IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 518/98

In the matter between :

ROAD ACCIDENT FUND **Appellant**

and

R E MOTHUPI
Respondent

CORAM : NIENABER, MARAIS, OLIVIER, PLEWMAN JJA and FARLAM AJA

HEARD : 15 MAY 2000

DELIVERED : 29 MAY 2000

JUDGMENT

Third Party claim - insurer invokes prescription - plaintiff's response, based on the insurer's concession of the negligence of the insured driver, fourfold: (i) implied waiver; (ii) estoppel; (iii) interruption; (iv) constitutional unfairness.

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NIENABER JA/

NIENABER JA :

[1] On 3 August 1991 the respondent, plaintiff in the court below, was a passenger in a motor vehicle. The vehicle was involved in a collision with another vehicle. She was severely injured. So were some of the other passengers. Two years later, on 3 August 1993, her attorneys lodged a claim form on her behalf against the then appointed statutory third party insurer of the other vehicle involved in the accident, Santam Insurance Company ("Santam"). Five and a half years after the collision, during February 1997, summons was served on the present defendant, now the appellant ("the Fund"), the statutory successor to Santam. The prescriptive period relevant to this claim is five years calculated from the date upon which the claim arose (art 57 of the agreement which forms a schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("the Act")). The sole issue in these proceedings is whether the plaintiff's claim, admittedly out of time, had nevertheless not prescribed. The court below, MacArthur J sitting in the Transvaal Provincial Division, held that the Fund had impliedly waived reliance on prescription and accordingly dismissed its special plea of prescription with costs. This is an appeal, leave having been refused by the court *a quo* but granted to the Fund on petition, against that order.

[2] Articles 55 and 57 of the schedule referred to earlier must be read conjointly.

> "What arts 55 and 57 in effect state, is that such a claim becomes prescribed within three years; prescription is 'interrupted' by the lodging of a claim in terms of art 62; if interrupted, the claim shall not become prescribed before the expiry of a period of five years from the date on which the claim arose."

(*Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) 720D-E.) This was not the position as at the time of the collision. As the Act then stood the claim form had to be lodged within two years (not three) and the claim would only prescribe 90 days after the statutory third party insurer had either formally repudiated the claim or made an offer of settlement by registered post. Even if a claimant had failed either to lodge his or her claim within the two year period or sue within the 90 days period, he or she could still apply for condonation if there were "special circumstances" which rendered it not unreasonable for the claimant not to

have lodged or sued within the prescribed periods (art 57 prior to the amendment of the Act). The Act was amended by Proclamation 102 of 1991 with effect from 1 November 1991, which was after the collision but before the action was eventually instituted. In accordance with *Swanepoel v Johannesburg City Council*, *President Insurance Co Ltd v Kruger* 1994 (3) SA 789 (A) the amended provisions apply to the plaintiff's claim. In terms of the amended provisions a claimant was granted a more generous period of five years within which to sue - provided that the claim form had otherwise been lodged within the three year period - but on the other hand art 58 which previously allowed for condonation on account of "special circumstances" was repealed. The clear legislative implication is that a claimant who failed to proceed regularly within the five year period would no longer be able to approach a court for condonation even if the circumstances were special (*Swanepoel*'s case, 796B-F).

[3] The Fund pleaded prescription and the plaintiff replicated

> "that the invocation by the Defendant of Article 57 constitutes an invasion of her constitutional rights enshrined in Sections 33, alternatively 34 of the Constitution of South Africa Act 1996 (Act 108 of 1996)".

In the alternative it was pleaded that the Fund had "waived any right to rely upon the provisions of the said Article 57".

[4] At a pretrial conference it was agreed that only two issues would be submitted to the court to be disposed of in advance, namely:

> "5.1 Of die Verweerder se beroep op verjaring grondwetlik is; en
>
> 5.2 Of Verweerder afstand gedoen het van die reg om hom op verjaring te beroep."

It was also agreed that the plaintiff accepted the onus in respect of both issues.

[5] The court *a quo* thereupon made an appropriate order in terms of Rule

33(4) of the Rules of Court and, having heard evidence, it upheld the plaintiff's contention that the Fund had impliedly waived reliance on a defence of prescription. The constitutional issue was accordingly not considered.

[6] At the hearing of the appeal the plaintiff sought to broaden her responses to the special plea of prescription by substituting an amended replication in which a further alternative of estoppel was introduced. The application for the amendment was opposed by the Fund on the grounds *inter alia* that it ignored the terms of the pretrial agreement and opened up factual issues not pertinently or adequately explored in the evidence. I shall return to the terms of the amendment later in this judgment when dealing with the issue of estoppel.

