Case No 131/95
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

THE MULTILATERAL MOTOR VEHICLE

ACCIDENTS FUND APPELLANT

and

BRIAN CONSTANTINOU CLAYTON obo

WILLSEROY PALANCO GEANNERET
ALBERTO ANGELOGEANNBRET AND
ANGELA MONIQUEGEANNERET

RESPONDENT

CORAM: VIVIER, KUMLEBEN, F H GROSSKOPF, MARAIS et
ZULMAN JJA

HEARD: 20 SEPTEMBER 1996

DELIVERED: 27 SEPTEMBER 1996

JUDGMENT

KUMLEBEN JA:

The respondent, as plaintiff, instituted action against the Allianz Insurance Limited (the "Allianz") as defendant, in the Witwatersrand Local Division of the Supreme Court. He claimed as cwnzfor ad litem damages on behalf of certain minor children as a result of their mother having been fatally run down by a motorist. The accident occurred on 24 June 1991 in Devland, Johannesburg. Liability to compensate (or the loss they sustained arises from, and is governed by, the "Agreement Establishing a Multilateral Vehicle Accident Fund" (the "Agreement") which in terms of the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 (the "Act") has the force of law. Allianz was at that stage an appointed agent in terms of art 13 of the Agreement and was the appropriate entity to be sued. However, at the start of the hearing of the appeal, by consent the Multilateral Motor Vehicle Accidents Fund ("MMF")

was substituted for the Allianz as defendant/appellant. I shall refer to both the MMF and its predecessor, the Allianz, as the defendant.

The pleadings took on the usual form in cases of this kind. In answer to the particulars of claim the defendant denied all the material allegations of the plaintiffs cause of action and put him to the proof thereof. However, after close of pleadings the defendant lodged a special plea. Its import was that there had been non-compliance with the provisions of sub-article 48(f)(ii) of the Act. Read with the opening sentence of article 48, the sub-article states:

> "The MMF or an appointed agent, as the case may be, shall not be obliged to compensate any person in terms of Chapter XII for any loss or damage -(f) if the claimant concerned refuses or fails -
>
> (ii) to furnish the MMF or the appointed agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof;"

The special plea was set down for separate adjudication and was dismissed in the court a quo. At the hearing the plaintiff called two witnesses, Maria Charad and Paula Clark. No rebutting evidence was led by the defendant. There was no suggestion that their testimony was untruthful or that for any other reason it ought not to be accepted. The following chronology of events emerges from their evidence and certain other common cause facts.

On 25 October 1991 Charad, in her capacity as a member of the firm of altorneys Malcolm Lyons and Munro (the "firm"), interviewed one Denise Petersen in connection with the accident. She contemporaneously made some handwritten notes of what Petersen told her. A typed transcript of these notes was handed in as Exhibit B. On the same day, using these notes as an aide-memoire, Charad dictated a summary of what Petersen had said. This was typed by someone in the office. It

features as Exh A and reads as follows:

"STATEMENT OF WITNESS, DEMISE PETERSEN TAKEN ON
THE 25.10. 91
DATE OF ACCIDENT: 24.06. 91
PLACE: ON MAIN ROAD, DEVILLIN,NEAR ELDORADO PARK
I was standing at a bus stop on main road on the opposite side of the
road to Jean. She was about to cross over to my side. The robot
turned red and she started crossing the road. As she had just stepped
onto the pavement, a taxi travelling in the second lane towards
Eldorado Park, cut across the first lane and drove straight onto the
pavement and into Jean.
The taxi then tried to drive away once it had hit Jean but it rolled
and landed up on its roof. An ambulance then arrived and took Jean
to the Baragwanath Hospital. She died a few hours later in the
Baragwanath Hospital.
NOTE: DEMISE PETERSEN'S ADDRESS:
114 Voicen Road
Gelvendale
PORT ELIZABETH PHONE NO. 041.426024 or
108 Merino Street,
Kroonvale 6281 PHONE No. 0491 2358."

(Although the two exhibits do not correspond in all respects the differences

are not material for present purposes.)

On 16 April 1993 the firm, in terms of the Act and on behalf

of the claimants, submitted a claim form to the defendant with some 15 Annexures, being documents and statements relating to the accident.

On or about 4 October 1993 the summons and particulars of claim were served on the defendant. The grounds of negligence relied upon included an averment that the motorist had entered the intersection against a red traffic light.

On 19 September 1994 at a pre-trial meeting of the parties the defendant's attorney asked Clark on what information this allegation was based. She had taken over from Charad. Both were articled clerks. In response she took Exh A from her file and handed it over. In this manner the exhibit came into the possession of the defendant.

In a rejoinder to the special plea the plaintiff raised a number of defences. Only two need be referred to: a denial that the plaintiff had "failed" to comply with the provisions of the sub-article; and a denial that

Exh A was a "statement" in the context of the sub-article.

Before examining the validity of these two contentions it is necessary to note certain uncontradicted facts in the evidence of these two witnesses. Charad said that as a matter of standard practice in the firm an articled clerk was not permitted to take a statement from a potential or prospective witness. The procedure was for the clerk to conduct a preliminary interview and note what was told to him or her. This information would then be conveyed to a principal in the firm. He would decide whether to pursue the matter in which event he would arrange for a further interview, take a detailed statement from the witness-to-be and have it signed. The reason for this procedure, said Charad, was that a witness statement was a "very important document" which "could [after delivery to a defendant] be used against the witness in court". Hence the fact that this task was not entrusted to an inexperienced articled clerk.

