Case No 470/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

SANTAM LIMITED Appellant

and

MOHAMED NAEEM SAYED Respondent

CORAM: VAN HEERDEN DCJ, HOWIE, PLEWMAN JJA, FARLAM et NGOEPE AJJA

DATE OF HEARING: 15 September 1998

DATE OF DELIVERY : 28 September 1998

JUDGMENT

/HOWIE JA :..

HOWIE JA:

Respondent was injured in a motor collision on 31 August 1988 in circumstances allegedly giving rise to liability on the part of appellant - an appointed agent under the Motor Vehicle Accidents Act, 84 of 1986 - to compensate him in terms of that legislation. In due course, when sued for damages in the Durban and Coast Local Division, appellant pleaded on the merits and raised a special plea of prescription. At the hearing in the Court below the prescription defence was dealt with as a preliminary issue and evidence was adduced by both parties. The trial Judge (Van der Reyden J) found in favour of respondent, hence the present appeal, which is brought with the leave of this Court.

Central to the parties' competing submissions are certain provisions of the Act. They read as follows:

"14. (1) (a) Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of

paragraph (b) of this subsection, the right to claim compensation under section 8 from an appointed agent in respect of claims referred to in section 6 (1) (a) (i) shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the periods referred to in subsection (2) of this section and section 15

(2).

(2) If an appointed agent does not within 60 days after receipt of a claim as set out in section 15 (1) object to the validity thereof prescription shall, notwithstanding the provisions of subsection (1), be interrupted until after the expiration of a period of 90 days from the date on which the appointed agent delivers to the claimant or his representative per registered post or by hand a notice to—

(1) repudiate liability; or

(2) convey an offer of settlement of the claim to the claimant or his representative.

15. (2) No such claim shall be enforceable by legal proceedings commenced by a summons served on the appointed agent —

(3) before the expiration of a period of 90 days as from the date on which the claim was sent or delivered by hand, as the case may be, to the appointed agent as provided for in subsection (1); and

(4) before all the prescribed requirements of the appointed agent have been complied with:

> Provided that if the appointed agent repudiates in writing liability for the claim before the expiration of the said period, the claimant may at any time after such repudiation serve summons on the appointed agent."

("Interrupted" in s 14 (2) (b) must be read, of course, as "suspended": Santam Insurance Ltd v Williams 1992 (2) SA 273 (A).)

The evidence presented to the Court a quo reveals the following undisputed facts. Had respondent done nothing to pursue his claim the statutory two year prescriptive period would have ended on 30 August 1990. However, on 28 June 1990 his claim in terms of the Act was sent to appellant by registered post, receipt of which was later acknowledged. Appellant at no time raised any objection to the validity of the claim. Accordingly, by reason of the terms of s 15 (2) (a), on 28

June 1990 prescription became indefinitely suspended pending repudiation of liability or an offer of settlement within the meaning of s 14(2).

On 24 September 1992 an offer was forthcoming. It was contained in a standard printed letter in a form obviously drawn by appellant for the specific purpose of conveying offers. One paragraph stated that the offer was made "without prejudice, without admission of liability and solely to reach a settlement". Another paragraph read: "Upon acceptance of this offer, payment will be made against receipt of a duly completed, signed and stamped discharge form . . .". The offer was not accepted. Instead, respondent's attorney requested appellant to grant what was, perhaps conveniently but nevertheless legally incorrectly, referred to in the record as an extension of prescription. In response, appellant wrote to respondent's attorney a letter dated 10 November 1992 saying

"We hereby confirm that extension of prescription was granted up to 30 April 1993."

When a further extension was requested appellant wrote to respondent's attorney on 14 April 1993 stating

"We hereby confirm that extension of prescription was granted up to 30 September 1993. Please note that this is the very last time mat extension of prescription will be granted on this file."

On 9 August 1993 respondent's attorney, Mr Gowans, telephoned Mr "Van Schalkwyk, the manager of appellant's legal branch, who was responsible for dealing with this claim. Gowans told Van Schalkwyk that the consequences of respondent's injuries were apparently more serious than had initially been thought and that Mr J C Usdin, the orthopaedic surgeon whose medico-legal report had accompanied the claim, was able to substantiate this. Van Schalkwyk asked that Usdin's latest views be committed to writing.