[7] The main witnesses for the plaintiff were her attorneys, Mr and Mrs Mahlase, practising in partnership in Pietersburg under the name Mahlase, Nonyane-Mahlase ("MNM"). MNM submitted the plaintiff's claim to Santam. Santam was the "appointed agent" in terms of the Act dealing with the third party claims arising from the collision in which the plaintiff was injured. The official to whom the file was allocated was a certain Mr Van Schalkwyk. He handled the claim throughout, initially as an employee of Santam, latterly as an employee and legal officer of the Fund. He testified on behalf of the Fund.

[8] MNM experienced enormous practical difficulties in communicating with the plaintiff and hence in processing her claim. The plaintiff lived in a remote area of the Northern Province and moved about amongst her relatives. Mrs Mahlase, asked to explain some of the delays in MNM's response to letters addressed to it by Van Schalkwyk, testified as follows:

"Can you tell the court what the reason was for that? -- The

> plaintiff lives in a certain village next to Ellisras and it is quite a distance travelling there and there is no other means of communication. There are no telephones, they do not have postboxes where you can perhaps write a letter to say come to the office or whatever or I will be coming to your place. The only way of seeing the client was to drive to client's place. And sometimes ...(intervene)
> COURT : And this is near Ellisras you say? -- It is near Ellisras and we are in Pietersburg. And sometimes when you get there you find that the client is not there, maybe she has gone to some of the relatives to ask for money, food for herself and her child. So I had to leave a message to say, please, should she come tell her to stay put until I come. It used to happen that sometimes when we drive there for the second time they tell us, no she has not yet arrived. So we have to go back like that. Sometimes when we make appointments with the doctors, for instance Dr Ledwaba, we go there to fetch client, the plaintiff, we find that she is not there, we have to cancel the appointment again. And those were the causes of the delays."

[9] The merits of the plaintiff's claim, that is to say, the negligence of the driver of the insured vehicle, one Petrus Lekgwabe (also referred to as "the insured driver"), was not seriously in dispute. Van Schalkwyk never requested specific information about the circumstances of the collision although he did requisition the record of the criminal trial against Lekgwabe, who was convicted of culpable homicide. On no less than six separate occasions, although not requiring the Fund formally to concede the so-called merits, MNM pointedly demanded that it should state what "the Fund's attitude was" to the plaintiff's claim. Van Schalkwyk, in his

response, invariably deflected the inquiry by asking for further information relating to the quantification of the plaintiff's claim although it was never suggested that any of his queries addressed to MNM were either irrelevant or deliberately contrived to cause the plaintiff to delay instituting action. Counsel for the Fund made much of the point that the merits had never formally or expressly been conceded by the Fund. Even so it is, I think, fair to say that the Fund was never intent on contesting the claim on the ground that Lekgwabe was not negligent. Van Schalkwyk under cross-examination conceded as much. He said:

> "En sal u met my saamstem dat dit die indruk kon geskep het dat u, wat betref die meriete van die aangeleentheid, die nalatigheid aan enige van die kante toegegee het? -- Dit kon dalk die indruk skep dat, by die prokureur wat die eis ingedien het, dat die meriete nie meer in dispuut is nie. Alhoewel op daardie stadium was dit nog nie formeel toegegee nie."

Ultimately, in its plea over on the merits, Lekgwabe's negligence was expressly conceded by the Fund. But of course that was not the end of the matter since the inquiry is not whether the Fund waived a defence on the merits; it is whether the Fund waived a potential defence of prescription. I return to this issue in greater detail later in this judgment.

[10] According to Van Schalkwyk his mind was not specifically attuned to prescription. He dealt with close to a thousand different matters at any one time, so he explained, and the prescriptive periods in respect of each of these matters were never diarised by him in the portfolio of claims which he administered. He dealt with each matter only when it was necessary to do

so, on receipt of a communication from claimants or their legal representatives. His attitude, as he explained under cross-examination, was as follows:

> "Maar u het op geen stadium dit pertinent gemeld aan die eiseres se prokureurs dat hulle moet nou 'n dagvaarding uitreik en beteken aangesien die eis gaan verjaar nie? -- Dit is korrek, omdat ek, soos ek reeds ook vantevore gesê het, ons geen sorgplig of regsplig daartoe het nie."

