Bib 117/87

GUARDIAN NATIONAL INSURANCE CO LTD — APPELLANT

and

RUDOLF STEPHANUS WEYERS — RESPONDENT

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GUARDIAN NATIONAL INSURANCE
COMPANY LIMITED APPELLANT

and

RUDOLF STEPHANUS WEYERS RESPONDENT

CORAM: RABIE, ACJ, CORBETT, BOTHA, NESTADT JJA et BOSHOFF, AJA

DATE HEARD: 17 AUGUST 1987

DATE DELIVERED: 29 SEPTEMBER 1987

J U D G M E N T

NESTADT, JA:

Respondent was injured in a collision

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between a vehicle he was driving and one insured by appellant under the Compulsory Motor Vehicle Insurance Act, 56 of 1972. In terms of sec 24(1)(a), read with sec 25 thereof, his claim for compensation, based on the alleged negligent driving of the insured vehicle, had to be sent or delivered, in prescribed manner (the M V A 13 claim form), to appellant within two years from the date of the collision. For reasons which will appear, this was not done and respondent's claim became prescribed. He thereupon, in terms of sec 24(2)(a)(i) of the Act, applied to the Transvaal Provincial Division for leave to serve the M V A 13 form and, subsequently,

a summons in his proposed action against appellant (for damages in the sum of R132 390,62) within an extended period. Despite appellant's opposition, an order to this effect was granted (by CURLEWIS J). This is an appeal, with the leave of the court a quo, against such decision.

The collision occurred on 5 November 1983. The insured vehicle bore registration number HDH 086 T. It was driven by a Mrs Venter. On 30 November 1983 the attorney, whom respondent had instructed to handle his claim, wrote to the station commander of the South African Police, within whose area the collision took place, requesting inter alia "die derde party gegewens"

of the other vehicle (ie HDH 086 T). The reply of the police, received on 19 December 1983, reads:

"Derdeparty besonderhede van mev Venter

BL 736915 Santam."

The attorney took this to mean that Santam, a well-known authorized insurer under the Act, was the insurer of the vehicle at the time of the collision and that respondent's claim accordingly lay against it. Acting on this assumption, he caused the M V A 13 form to be sent to Santam. This took place on 4 November 1985 (which was the day on which the two-year period of prescription expired). On 18 December 1985 he was informed by Santam that the declaration of insurance relied on (ie number 736915) "nie die datum van ongeluk dek nie".

This obviously disconcerting disclosure was true. Santam had not been the insurer of motor vehicle HDH 086 T for the year in which the collision occurred. The police information was erroneous. The cause of the mistake is not clear from the papers but it would seem to have been the following. The information conveyed by the police to the attorney was based on their accident report form. The statement therein that Santam was the third party insurer emanated from the observations of the policeman who attended the scene of the collision. It is to be inferred that he found on the windscreen of the insured vehicle a third party token bearing the figures 736915 and reflecting Santam as the insurer. This was, however, in respect of a period prior to

to the one in which November 1983 fell. It will be borne in mind that insurance under the Act was, save for vehicles operated under special permits, for annual periods running from 1 May to 30 April of the following year. Accordingly, a token for "1983/1984" should have been displayed on the vehicle driven by Mrs Venter. The one - and presumably the only one - the police officer probably saw was for 1982/1983. Wrongly assuming that it represented a current and valid insurance, he, without noting the date, reported that Santam was the third party insurer. As I have indicated, appellant was the insurer at the relevant time. This the attorney ascertained on 19 December 1985 from Mrs Venter's father (apparently the owner

of the car she was driving). He furnished the attorney with the third party token for the 1983/1984 year reflecting appellant as the insurer. By this time, of course, more than two years having elapsed since the collision and no M V A 13 form having been served on appellant, the claim against it had prescribed. On 14 January 1986 the attorney requested appellant to waive its right to rely on prescription but it refused to do so. Hence the application in terms of sec 24(2)(a)(i).

It provides (in so far as is material to this matter):

> "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) ...

(iii) ...

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 ..."

"Special circumstances" (as defined in sec 1) do "not include any neglect, omission or ignorance". In an affidavit in support of the application, the attorney alleges that the furnishing of incorrect information

to him by the police concerning the identity of the authorized insurer constituted special circumstances and that by reason thereof (seeing he was ignorant of appellant being the insurer) he could not reasonably have been expected to have timeously served the M V A 13 form on appellant. This was accepted by the court a quo, which, accordingly, found that the requirements of the section had been satisfied.

In a number of recent decisions (Federated Employers' Insurance Co Ltd vs Magubane 1981(2) S A 710(A), Oelofse vs Santam Versekeringsmaatskappy Bpk 1982(3) S A 882(A), Commercial Union Assurance Co of S A Ltd vs Johannesburg City Council 1983(1) S A 226(A) and Coetzee vs Santam Versekeringsmaatskappy Bpk 1985(1) S A 389(A)) this Court, in interpreting sec 24(2)(a)(i)

(and/ .....