7 Gowans then wrote appellant a letter dated 11 August, having had discussions with respondent and Usdin. Usdin, wrote Gowans, confirmed that respondent had suffered a severe back injury and also that increases to the claims for past loss of earnings and future medical expenses would be reasonable. Gowans then set out figures substantiating increased claims in respect of those heads of loss as well as general damages.

Gowans wrote to appellant again on 12 August enclosing a letter from Usdin, dated 8 August, providing substantiation of increases to the amounts claimed for past loss of earnings and future medical expenses.

Gowans's letter of 11 August reached Van Schalkwyk on 24 August. The latter wrote back on 25 August:

> "We refer to your letter dated 11 August 1993 as well as the telephone conversation between your Mr Gowans and our Mr van Schalkwyk on 9 August 1993.

Please furnish us with an update report from Mr Usdin as requested in our telephone conversation. This claim will be finalised once we receive the above-mentioned report."

Gowans's letter of 12 August was received by Van Schalkwyk on 2 September. In immediate response that same day he faxed Gowans a second settlement offer. Being in the form of the standard offer letter, it was also without prejudice. It concluded with the remark

"This is our final offer".

Respondent did not accept this offer either. Gowans, acting on Van Schalkwyk's request for an "update report", had his client examined by Usdin for purposes of afresh medico-legal report. This was sent to appellant under cover of a letter of 7 October 1993 which referred back to Van Schalkwyk's letter of 25 August.

Also on 7 October, Gowans's secretary, Mrs Naicker, acting

on his instructions, telephoned appellant in order to request a further extension of the time in which to sue. She spoke to a Mr Van Zyl and after giving the relevant claim number asked for an extension. She recorded in a contemporaneous note:

> "He will extend and confirm in a week."

On the following day, however, Van Zyl telephoned Mrs Naicker to say that no further extension would be granted. Again she recorded the gist of what he said. Her note reads:

> "... He says that unfortunately this matter cannot be extended and we only have until the end of the 90 days period on the offer to come to a settlement. The matter has previously been extended until 30 September and we have only requested extension now, that is, after 30 September. If we had requested an extension before 30 September it would not have been a problem. He says the fund will not extend after the prescription date."

(The reference to the fund was, of course, to the Motor Vehicle Accident Fund established under the Act.)

In reaction to this communication Gowans arranged for the issue of summons, his intention being nonetheless that negotiations would continue.

On 26 October he wrote to appellant, referring to the telephone conversation on 8 October between Mr Van Zyl and Mrs Naicker and requesting confirmation, inter alia, that appellant would, in the event of it being necessary to sue, consent to the jurisdiction of the Court below.

Appellant's letter in reply, dated 27 October, informed Gowans that the claim could not be entertained as it had become prescribed on 30 September 1993.

Summons was issued and served during November 1993.

The trial Judge found it necessary to deal with only two of the issues canvassed in evidence and raised in argument before him. First, he held, contrary to a submission on behalf of respondent, that a

without prejudice offer constituted an offer of settlement within the meaning of s 14 (2) (b) of the Act. Secondly, he concluded that the offer of 2 September 1993 was made in terms of the Act and therefore "suspended prescription" for 90 days, during which period the action was timeously instituted.

Obviously if appellant's offers were not offers as meant by s 14 (2) (b) then nothing at all would have happened to disturb the suspension of prescription which took effect on 28 June 1990. Prescription would have remained suspended right up to the time that the action was begun and the special plea would have been bad purely on that narrow ground.

The Court below, however, preferred the decisions in Vosloo v Sentraboer (Koöperatief)Bpk 1993 (1) SA 722 (K) and Jili v South African Eagle Insurance Co Ltd 1995 (3) SA 269 (N) to that in Potgieter v Santam Bpk 1995 (1) SA 465 (T) in coming to its conclusion that the

fact that the offers were without prejudice did not disqualify them as offers within the meaning of s 14 (2) (b).

Subsequent to the decision of the Court a quo Smith v Sentrasure (Edms)Bpk 1996 (3) SA 72 (W) was reported. In that case Potgieter was followed, the court considering itself bound by Potgieter but in any event holding that offers made during the course of settlement negotiations, in circumstances rendering such offers inadmissible in later proceedings, were not offers within the meaning of s 14 (2) (b).