Delay with a view to allowing prescription to run was never a consideration with him. Indeed, his exchanges with MNM show that he repeatedly urged them to treat the matter as urgent. He was asked about this and stated as follows:

> "Wat, wat was die rede vir die gebruik van die woord "urgent"? -- U edele ek ervaar daagliks dat, u moet verstaan ek wil ook graag 'n eis afhandel so gou as moontlik, want dit strek vir beide partye tot voordeel. En ek gebruik dit maar deurgaans om vir die prokureurs net 'n aanduiding te gee ek sal graag wil dringend terugvoering hê sodat ek kan die volgende stap neem om die eis te finaliseer. Of af te handel óf te evalueer."

[11] On 4 March 1996, more than four months before the claim would prescribe, Van Schalkwyk sent a fax to MNM which read as follows:

> "We discussed the quantum of your client's claim with our own actuary, Mr Marais, who informed us that we must obtain from you full details of the state disability grant that your client is receiving to enable us to calculate your client's loss of income. We await your urgent response."

Such a request, he stated, was standard procedure since grants so paid had to be deducted from any amounts awarded to claimants. On 9 March 1996

MNM, without referring to this fax, wrote to Van Schalkwyk complaining of a perceived lack of communication from him. The letter proceeded:

> "We have also written letters asking yourself of your attitude towards our client's claim.
>
> We have furnished all the relevant information in regard to our client's claim with no response from you. Your office has not reacted to our client's claim, and have not even acknowledged receipt of our letters or documentation/information as requested by yourself.

Should we receive no response within 7 days of date of this letter, we shall proceed by way of summons as it is our legal right to do so.
Kindly attend to this letter with the professional courtesy it deserves."

On 25 March 1996 Van Schalkwyk wrote:

> "Please note that we tried at numerous occasions to make contact with your office by way of telephone as well as fax. We later realised that your dialling code as given on your letterhead is incorrect. We then tried a couple of times the correct dialling code, but still could not get through to you as there seems to be a sort of technical problem with the lines to Pietersburg.
>
> Attached please find a copy of our fax dated 4 March 1996 which we tried to fax through to you.

We await your response to the contents of this fax to enable us to fully quantify your client's claim.
We await your urgent response."

On 3 April 1996 MNM wrote:

> "We refer to telephone conversation between our Mr Mahlase and your Mr Van Schalkwyk on the 3rd April 1996.
>
> Our client has applied for a Disability Grant. She has however been unsuccessful in her application and has received no compensation at all.

Kindly quantify our client's claim as soon as possible."

On 16 April 1996 Van Schalkwyk replied:

> "We also wish to refer to the telephonic conversation which took place on 3 April 1996 when our Mr. Van Schalkwyk requested from you copies of your letters where you applied for a disability grant on behalf of your client. We also would like to receive copies of the response received from the applicable state department.

We now await your response to enable us to quantify your client's claim."

This happened to be the last of the exchanges between Van Schalkwyk and MNM before prescription supervened on 2 August 1996. It was only on 18 September 1996, well after that date, that MNM replied by fax in conciliatory terms as follows:

> "We refer to the above matter as well as our telecon with the good and kind Mr Van Schalkwyk of Santam.
> We are pleased as agreed to send you the final document in this matter which is necessary for your goodselves to quantify our client's claim and finalise the matter.
> We really thank you for exercising patience as we had serious difficulty in obtaining the said document."

Enclosed was a document dated 16 September 1996 which stated as follows:

> "This is to certify that Mothupi R Elizabeth is receiving disability grant amounting R430,00. Her pension became effective from March 1995."

[12] The reasons for the delay in furnishing the required information about the disability grant was a matter for debate in the court below. According to Mrs Mahlase the information was not only time consuming to obtain but was sometimes contradictory. A witness, Mr Mohale, a welfare official in the employ of the Department of Health and Welfare of the Northern Province, eventually testified (contrary to the document of 16 September 1996) that the plaintiff received a disability grant only from February 1997 to February 1998 when further payment was suspended for lack of funds. Mrs Mahlase's evidence about the industry with which she pursued these

inquiries, was in dispute. The court *a quo*, while expressing reservations about MNM's diligence in general, did not find it necessary to resolve the dispute. Whatever the true position may be, she never communicated her difficulties to Van Schalkwyk and it was never said by her or suggested to him in cross-examination that she asked for more time within which to submit the required information. The upshot was that the date of prescription passed without either of the parties apparently appreciating its significance.

[13] On receipt of MNM's last fax Van Schalkwyk, when he drew the file, realised that the claim had in the meantime prescribed. He immediately notified MNM accordingly by fax and this led to further exchanges between the parties culminating in the institution of action during February 1997.