(and (ii), which regulates the situation where the claim has prescribed by reason of the failure to serve the summons timeously after service of the M V A 13 form) has dealt with what an applicant for relief thereunder has to establish. The central requirement, and the only one to which, in the view I take of the matter, it is necessary to refer, is that the failure to serve the M V A 13 form (or summons) must not have been due to the culpable or blameworthy ("verwytbare") conduct of the third party or the person he instructed to act on his behalf. In other words, he must not have been negligent (in the delictual sense - Coetzee's case (supra) at 394 E). This means, where the third party acts himself, that he observed the degree of care which a reasonable man (the diligens paterfamilias) would

have/.....

have in the circumstances. Where an attorney is employed, the issue is whether, in carrying out his mandate, he acted with the care of a reasonably prudent practitioner. In the latter case, a higher standard will be required than in the former. More is reasonably to be expected of a skilled professional than an untrained layman. The test is therefore not a uniform one. This may seem strange but it is an inevitable consequence of the section, in effect, providing for the yardstick of reasonableness to be applied to persons possessing different qualifications and skills. It follows that in a given case, whether there has been negligence, might depend on whether the third party was represented or not. In either event, however, the question of what ought to have been foreseen

as a reasonable possibility necessarily arises; for the answer to it determines whether, and if so what, precautions need have been taken.

With these basic principles in mind, I turn to a consideration of the vital inquiry in this matter, viz, whether the attorney was negligent in accepting the correctness of the police report that Santam was the insurer of the other vehicle. If he was not, then, by reason of special circumstances, the attorney could not reasonably have been expected to timeously serve the M V A 13 form and the application was correctly granted. If, however, he was negligent, then the application should have been refused.

A value judgment is involved. An assessment of whether a person's conduct measures up to that of the mythical reasonable man has to be made. This is

often/ .....

often a matter of difficulty. The present is such a case. There is much to be said in favour of the finding of the court a quo that the attorney was, on the basis of what he had been told by the police, entitled to believe that Santam was the insurer and to content himself with that information. The report to him was a formal one, made by a member of the police force. As far as he knew there was no prosecution for driving an uninsured vehicle in contravention of sec 2(1) of the Act or for failing to attach the 1983/1984 token to the vehicle as enjoined by sec 16(1) of the Act. The attorney was aware, merely, that Mrs Venter was charged with culpable homicide and driving without a valid licence. He deposed to the fact, albeit only in reply, that in seventeen year's experience

he could only recall one occasion when the police had made the sort of mistake that occurred here. During February 1984 he was informed by respondent's wife that she had ascertained that Santam was the insurer of the other vehicle involved in the collision. All these factors, so it was argued on behalf of respondent, would have served as confirmation of the police report that Santam was the insurer. Certainly, no alarm bells rang to act as a warning that it was not. Moreover, the avenues open to the attorney to check the correctness of what the police told him were limited. There was no statutory obligation on an authorized company to inform a third party that it was the insurer; indeed, the attorney states, the policy of some companies was to refuse to admit that

they were on risk until a plea was filed. It is also alleged that owners did not usually comply with their statutory duty (in terms of sec 20(2) of the Act) in effect to disclose the identity of their insurer. Finally, there is the consideration that one has to guard against being wise after the event. In all these circumstances, there is force in the following contention of the attorney (contained in his replying affidavit):

> "In my submissie kon dit nie redelikerwys van my verwag word om, in die afwesigheid van enige aanduiding dat die M V A 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 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 versekeringsdeklarasie wat reeds verval het nie."

I have, nevertheless, come to the conclusion that the submission cannot be sustained. The onus of satisfying the court a quo that the attorney was not negligent was on respondent. In my view, it was not discharged. The correct and timeous identification of the authorized insurer by the attorney was, of course, fundamental to the pursuit of respondent's claim. What the attorney did in this regard was to rely exclusively on what the police told him. Respondent's wife's report cannot truly be viewed as verification thereof. He had not

asked her to find out who the insurer was or to confirm that it was Santam. The source of her information was unknown to him. Indeed, it is clear that he did not rely on what she told him. As I have said, he pinned his faith on the police report. In my view he was not entitled to do so.

The attorney ought to have foreseen that, for various reasons, the insured vehicle might have had affixed to it merely a "stale" token (ie one in respect of an expired period of insurance). I deal with only one such reason. As a reasonably skilful attorney he would know that insurance under the Act ran from year to year, that there are a number of companies which

are authorized insurers and that different tokens were issued for each annual period. Such an attorney would, therefore, appreciate that (as happened here) an owner, though having taken out fresh insurance with a different company for the current year, might overlook the necessity of displaying the new token on his vehicle (even though this would constitute an offence in terms of sec 16(3) of the Act); and that he might have left the previous year's token on the vehicle. Certainly, one knows that this not infrequently happens. This is what is alleged in appellant's answering affidavit and there is no reason not to accept it.