In Potgieter the court reasoned (at 468 E - 469 A) that because, on the authority of Tshabalala v President Versekeringsmaatskappy Bpk 1987 (4) SA 72 (T), a without prejudice offer was inadmissible material for a court to take into consideration when making a costs order in terms of s 8 (4) of the Act, it was equally inadmissible, and therefore ineffective, when it came to s 14 (2) (b). The legislature, it was reasoned, could not have intended the anomalous

situation that the words "aanbod ter skikking" ("offer of settlement") meant different tilings in different sections.

However, as explained in Jili at 275 B - G, a without prejudice offer during settlement negotiations is inadmissible as an admission by the party making it but necessarily admissible if the fact to be proved is that an offer of settlement was made at all. And in any enquiry whether prescription was suspended in terms of s 14 (2) (b) that is a crucial fact to be proved. Moreover, in enacting s 14 (2) the legislature intended to facilitate the negotiation of settlements and an interpretation of the subsection is required which advances that object: Santam Insurance Ltd v Williams 1992 (2) SA 273 (A) at 277 G-J. The conclusion in Smith is wholly inconsistent with such an interpretation.

The satisfactory negotiation of settlements is enhanced by affording adequate time within which to reflect upon an offer. At the

same time it is beneficial to provide for a limit to the suspension period so that matters can be brought to a head and not drift on indefinitely. To preclude an authorised agent who seeks genuinely to negotiate to finality but who requires that in the event of the breakdown of negotiations the prescriptive period should resume running, from doing just that by way of a without prejudice offer, would be to impose an inhibition upon the negotiation process which is unwarranted by a proper construction of the subsection. Nothing in the language of the subsection justifies the exclusion of such an offer. This is emphasised by the judgments in this Court in Malindi v Commercial Union Insurance Co SA Ltd 1997 (1) SA 327 (A) (a matter also involving a without prejudice offer) which stress the absence of any qualification of the word "offer" in the subsection and which require only that an offer be such that on acceptance the resultant contract would dispose of the claim (at 332 H - I and 337 A - B). See, too. Vosloo at 730 D-E and Jili at 274I-J.

I accordingly consider that the dicta on the present point in Vosloo and Jili are correct and that Pot meter and Smith were wrongly decided.

The offers in this case would plainly have disposed of the claim on acceptance and therefore fell within the ambit of s 14 (2) (b). (It is unnecessary to consider the correctness or otherwise of Tshabalala; it dealt with a different statutory provision and context.)

The consequences of that conclusion are these. The 90 day period following upon the first offer expired late in December 1992. (It is unnecessary to be more specific.) Upon expiry, prescription resumed running. Having been suspended on 28 June 1990, just over two months short of what would otherwise have been its termination date, the prescriptive period was due to elapse by the end of February 1993. (Again, there is no need to be more precise.)

Now, the termination date of the two year statutory

prescriptive period is, of course, only variable depending on the time or times for which prescription has, during that period, become suspended. Subject to that, however, the termination date is immutable. It cannot be altered by waiver of the debtor-agent's right to plead prescription. Upon expiry of the prescriptive period the latter's debt is extinguished.

Standard General Insurance Co Ltd v Verdun Estates (Pty)Ltd 1990 (2) SA 693 (A) at 698 A - D and 699 B -I. That case was decided in relation to the Compulsory Motor Vehicle Insurance Act, 56 of 1972 which, like the statute presently under consideration, laid down a finite prescriptive period subject only to situations in which prescription would be temporarily suspended. There is accordingly no reason why that decision is inapplicable to the present matter. It follows that the agreed extension referred to in appellant's letter of 10 November 1992 could not change me expiry date of the prescriptive period. Prescription finally ran its course by the end of February 1993 and what ensued after that was a

period of agreed duration in respect of which appellant waived its right to plead prescription and in which, therefore, respondent was free to institute action immune from that defence.

Accordingly, the Judge's conclusion that the second offer was made in terms of the Act was incorrect. The prescriptive period having elapsed, the parties were no longer proceeding within the statutory prescription framework but within a contractual one. The question, then, is what the terms of that contractual relationship were other than those already stated, and whether such terms were covered by the pleadings and the evidence.