[14] Against that factual background I turn to the plaintiff's various responses to the defendant's special plea of prescription. Since the court *a quo* found the waiver issue to be decisive of the whole matter I propose to commence at that point.

[15] INFERRED WAIVER:
Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the

will of the party said to have waived it. The right in question in the instant case is the statutory provision specifically accorded to the Fund to avert claims which are out of time.

> "It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms."

(*SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) 49G-H.)

[16] The test to determine intention to waive has been said to be objective (cf *Palmer v Poulter* 1983 (4) SA 11 (T) 20C-21A; *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) 26H-27G; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) 543A-544D). That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations (cf *Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) 634H-635D; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 792B-E); secondly, that mental reservations, not communicated, are of no legal consequence (*Mutual Life Insurance Co of New York v Ingle* 1910 TS 540, 550); and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes.

[17] The third aspect has not yet been finally settled by this court, or so it would seem (cf *Thomas v Henry and Another* 1985 (3) SA 889 (A) 896G-898C). What the one party now says he then intended and what his opposite number now says he then believed, may still be relevant (*Thomas v Henry and Another, supra,* 898A-C) although not necessarily conclusive. The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver (*Martin v De Kock* 1948 (2) SA 719 (A) 732-733). With those two qualifications I propose, in this judgment, to apply the test of the notional *alter ego.*

[18] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists. A complication may arise where a person's outward manifestations of intention are intrinsically contradictory, as for instance where one telefax indicates an intention to waive and another, perhaps as a result of a typographical error, does not. That problem does not arise in this case and consequently need not be discussed (cf *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) 737D-E). Nor is it necessary to consider some of the other problems relating to waiver which do not arise in this case, such as whether the manifestation of an intention to waive must of necessity be communicated to the other side, and, if so, whether by some means or another it must always be "accepted" or acted upon by the other party (cf *Traub v Barclays National Bank Ltd, supra*, 634H; *Botha (now Griessel) v Finanscredit (Pty) Ltd, supra*, 792B-E*; Segal and Another v Segil* 1992 (3) SA 136 (C) 144J-146J; 155B-156J; *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc and others* 1997 (3) All SA 691 (W) 700c-702d).

[19] Because no one is presumed to waive his rights (cf *Ellis and Others v Laubscher* 1956 (4) SA 692 (A) 702E-F), one, the onus is on the party alleging it and, two, clear proof is required of an intention to do so (*Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) 778D-9A; *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) 704F-H). The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.

[20] In the instant case it is common cause that the Fund did not in express terms notify MNM in advance that it would not rely on prescription. The dispute between the parties is whether it did so by conduct. The issue, then, is whether the Fund's conduct was consistent only with an intention *not* to raise or rely on prescription should the occasion for doing so otherwise arise.

[21] The court *a quo* in finding an implied waiver reasoned as follows:

> "The test to be applied as appears from these cases is the objective one and once it is said by a senior and experienced official who was responsible for handling the claim that the

> impression could have been created that the merits had been conceded I am of the view that waiver has been established. The fact that Van Schalkwyk had reservations which he kept to himself is irrelevant and it cannot lie in the mouth of the defendant that Van Schalkwyk was not a reasonable man. That view is reinforced by the fact that the defendant in its plea conceded the merits of the case. In the circumstances I think the attorneys were entitled to accept that the defendant had waived its right to rely on prescription and to act on that assumption. Once the merits had been conceded and prescription waived this would in the circumstances of this case apply to the whole claim ie both merits and *quantum*."

[22] The reasoning, in its stark form, amounts to this: because negligence has not been contested therefore prescription has been waived. Perhaps the thinking may be bolstered by restating it in a somewhat more elaborate form, as follows: (a) The Fund, through Van Schalkwyk, conceded negligence on the part of the driver of the other vehicle. (b) By conceding such negligence the Fund in effect intimated to the plaintiff that it would assume liability for at least some compensation to be paid by the Fund to the plaintiff, *ergo*, that its only resistance to the plaintiff's claim was as to the amount payable. (c) The correspondence shows that Van Schalkwyk eventually proposed to make an offer to MNM and that the overwhelming likelihood was that the matter would eventually settle, *ergo*, that there would be no need for the Fund to raise prescription. (d) Hence it would have been reasonable for the plaintiff (or for someone in her position) to conclude