The second possibility (in logical sequence)

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that ought, in my judgment, to have been foreseen by the attorney and accordingly guarded against, is that the police officer, in recording the details of the vehicle's third party insurance at the scene, might not notice or realise that the token related to an expired period of insurance; and that he might, accordingly, mistakenly reflect the company which issued it as the current insurer. Two persons were killed in the collision (which occurred at night); three were injured, one (respondent) seriously. Two vehicles were involved. There was, therefore, probably a great deal for the policeman to do at the scene and a lot of information to gather. In this situation, his attention would

hardly/.....

hardly have been focused on details of the third party insurance of the vehicle; and he might not have been alerted to any offence having been committed under the Act. He did, of course, correctly record, save for the date, the particulars appearing on the token, but it is not surprising that he was not alive to the fact that it was in respect of insurance which had expired. He might even have thought, if he was particularly inexperienced, that "1982/1983" on it covered insurance for the whole of 1983 and not just until 30 April 1983. There is no indication in the papers of the rank of the officer who went to the scene. The attorney was, therefore, not entitled to assume that he was an experienced policeman.

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In a case relied on by the court a quo, viz

Mazibuko vs Singer 1979(3) S A 258(W) at 263 B - C,

COLMAN J expressed the passing thought that it would be "rare" for an accident report form, prepared by the police, to reflect incorrectly the name of the third party insurer. And in his founding affidavit, the attorney states that the presence on a vehicle of a stale token and the police regarding it as valid and current and reporting accordingly, are unusual and unexpected circumstances. That may be (although, I must add, this is denied on behalf of appellant). But, in any event, in the light of what has been said, they were foreseeable as a reasonable possibility even though the risk of them happening may have been small. It follows that the attorney ought to have foreseen that Santam might not be the authorized insurer at the relevant time and that

the police report to this effect might be mistaken. And he should not have taken any comfort (if he did) from there not having been any prosecution for the owner's failure to take out insurance for the 1983/1984 year or, if this was done, his failure to attach the relevant token to the vehicle.

Naturally, the attorney is not to be faulted for looking, in the first instance, to the police for information as to who the authorized insurer was. This is invariably done. In my view, however, he culpably erred in taking what they told him as the last word on the subject. He placed too much confidence in what was essentially a hearsay report. In not checking its veracity and in waiting until the last day before serving the M V A 13 form on Santam (so that, if it

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turned out not to be the insurer there was no time left to serve on the correct company) he took a chance; he ran an unwarranted risk. He should not have. The consequences of Santam not being the insurer and this being ascertained only after prescription had run were dire. And there were a number of relatively simple courses open to him and which should have been taken on receipt of the police report. One was to follow the procedure (which the attorney in his replying affidavit admits is often adopted) of asking the insurance company referred to by the police (ie Santam) whether it was on risk. True, it was not obliged to react and might not have. But respondent

has/ .....

has not established that it would not have and that in this way he would not, at an early stage, have learned that Santam was not the insurer at the time of the collision. Secondly, a demand could, in terms of sec 20(2) of the Act, have been made on the owner of the vehicle to identify the insurer by producing the prescribed proof of insurance. In Herschel vs Mrupe 1954(3) S A 464(A) SCHREINER JA described this step as "an elementary precaution". The learned judge was dealing with sec 22(2) of Act 29 of 1942 (the predecessor to sec 20(2) of the present Act). A letter had been written to the owner requesting, not the declaration of insurance, but merely the name of the company. At 481 (A - D) the

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following is said:

> "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 ...
> No reasonable man would conclude from this letter that the attorney was about to plunge into litigation without taking the elementary precaution of seeing the document on which his whole case would rest."

Here the attorney did not even communicate with the owner. Though, as I have indicated, he states that there is usually no response to the utilisation of

this type of remedy, I am not persuaded that it has been shown that it would not have borne fruit. It is significant that eventually the attorney was told who the authorized insurer was the day following his request to the owner for this information. It must also be remembered that the owner commits an offence if he fails to comply with sec 20(2).

It may be said that what has been stated places an undue and indeed unreasonable burden on an attorney; that it requires of him too high a standard of care. I do not think so. On the basis of the ordinary standard of care of a reasonably diligent and careful practitioner, the profession of an attorney is an exacting

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one. Measuring the attorney's conduct against it, it must be adjudged to have been wanting.

To sum up, I find that the attorney was negligent, that this was the cause of the M V A 13 form not being timeously served on appellant, that respondent did not satisfy the requirements of sec 24(2)(a)(i) of the Act and that the court a quo should therefore not have granted the application.

In the result, the following order is made:

(1) The appeal succeeds with costs.

(2) The judgment of the court a quo is altered to read:

"The application is dismissed with costs".

H H NESTADT, JA

RABIE, ACJ)
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CORBETT, JA) CONCUR
)
BOTHA, JA)