As far as the pleadings are concerned, respondent filed a replication in answer to defendant's plea of prescription. Par 3 of the replication reads as follows:

"(a) A further offer was made by Defendant on 2 September 1993. (b) Accordingly Plaintiffs claim did not prescribe until

ninety days from 2 September 1993 (i e on 30 November 1993).

(5) On 8 October 1993 the Defendant orally confirmed and agreed with the Plaintiffs attorneys on behalf of the Plaintiff that the Plaintiff's claim would not prescribe until ninety days from 2 September 1993 had expired (i e on 30 November 1993).

(6) The Summons was served on 16 November 1993 before the time when Plaintiffs claim would

otherwise have prescribed."

Because the legal conclusion in the replication - that the claim did not prescribe until 90 days after the second offer - was not expressed as being based on the terms of the Act it is perhaps arguable that respondent pleaded the availability of a 90 day period as something implicit in the extension agreement. This is by no means clear but I shall assume in respondent's favour that, on the pleadings, he was entitled to pursue the question whether, as a tacit term of the agreed extension of prescription, a 90 day "suspension" period was available upon the making of an offer within the period of extension. (Strictly

speaking, if the statutory provisions were to be applied accurately, the agreed prescriptive period would not have expired at the end of 90 days but quite well after that seeing that the offer was made some 28 days before 30 September 1993. However this is not material for present purposes.)

Nothing, of course, prevented the parties from agreeing both to a period of contractual prescription and to the contractual applicability of one or more of the relevant provisions of the Act.

As to the background circumstances, the first extension was granted when prescription had not yet run its course and the Act still applied. The second extension, but for the rider that it would be the last, was, on the face of it, subject to terms no different from those that applied to the first. When the original extension was agreed to in November 1992 respondent was experiencing the benefit of a 90 day prescriptive suspension brought about by the initial offer. And much of

the time covered by the first extension was due to fall within the statutory prescriptive period. It must therefore have been clear to the parties that had a second offer been made at any time before the expiry of that period respondent would inevitably have had the advantage of another statutory 90 day suspension. That was so obvious it needed no specific mention in the parties' communications.

The essence of the enquiry is therefore whether they intended a different position to obtain immediately the prescriptive rubicon was crossed in February 1993. There was no hint of an intention either way in the letter confirming the second extension. The parties could well have considered, perhaps for different reasons, that the post. prescription position was as obvious as the pre-prescription position and needed just as little express mention. However, the fact is that respondent was at liberty expressly to raise the applicability of a 90 day "suspension" but did not do so.

Turning to the evidence, Gowans testified that when he was about to send Usdin's latest medico-legal report to appellant he bore in mind that over a month had already passed of the 90 days he thought were available to respondent following upon the offer of 2 September 1993. That state of mind, he said, was reinforced by Van Zyl's comment on 8 October to Mrs Naicker that respondent had "until the end of the 90 days" period to come to a settlement. Whether Gowans had all along considered that the agreed extension was subject to the 90 day "suspension" in the event of a second offer he did not say. Nevertheless I shall assume that had respondent, through Gowans, been asked, when the extensions were agreed to, whether extension incorporated such a "suspension" the response would have been in the affirmative.

As to the answer that would at that time have been given on behalf of appellant, Van Zyl's comment just referred to is supportive of an affirmative reply but he was unavailable to give evidence and whether

it was anything more than the expression of a purely personal opinion one

cannot say.

Appellant's sole witness was Van Schalkwyk. He said that he faxed the offer of 2 September 1993 instead of sending it by post because he wanted to afford respondent as much time as possible before 30 September in which to consider and react to the offer. Implicit in that explanation is mat he did not envisage that a 90 day interval would follow between the offer and the end of the period of contractual prescription.

When expressly alerted under cross-examination to Van Zyl's reference to a 90 day period consequent upon the second offer, Van Schalwyk said he could not deny that Van Zyl had mentioned this but he maintained, in line with his evidence-in-chief, that it was for Gowans to keep a close watch on the deadline of 30 September 1993 and, in the event of time running out, to arrange timeously either for a further extension or for the institution of action. It will be recalled that the

possibility of a timeous further extension was also something that Van Zyl had alluded to on 8 October 1993 when he spoke to Mrs Naicker.