Charad was at all times conversant with the provisions of the sub-article and mindful of its requirements. She did not consider Exh A to be a statement or document within the meaning of the sub-article: "It was for my purposes and my principal's purposes. It was a note for our file." On this account she did not furnish it to the defendant and for the additional reason that she regarded it to be a privileged document. She specifically denied that it had been deliberately withheld by her. Clark confirmed the standard practice as described and said that she had handed over Exh A in response to the query and without having the requirements of the sub-article in mind.

On the assumption that the sub-article called for a copy of Exh A to be furnished to the appointed agent, I turn to the question whether the plaintiff "failed" to do so.

1981 (3) SA 293 (A) this court was concerned with this question in relation

to a similarly worded requirement of disclosure and delivery. In terms of

s 23(c)(ii) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (a

predecessor of the present Act and Agreement) copies of medical reports

had to be furnished to the authorised insurer. The plaintiff was in default

and the issue was whether this amounted to a failure. The court a quo had

held that the word "fails" in the context of the sub-section connoted "wilful

and blameworthy conduct on the part of the injured plaintiff". On appeal

this conclusion was impliedly approved. It was moreover endorsed by the

following remarks of Rumpff CJ in the judgment on appeal:

> "The word 'refuses' implies a specific verbal or written refusal. Having regard to the context of the Act and of s 23 itself, the word 'fails' in (c)(ii) implies more than the mere omission to furnish copies of reports. To hold otherwise would create an injustice which the Legislature could not have intended. In view of the severity of the penalty, a final loss of claim, one has to consider the failure to furnish copies of reports in a restrictive manner, restrictive in the sense that a court will not deprive the plaintiff of his right to claim

compensation unless he can be said to have obstructed the insurer from getting the information which he is entitled to. As the object of the section is to allow the insurer to get information, forfeiture of plaintiffs claim will only be allowed, in my view, if the information is wilfully withheld after a request is made or if the request is deliberately ignored." (301 B - D)

Turning to the facts Rumpff CJ went on to say (at 301G - H):

"The letter dated 3 December 1979 was not a refusal in express terms. Although it may have been evasive as to the full contents of Dr Warren's report, I do not think that plaintiffs attorneys deliberately tried to hoodwink the defendant's attorneys. It is quite possible that they were bona fide in their statement in the letter that they considered that the report did not affect the question of damages as such, and that the failure at the time to provide a copy of the report itself was due to inadvertence."

More recently these key words - "refuses or fails" - as they appear in the sub-article were interpreted in Touyz v Greater Johannesburg Transitional Metropolitan Council 1996 (1) SA 950 (A). After pointing out that the difference in wording between s 23(c)(ii) and the sub-article is immaterial, and after referring to the passages just quoted from the Fantiso decision,

Van Heerden JA concluded:

> "The object of the present Act is manifestly the same as that of the 1972 Act, and in the context in which it appears in art 48(f) 'fails' remains a word of uncertain meaning. It therefore appears to me that the construction of 'fails' in Fantiso governs the meaning of the same word in art 48(f).
>
> This conclusion is to some extent borne out by art 48(e)(ii) which has been quoted above. It provides for the forfeiture of a claim relating to bodily injury if the person concerned 'refuses or fails to furnish the MMF or the appointed agent, at its or his request and cost' with copies of certain medical reports. Counsel for the respondent rightly felt constrained to concede that on an application of the Fantiso construction the word 'fails' in art 48(e)(ii) means 'deliberately fails'. That being so, it is in my view unlikely that the Legislature intended the same word to bear a different meaning in art 48(f).
>
> It follows that a mere omission cannot constitute a failure within the meaning of art 48(f), and that for the purposes of art 48(f)(ii) there must be a deliberate withholding of a statement or a document before it can be said that the claimant failed to furnish the same." (958G -959A)

In sum, there must be a deliberate and blameworthy withholding of the

statement or document in question for the sub-article to have been

contravened.

Any such inference in the present case is refuted by the evidence to which I have referred. In answer to a question, Charad expressly denied that she had deliberately withheld the exhibit. She was plainly bona fide in thinking that the sub-article did not require her to furnish a copy of the exhibit. It was promptly handed over when the source of the particular allegation of negligence was sought. Counsel was constrained to argue that "fails" means no more than a conscious decision not to deliver a copy. Such a submission is untenable in the light of the two Appellate Division decisions.

One must therefore conclude that the plaintiff and his legal representatives did not fail to comply with the requirement of the sub-article, assuming that it called for the furnishing of a copy of Exh A to the defendant. In the circumstances it is unnecessary to decide the question

whether Exh A is a statement or document within the meaning of the sub-article or to express any opinion in this regard. The appeal is dismissed with costs.

M E KUMLEBEN
JUDGE OF APPEAL

VIVIER	JA
F H GROSSKOPF	JA
MARAIS	JA-Concur
ZULMAN	JA