that the Fund would not eventually, or at least not for as long as the parties were engaged in negotiation, resist the claim on the grounds of prescription.
[23] The argument, even in its amplified form, remains unconvincing. Conclusion (d) simply does not follow from premise (a). By not disputing negligence the Fund did not concede liability *in toto*. MNM never intimated in advance that the plaintiff would accept whatever quantification the Fund proposed. The possibility of litigation could therefore not be excluded, even if the merits, so called, were no longer in dispute. Neither side ever mentioned a concrete figure to the other. The quantification of the claim therefore remained wide open. A waiver of prescription would mean that the Fund, as debtor, bound itself in advance never to raise prescription against the plaintiff even if the quantum was not settled. By not actively disputing the merits Van Schalkwyk at most conveyed the impression that the defendant was not going to rely on the defence that the insured driver was not negligent; *non constat* that it could reasonably be understood to have conveyed the notion that the Fund abandoned any other defences that may have been open to it should the parties not have reached a satisfactory settlement. Nothing Van Schalkwyk did could reasonably have led MNM (or the plaintiff or someone in her shoes), to believe that prescription was present to the mind of Van Schalkwyk at the time. The correspondence makes it clear that neither side gave prescription a thought. Nothing Van Schalkwyk did could therefore have led the plaintiff (or her notional *alter ego*) to believe that the statutory right which was given to the Fund for that very eventuality would not be relied upon by it should the occasion for doing so arise. Absent a “sorgplig”, as Van Schalkwyk testified, an assertion not challenged on behalf of the plaintiff, no duty rested upon him or the Fund to alert MNM to the perils of prescription. Moreover, the plaintiff failed, indeed, did not even begin to prove that “information sought by the Defendant could not be obtained prior to 2rd August 1996", which was one of the principal allegations pleaded by her in support of her reliance on waiver. And finally, any doubt as to how Van Schalkwyk’s actions were to be interpreted must be resolved against the plaintiff who bears the *onus* to prove waiver.

[24] The actions of Van Schalkwyk were plainly not calculated to lull the plaintiff into a false sense of security that the option of raising prescription (if it should supervene) had been ruled out by the Fund; rather, it was

designed to bring matters to a head as far as the claim was concerned. That was his evidence and it was never suggested to Van Schalkwyk that he schemed to wrong-foot the plaintiff or her attorneys. In my view Van Schalkwyk's conduct, in not actively disputing the negligence of the insured driver and in actively taking steps to quantify the claim, was an entirely neutral factor. It did not provide any indication as to whether it was the intention of the Fund to waive or not to waive prescription. His conduct would have been the same even if he or the Fund was mindful of prescription at the time. In short, his conduct was consistent with the hypothesis that he was simply doing his job; it was not inconsistent with the hypothesis that prescription might yet be raised if circumstances so required. The response of implied waiver, more accurately described as tacit or inferred waiver, accordingly cannot succeed.

[25] ESTOPPEL:

I turn to the issue of estoppel. This response to the defendant's plea of prescription is contained in a proposed amendment to the plaintiff's replication. The amendment was moved at the time of the hearing of the appeal. It reads as follows:

> "2.A.
>
> Further alternatively, the plaintiff pleads that the defendant is estopped from relying on the prescription provisions of Article 57 of the Act by virtue of the following:
>
> (a) Through the conduct of its appointed agent and/or servants including Mr Van Schalkwyk, the defendant represented, by words alternatively by conduct to the plaintiff and/or the plaintiff's attorneys, that the question of its liability for the

plaintiff's claim was not disputed and that only the quantum of her claim still needed to be finalized;

(b) The defendant similarly also represented to the plaintiff and/or her attorneys that, while negotiations and communications were continuing between it and the plaintiff's attorneys in regard to the issue of quantum, it would not rely on prescription despite the passing of the prescription date of the claim in terms of Articles 57 of the Act;

(c) Accepting and relying upon such representations, the plaintiff's attorneys continued with **bona fide** settlement negotiations and communications in order to finalize the quantum of the claim, and did nothing to interrupt prescription by the issue of summons on or before the prescription date of 3 August 1991;

(d) In so acting, the plaintiff's attorneys did so to the prejudice and detriment of the plaintiff;

(e) In the premises, the defendant is estopped from relying upon the said Article 57."

[26] There are, in the main, two reasons why the amendment should in my opinion not be granted. The first is that, even if granted, it would still not rescue the plaintiff's cause. I return to this point in par 29 below. The second is that one cannot be confident that, if pleaded initially, it would not have had some bearing on the course of the trial - in the sense of relevant matter not being explored in cross-examination nor led in evidence. To allow the amendment in those circumstances would be unfair to the defendant. I return to this point in par 30 below. And if the amendment is not to be granted on either of those grounds it is not necessary to consider a

third reason i.e. whether the agreement concluded between the parties at the pretrial conference, in the absence of a further agreement between them, precluded the introduction of new matter and a new issue.

