked this piece of evidence, the neglect on the part of the policeman cannot be attributed to Hoffman and cannot affect the special circumstances relative to Hoffman. Hoffman denied the statement that he or any experienced attorney would or should have known that the first number in the insurance declaration number indicated the year in respect of which the insurance was valid. He is supported in this connection by Marais and Pieter Jan Botbijl, a practising attorney who is chairman of the standing committee of the Transvaal Law Society that deals with

MVA matters, and a member of the standing committee of the Association of Law Societies of South Africa which deals with similar matters. Botbijl has himself handled a few thousand third party claims during almost 25 years and was not aware of the significance of the first number in the insurance declaration number.

There was consequently no negligence on the part of Hoffman in this regard.

According to Van Niekerk it was not unexpected that information supplied by the police in respect of third party insurance was incorrect and that it was normal procedure for attorneys to check with the insurance

company...../33

company that the insurance was still valid before lodging the form MVA 13. Hoffman disputes this in the following terms:-

"6.2 Ek kan my nie vereenselwig met mnr. VAN NIEKERK se siening van normale praktyk en prosedure met betrekking tot die indiening van MVA 13 eisvorms deur prokureurs nie. Hoewel dit dikwels gebeur dat prokureurs 'n afskrif van die versekeringsdeklarasie aanvra van die versekeringsmaatskappy wie se naam op die polisie-ongeluksverslag verskyn, gebeur dit net so dikwels dat MVA 13 vorms doodgewoon ingedien word by die maatskappy wat aldus aangedui word. Daar moet op gelet word dat daar geen statutêre of ander verpligting op 'n versekeraar rus om 'n afskrif van die betrokke versekeringsdeklarasie aan 'n voornemende Eiser of sy regsverteenwoordigers te verskaf nie. Ek kan ook meld dat uit my eie kennis ek daarvan

bewus...../34

bewus is dat dit sommige versekerings-maatskappye se vaste beleid is om nie te erken dat hulle op risiko is alvorens 'n Verweerskrif namens hulle geliasseer word nie.

6.3 Die stelling dat dit normale prosedure is dat prokureurs eers navraag doen by die betrokke versekeringsmaatskappy oor die geldigheid van 'n gegewe versekeringsdeklarasie op die datum van die ongeluk, is reëlreg in stryd met mnr. VAN NIEKERK se submissie dat enige ervare prokureur deur bloot na die versekeringsdeklarasienommer te kyk, kan vasstel of die versekering van krag was aldan nie.

6.4 Alhoewel ek nie persoonlik kennis dra van die posisie by Respondent-maatskappy nie; kan ek dit nie aanvaar dat dit by wyse van uitsondering gebeur dat 'n MVA vorm ingedien word sonder enige voorafgaande navraag of versoek om 'n afskrif van die versekeringsdeklarasie en 'n afskrif van die versekerde se ongeluksverslag ingevolge Artikel 20 nie. Soos hierbo vermeld, gebeur dit in my ervaring dikwels dat 'n

afskrif...../35

afskrif van die versekeringsdeklarasie aangevra word, maar net so dikwels dat 'n MVA eisvorm ingedien word sonder dat so 'n afskrif vooraf aangevra is. Dit is 'n uiters seldsame verskynsel dat versekerde bestuurders 'n ongeluksverslag soos beoog in Artikel 20 van die MVA Wet by die bevoegde versekeraar indien. Praktyk het ook geleer dat dit 'n verkwisting van tyd is om die versekerde bestuurder of eienaar van die versekerde voertuig daarvoor te nader aangesien daar gewoonlik net eenvoudig geen reaksie op so 'n versoek ontvang word nie."

and

"7.3 In my submissie kon dit nie redelikerwys van my verwag word om, in die afwesigheid van enige aanduiding dat die MVA besonderhede deur die polisie en die Applikant se eggenote verstrek, moontlik nie korrek was nie, enige verdere navrae te doen ten einde dubbel seker te maak dat dit korrek is nie. Alhoewel 'n oorversigtige prokureur dit moontlik sou gedoen het,

was...../36

> was dit met eerbied nie 'n gewone en te wagte verskynsel dat die inligting wat die polisie van die versekerde voertuig bekom het, betrekking sou hê op 'n verseker-ingsdeklarasie wat reeds verval het nie."

Marais confirms this statement of the existing practice in an attorney's firm.