Whether Van Schalkwyk would in evidence ever have conceded the possibility of a tacit incorporation of a 90 day "suspension" is a matter for speculation. The topic was not canvassed with him in cross-examination and the onus in this regard was on respondent.

On the evidence as it is I am unable to conclude that the notional bystander would have received an answer favourable to respondent if Van Schalkwyk had been asked, when extension was agreed to, whether a 90 day "suspension" of the extension period would come about as a result of a second offer. On the contrary, to judge by his testimony, had he been asked, more specifically, what would happen were a second offer to be made only a day or so before 30 September 1993 his answer would in all probability have been that there would either have to be a further extension of prescription to an agreed date or

respondent would simply have to sue.

It follows that respondent failed to establish the tacit term necessary for his success on the basis of what he pleaded in par 3 of his replication.

The only other ground on which respondent sought to overcome the defence of prescription was mat of estoppel. It was set out in the replication in the following terms:

> "(a) On 25 August 1993, the Defendant wrote to Plaintiffs attorneys a letter requesting Plaintiffs attorneys to obtain 'an update report from Mr Usdin' and that 'the claim will be finalised once we have received the abovementioned report'.
>
> (b) Such letter constituted an implied representation that (i) the Defendant would re-consider the Plaintiff's claim after Mr Usdin (the orthopaedic surgeon who had already examined the Plaintiff at the Defendant's request) had furnished a further report on the current state of the injuries suffered by the Plaintiff and giving rise to the

Plaintiffs claim; (ii) the Defendant would make a further offer based upon such report by Mr Usdin and the Plaintiffs claim would only prescribe ninety days after such further offer had been made.

(7) Mr Usdin's further report was received by Plaintiffs attorneys on 5 October 1993 and forwarded to Defendant on 7 October 1993 whereupon Defendant rejected the Plaintiffs claim as having prescribed.

(8) The Plaintiff, represented by his attorneys, relied upon such representation by the Defendant and did not institute proceedings and serve a summons on the Defendant prior to 30 September 1993 as it would otherwise have done.

(9) The Defendant is accordingly estopped from pleading prescription."

The content and effect of the defendant's letter of 25 August 1993 must be assessed objectively. As explained in Monzali v Smith 1929 AD 382 at 386, to found estoppel the conduct relied on

"must be of such a nature that it could reasonably have been

> expected to mislead. The expectation referred to is that of the person who is sought to be bound. But it must be reasonable expectation, that is, the conclusion of a reasonable man placed in his position. A court of law would not hold a person bound by consequences which he could not reasonably expect and are therefore not the natural result of his conduct."

The relevant facts are these. In the letter recording the extension to 30 September 1993, Van Schalkwyk warned that it was the "very last". Subsequently, in neither his telephone conversation with Gowans on 9 August, nor in the letters from Gowans of 11 and 12 August, was he told that it would, or even might, take until after 30 September 1993 to obtain the "update report". Accordingly nothing in the letter of 25 August 1993, read in context, conveys, as a matter of reasonable construction, that Van Schalkwyk would not enforce the deadline of 30 September. The interpretation of the letter set out in the replication is one which a reasonable person in Van Schalkwyk's position

would not have expected. That letter therefore cannot found an estoppel.

If Gowans was misled it was not by the letter at all but by his own impression that a 90 day "suspension" applied. Nothing emanating from appellant caused or justified that impression.

Even assuming in respondent's favour that the letter was reasonably capable of misleading Gowans as alleged (which, as indicated, I certainly do not find to be the case) its misleading effect was eliminated by the terms of the offer of 2 September. As a matter of reasonable construction, that conveyed that what Van Schalkwyk had received he understood to be the required updated information and that he was now finalising the claim as undertaken in the letter of 25 August, and doing so, moreover, with sufficient time before the deadline, objectively viewed, to enable consideration of the offer and, in the event of rejection, the service of summons.

Respondent therefore failed to establish estoppel and, in the

overall result, the special plea ought to have been upheld.

The order of this Court is consequently as follows:

(10) The appeal is allowed, with costs.

(11) The order of the Court below is set aside and substituted for it is the following:

"The special plea of prescription is upheld, with costs."

CT HOWIE

VAN HEERDEN DCJ)
PLEWMAN JA)
FARLAM AJA) concur
NGOEPE AJA)