[27] The "estoppel response" presupposes that actual intention to waive (in the sense discussed in par 16 above) has not been established by the plaintiff. The question then is whether the Fund, not intending to waive, nevertheless created the impression that it intended to do so, on the strength of which the plaintiff acted to her prejudice in not issuing summons before the expiry of the date upon which the claim would otherwise have prescribed (cf *Aris Enterprises (Finance) (Pty) Ltd v Protea Insurance Co Ltd* 1981 (3) SA 275 (A) 291D-E).

[28] The very first requirement for estoppel by representation is a representation made by the party against whom the estoppel is raised. The representation pleaded in the amendment is that contained in par (b). There is this difference between the response of waiver pleaded by the plaintiff and the further response of estoppel introduced in the amendment. On the basis of the waiver response the Fund would never thereafter be permitted to plead prescription, even if the matter did not settle and litigation ensued on the quantification of the claim; on the estoppel response the Fund would be

precluded from relying on prescription while, and only for as long as, "negotiations and communications were continuing between it and the plaintiff's attorneys in regard to the issue of quantum". It was no doubt for that reason that counsel for the plaintiff, during argument, was disposed to favour the estoppel response above the waiver response. What was perhaps overlooked is that this formulation comes perilously close to an assertion that the parties by tacit agreement extended the time for instituting action - an allegation that was neither made nor proved.

[29] The test for inferred waiver, as stated earlier in par 16, is the impression created by the conduct of the Fund on the mind of the plaintiff's notional *alter ego*; that, as it happens, is also, in the context of estoppel, the test for a representation (*Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd, supra,* 292E-F; Rabie, *The Law of Estoppel in South Africa,* 37). Having earlier found that the conduct of Van Schalkwyk was not capable of creating the reasonable impression that the Fund meant to waive prescription in perpetuity, it seems to me that by the same token and for substantially the same reasons it is not capable of creating the reasonable impression that prescription will not be invoked pending finalisation of the quantum by negotiation. In itself that is a sufficient reason for refusing the

amendment. But as stated earlier there is a second equally potent reason for doing so.

[30] Subject to what is said below, a court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings. The application for the amendment of the replication was designed to circumvent that difficulty; but in essence the amendment is simply the platform from which the plaintiff sought to launch the new point on appeal. A party will not be permitted to do so if it would be unfair to his opponent (cf *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 23D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) 290E-H). It would be unfair to the other party if the new point was not fully canvassed or investigated at the trial. In this case it is by no means certain that the issue of estoppel in all its ramifications was properly and fully investigated. So for instance there was no evidence by and no cross-examination of Mr and Mrs Mahlase on whether they ever thought of prescription at the time and on whether they would have acted differently if they were attentive to it; nor was there any explanation offered as to why summons was only issued in February 1997, whereas negotiations about the quantification came to an abrupt end in September 1996. In the result it appears to me that the proposed amendment opened up entirely new fields of enquiry which were not properly explored before the trial court. The amendment must accordingly be refused. And if that is so estoppel falls by the wayside.

[31] INTERRUPTION OF PRESCRIPTION :

During the course of argument counsel for the plaintiff raised a completely new response to the defence of prescription, foreshadowed in neither the pleadings nor his heads of argument. It was that Van Schalkwyk's conduct (in not disputing the merits and in pressing for further information in order to quantify the plaintiff's claim, thereby inducing MNM to believe that the matter was certain to settle) amounted to an acknowledgment of liability by the Fund for the purpose of s 14 of the Prescription Act 68 of 1969. The

section reads as follows:

> "14. Interruption of prescription by acknowledgement of liability. -
>
> (1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."

[32] It has been held that the relevant provisions of the Prescription Act, to the extent that they are not otherwise incompatible with the Act, apply to claims processed under it (cf *Road Accident Fund v Smith NO* 1999 (1) SA 92 (SCA) 98F-G).

[33] Not having been pleaded the new point was presented in argument as one purely of law, apparent on the record, and in respect of which no elaboration in evidence was possible; consequently, so it was submitted, it would involve no unfairness to the Fund if it were considered by this court (cf *Paddock Motors (Pty) Ltd v Igesund, supra*, 23D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others, supra*, 290E-H). Counsel frankly admitted that the point only occurred to him when he read the recently reported judgment of *Solomons v Multilateral Motor Vehicle Accident Fund and Another* 1999 (4) SA 237 (C).