In the case of Mazibuko v Singer 1979(3) SA 258 (W) at p 263 B-C Colman J had occasion to make the following observation about the information of the identity of a third party insurer as reflected in an accident report:-

> "On the report Makda saw Santam reflected as the third party insurer. But he was

not...../37

not content to act on that. It was suggested in argument that that was probably because one often finds errors in accident reports prepared by the police. I am aware that such errors do occur, although I should think it would be rare for such a report to reflect incorrectly the name of the third party insurer."

In the case of Herschel v Mrupe 1954(3) SA 464 (A) Centlivres C J and Schreiner J A, respectively, made a finding and expressed a view on the obligation of a third party or his attorney in a context somewhat different from the present one.

To enable the plaintiff to recover, in terms of the Motor Vehicle Insurance Act 29 of 1942, damages sustained through the death of her husband in a collision

between...../38

between two vehicles one of which was the property of the defendant, the plaintiff's attorney by letter requested the defendant to advise her of the name of the insurance company so that a communication could be addressed to it. The defendant's attorney informed the plaintiff that S was the name of the insurance company. This information, though given in good faith, was incorrect. Plaintiff through her legal adviser sent a letter of demand to the S Company claiming damages. Throughout the negotiations for a settlement with S Company it was accepted that the vehicle had been insured with the S Company. These negotiations broke down and the plaintiff, without making further enquiries,

instituted...../39

instituted action against S Company. When the company's plea was received it was revealed for the first time that S Company was not the insurer of the vehicle. Plaintiff withdrew her action against the company. She paid £10-10-0 in settlement of its costs and had in the meantime wasted £102-0-10 in costs between attorney and client. Plaintiff instituted action against the defendant for the recovery of these wasted costs, averring in her particulars of claim that as a result of the information given by the defendant to plaintiff, which was given wrongly and negligently, the plaintiff had suffered damage amounting to £112-10-10 being the attorney and client costs.

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The defendant pleaded that the costs were caused by one or more of the following negligent acts or omissions of the plaintiff (at p 473 G-H):-

"(a) She failed to ascertain from the South British Insurance Company whether the respondent was insured with that company.

(b) She failed to ascertain what the contents of the declaration of insurance issued in respect of respondent's vehicle were.

(c) She failed to inspect the declaration of insurance.

(d) After the South British Insurance Company Limited had repudiated liability she failed to ascertain on what grounds the company repudiated liability."

Centlivres C J, at p 473 E-H, held that the

plaintiff...../41

plaintiff had a cause of action and was entitled to her damages, and also that there was no substance in the plea of contributory negligence.

Schreiner J A (at p 479 B-C) in considering the position of the defendant stated:-

> "But the question remains whether the defendant, who was admittedly not obbliged to answer the plaintiff's question at all, was bound, if she did so, to take due care to see that the answer was correct. The parties were, through their attorneys, in touch with each other and it would have been open to the plaintiff to try to secure from the defendant a contractual warranty as to the identity of her insurance company. That was not attempted and the question is whether the plaintiff was entitled,

by...../42

by way of the law of delict, to be put in practically the same position as if the defendant had so contracted."

It was in these circumstances that the learned judge stated at p 481 A:-

"I find it difficult to understand why any ordinarily careful attorney should ever institute proceedings against an insurance company under the Act without having first obtained from the owner of the motor vehicle, whose insurer he wishes to sue, production of the declaration of insurance and the copy of the information mentioned in sec. 22 (1). The whole case which is contemplated depends upon the statutory declaration of insurance, and the Act accordingly provides for its production to anyone who might wish to bring action under its provisions."

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In the circumstances of the present case and particularly in the light of the experience of both Hoffman and Marais it cannot, in my view, be said that there was such a degree of likelihood of the information supplied by both the police and the respondent's wife being wrong that Hoffman, as a reasonable man, should have taken the precaution of verifying his information with the insurer before lodging the form MVA 13. All that section 24(2)(a) required was that the special circumstances should be such that Hoffman could not reasonably have been expected to comply with the provisions of section 25(1). As was pointed out in Federated Employers' Insurance Co Ltd v Magubane

supra...../44

supra at p 717 D, his conduct must be critically examined in the light of the criterion of reasonableness. On the facts of this case it cannot be said that Hoffman acted unreasonably by not verifying his information. If this view is correct there was no such negligence on the part of Hoffman as would have affected the special circumstances.

I am consequently of the opinion that the appeal should be dismissed.

ACTING JUDGE OF APPEAL.