[34] Solomons, like the plaintiff in this case, was injured in a motor vehicle collision. A claim was duly lodged on his behalf whereupon the Fund expressly acknowledged that the negligence of the insured driver was no longer in issue. As in this case the Fund called for further information to

consider the quantification of the claim. Within the time, well before prescription supervened, the Fund made an offer, which it later substantially increased. This was in November 1996. The plaintiff's attorneys acknowledged the offer and stated that they would take instructions from him. They eventually wrote to the Fund on 4 July 1997 that the offer, save for the scale of payment of costs, was accepted by the plaintiff, only to be met by the response from the Fund that the claim was repudiated because it had prescribed two days earlier on 2 July 1997.

[35] Three issues in that case, as in the present one, were whether the Fund had waived reliance on prescription, whether it was estopped from raising prescription and whether prescription had been interrupted by the Fund's concession of negligence on the part of the insured driver. The court found in favour of the plaintiff on the third of these issues, stating at 249C:

> "It is my conclusion therefore that the Fund's admission of liability in respect of negligence (the merits) did indeed have the effect of interrupting prescription, so that the plaintiff's claim had not become prescribed by the time that the offer was accepted."

It was on this *dictum*, as a proposition of law, that the plaintiff in the present case relied for her submission that prescription had been interrupted by the Fund's tacit concession of negligence on the part of the insured driver.

[36] I am afraid that I cannot agree, with respect, that the dictum

represents an accurate and self-sufficient statement of the law on the point. I am prepared to accept in favour of the plaintiff, without deciding, that the Fund's passivity in regard to the negligence of the insured driver in the present case can be equated with an express acknowledgment of liability in respect of the merits, in the sense in which the expression is used in *Solomons*' case. That then pertinently poses the question whether an acknowledgment to that effect can in turn be equated, as a matter of law, with a tacit acknowledgment of liability by the debtor for the purpose of s 14 quoted in par 31.

[37] For a variety of reasons the question posed must in my opinion be answered in the negative. In the first place an acknowledgment of liability for the purpose of s 14 of the Prescription Act is a matter of fact, not a matter of law. Thus it was stated in *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) at 623A-B:

> "Of daar in 'n bepaalde geval 'n erkenning van aanspreeklikheid was, is 'n feitlike vraag wat betrekking het op die bedoeling van die persoon wat as skuldenaar aangespreek is. In dié verband het BROOME, R.P., die volgende gesê in *Petzer v. Radford (Pty.) Ltd.*, 1953 (4) S.A. 314 (N) op bl. 317 en 318:
>
> > 'To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.' "

It is by no means inconceivable that in a particular case the Fund may be disposed, either because of difficulties of proof or because the amount in issue is not substantial, not to contest negligence, without necessarily admitting or conceding that the insured driver was in fact wholly or partly to blame for the collision.

[38] Secondly, and more importantly, the dictum, presented as a statement of law, is against the tenor of authority. It is inconsistent with *Benson and Another v Walters and Others* 1984 (1) SA 73 (A) to which no reference was

made in the judgment. That case expressly approved the dictum from *Petzer v Radford (Pty) Ltd*, quoted in the passage cited above. It was also approved in the earlier case of *Markham v South African Finance & Industrial Co Ltd* 1962 (3) SA 669 (A) at 676E-F. The debt in question is the payment of an amount of compensation to an injured party in accordance with the provisions of the Act. An acknowledgement of negligence on the part of the insured driver, coupled with a willingness to seek a settlement of the quantum if such can be reached, is not an acknowledgment of the existence of a debt or of a present liability (cf *Markham*'s case, *supra,* at 676F; *Benson and Another v Walters and Others*, *supra*, at 87C-D); at most it is an acknowledgment of a *potential liability* if certain conditions are fulfilled (a settlement of the quantum), failing which litigation would have to follow. In *Benson*'s case, *supra*, the majority of the court at 86H put it on the footing that the Act "requires an acknowledgment of liability ('aanspreeklikheid') and not merely an acknowledgment of indebtedness".

And in the minority judgment, in that case, it is further stated at 90G:

> "For an acknowledgment of the debt to be effective as an interruption of prescription it is not necessary that it should be quantified in figures. It is sufficient if it is capable of ascertainment by calculation or extrinsic evidence without the further agreement of the parties".

In this case there is not even common ground on a minimum amount which is acknowledged by the Fund. The admission, in short, must cover at least every element of the debt and exclude any defence as to its existence. An admission relating solely to the negligence of the insured driver does not comply with that requirement.

[39] And finally there is the point raised in *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) 7F-G:

> "In the end, of course, one must be able to say when the acknowledgment of liability was made, or otherwise it would not be possible to say from what day prescription commenced to run afresh."

This links up with what was earlier stated in *Benson*'s case, *supra*, at 86E:

> "No doubt an alleged, but ambiguous, 'acknowledgment' may fall to be interpreted in the light of preceding conduct of the debtor, but, since interruption takes place at a specific point in time, I have some difficulty in understanding how various factors can cumulatively amount to a single act of interruption."

On the facts of this case, where the alleged concession as to negligence does not consist of a single act but of an impression due to inaction over a prolonged period, it is even more difficult to conceive how the requirement of s 14 can be said to have been fulfilled.

[40] In the result I am of the view that the dictum in *Solomons*' case is too

widely stated and does not, as a proposition of law, lend the support to the plaintiff which her counsel sought to derive from it.

[41] THE CONSTITUTIONAL ISSUE:

The plaintiff sought refuge in s 33 alternatively s 34 of the Constitution of South Africa, 108 of 1996 (cf *Fedsure Life Assurance and Others Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 112-115). Section 33 (read in the light of item 23(2) (b) of Schedule 6 of the Constitution) requires "administrative action" that is lawful and procedurally fair and s 34, as its heading states, deals with "Access to courts".

[42] Notwithstanding its formulation in the replication the plaintiff's complaint was not that art 57 of the Act was unconstitutional as such (cf *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)) or that the plaintiff was denied access to the courts, but that the Fund acted unconstitutionally in relying on the section. The Fund was accused of unfair administrative action. The accusation was formulated as follows in par 9 of the respondent's heads of argument:

> "... the actions of the appellant in invoking and relying upon prescription in view of the conduct of Van Schalkwyk in lulling the respondent's attorneys into a false sense of security concerning any risk of prescription, amounted to opportunistic, unconscionable and unfair administrative action on the part of the representatives of the Fund"

and again, in par 55 thereof,

> "The appellant's invocation of article 57 constituted a deliberate act designed to deprive the respondent of compensation".

[43] In my opinion, the factual foundation for these accusations, leaving aside any legal objections, is entirely lacking. The complaint that Van Schalkwyk's conduct prior to and leading up to the date of prescription was in any way reprehensible is groundless. If MNM was lulled into a false sense of security it was due to its own misconception of the operation of the Act and not as a result of anything Van Schalkwyk had said or done. Moreover, the suggestion that Van Schalkwyk acted improperly, diverting her attention in order to divest the plaintiff of her claim, was never put to Van Schalkwyk under cross-examination nor argued on appeal. Van Schalkwyk acted reasonably in asking for more details relating to the disability grant; nor was the timing of the request unreasonable or designed to frustrate the plaintiff's attempts to institute action in time. None of the plaintiff's witnesses complained or objected that Van Schalkwyk had misled or pressurised them in any way. MNM did not ask for more time within which to garner the required information. Mr and Mrs Mahlase did not testify that they were unaware of the new scheme of the Act relating to prescription. And nothing in the negotiations between the parties could reasonably have induced them to believe that prescription was a contentious issue between them and the Fund. The plaintiff's real complaint is that the

Fund invoked art 57. The result was that settlement negotiations were thereupon terminated and that the plaintiff was deprived of compensation to which, but for art 57, she would have been entitled in terms of art 40 of the Act. What the plaintiff in effect is saying is that the mere reliance on art 57 by the Fund was unconstitutional. But if the section itself was not unconstitutional I fail to see how in the circumstances of this case its invocation can in any sense be said to be unfair and therefore unconstitutional. As stated earlier the dilemma in which the plaintiff now finds herself resulted not from things done by the Fund but from the things not done by MNM.

[44] Where the factual foundation for the constitutional response is lacking, it is not necessary to consider various other difficulties standing in the way of the plaintiff in deploying the Constitution as a rejoinder to the special plea of prescription - such as for instance whether the Fund is an organ of state and whether the invocation of a statutory defence can ever qualify as "administrative action" within the meaning of s 33 of the Constitution.

[45] The following order is made:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is amended to read:

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

.....

P M NIENABER
JUDGE OF APPEAL

Concur :
Marais JA
Olivier JA
Plewman JA
Farlam AJA