Case No: 288/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

TRANSNET LIMITED Appellant

v

NOMZOXOLO NGCEZULA Respondent

CORAM: BOTHA, VAN HEERDEN, REFER, NIENABER et HOWIE

JJA

Heard: 18 November 1994 Delivered: 30

November 1994

J U D G M E N T

BOTHA JA:-

On 15 August 1989 the respondent sustained serious injuries when, as she alleges, a train at New Brighton station pulled away while she was in the process of boarding it. She alleges further that her injuries were caused by the negligence of the persons who were in control of the train. They were employees of the South African Transport Services ("SATS"), which was a commercial enterprise of the State established by section 3 (1) of the South African Transport Services Act 65 of 1981 ("the 1981 Act"). The respondent intended to bring an action against SATS for damages arising out of her injuries.

In terms of section 64 (3) of the 1981 Act (which will be quoted presently) it was a prerequisite for the enforcement of the respondent's claim against SATS that it be lodged in writing with SATS within three months of the date upon which it became due. The respondent failed to comply with this requirement. A claim was lodged, through her attorney, but only on 7 March 1990, well out of time. However, all was not then lost for the respondent. In terms of the proviso to section 64 (3) a competent court was empowered to grant her special leave to lodge her claim, if certain requirements could be

satisfied.

On 1 April 1990 SATS ceased to exist. The whole of its enterprise was taken over by the appellant ("Transnet"), a public company established pursuant to the provisions of section 2 of the Legal Succession to the South African Transport Services Act 9 of 1989 ("the 1989 Act"). 1 April 1990 was the date stipulated by notice in the Gazette in terms of section 3 (1) of the 1989 Act, as the date upon which Transnet became the legal successor to SATS. At the same time, in terms of section 3 (2) (to be quoted presently), all the rights and obligations of SATS were transferred to Transnet. Simultaneously, the whole of the 1981 Act was repealed; this was the effect of the provisions of section 36 (6) read with section 37 (2) and Part 6 of Schedule 2 of the 1989 Act. So on 1 April 1990 section 64 (3) of the 1981 Act also fell away. The 1989 Act has no counterpart for it. The result of all this was that the respondent had to look to Transnet for the enforcement of her claim, but she was faced with this problem: prior to the repeal of section 64 (3) she was in default of lodging her claim with SATS as required by the section; after its demise she was ostensibly unable to invoke the proviso to obtain special leave to lodge her

claim with Transnet.

In these circumstances the respondent sought relief in the South Eastern Cape Local Division. She brought an application on notice of motion against Transnet in which she claimed an order granting her special leave in terms of section 64 (3) of the 1981 Act to lodge her claim with Transnet, or, in the alternative, an order declaring that she was entitled to institute action against Transnet without first lodging with it a claim as envisaged in section 64 (3) .

The matter came before KROON J. He granted the respondent her alternative prayer and issued a declaratory order entitling her to institute action against Transnet. Thejudgment has been reported: see Necezula v Transnet Ltd 1993 (3) S A 482. The appeal is now before us by virtue of leave granted to Transnet by the Court a quo.

Section 64 of the 1981 Act read as follows:

"64. (1) Subject to the provisions of subsection (3), a claim against the South African Transport Services or an employee of the South African Transport Services (hereinafter referred to as 'the defendant') shall be extinguished by prescription after the expiry of three years.

(2) The provisions of sections 12, 13, 14, 15, 17 and 18 of the Prescription Act, 1969 (Act No. 68 of 1969), shall be applicable mutatis mutandis to any claim against the defendant.

(3) Subject to the provisions of sections 26 (2) and 65 (1), no claim against the defendant shall be enforced and the defendant shall not be liable unless the claim has been lodged in writing by hand or post with the defendant within three months of the date upon which it became due: Provided that if a competent court is satisfied on application being made to it, which application shall be made before lapse of two years and nine months from the date upon which the claim became due, that the defendant is in no way prejudiced by reason of failure to lodge such claim within three months and that, having regard to special circumstances, the claimant could not reasonably have been expected to have lodged such claim within such period, such court may grant the claimant special leave to lodge such claim and may make such order as to the costs of the application as may be deemed just".

Section 3 (2) of the 1989 Act reads as follows:

"3. (2) On the date stipulated in terms of subsection (1) the whole of the commercial enterprise of the State as contemplated in section 3 (1) of the South African Transport Services Act, 1981, including all assets, liabilities, rights and obligations of whatever nature, with the exception of the assets referred to in section 25 (1), shall be transferred to the Company, which shall acquire such enterprise as a going concern".

The Court a quo held that the respondent's claim against SATS, which on 1 April 1990 became a claim against Transnet, was as from that date not subject to the provisions of section 64 (3) of the 1981 Act (see the reported judgment at 487 F/G). The reasoning which led to that finding was based primarily on the authority of Curtis v Johannesburg Municipality 1906 T S 308,

and it may be paraphrased as follows: the presumption that the Legislature intended its legislation to affect only future matters does not apply where the legislation in question deals with procedural matters, including the case where an enactment providing for a specified procedure is simply repealed and not replaced by any other procedural provision; section 64 (3) of the 1981 Act was clearly an enactment dealing with purely procedural matters; its repeal was therefore a change which affected a purely procedural matter; accordingly the changed procedure, in the form of there no longer being the necessity to comply with the provisions of section 64 (3), thenceforth applied to all causes of action, whether they arose prior to the repeal or thereafter (see the reported judgment at 486 1-487 C).

In this Court counsel for Transnet argued that the Court a quo's reliance on Curtis v Johannesburg Municipality supra was unsound, for the following four reasons:

(1) The ratio decidendi of the Curtis case does not apply to the facts of the present case.

(2) Doubt was in any event expressed as to the correctness of the ratio

decidendi in the Curtis case, in Protea International (Pty) Ltd v Peat

Warwick Mitchell & Co 1990(2) S A 566 (A) at 573 A-B.

(3) Section 64 (3) of the 1981 Act was part of the substantive law, not a procedural measure, so that the ratio of the Curtis case cannot be applied to its repeal by the 1989 Act in any event.

(4) After all is said and done, the question whether a particular repealing enactment was intended to have retrospective effect is a matter of interpretation of the legislation in question, and no such intention appears from wording of the 1989 Act.

As to (a) above, counsel pointed to the question which called for decision in the Curtis case and to the actual decision on that question. The question was whether a statute introducing a period of prescription in respect of certain causes of action applied to causes of action that arose before its promulgation. The decision of the majority of the Court is reflected in the following passage in the judgment of INNES CJ at 316:

> "There is, therefore, considerable weight of Roman-Dutch authority in favour of the view that a statute of limitations, which in terms draws no distinction between debts due before and those which became due after

> its promulgation, should be held to apply to both classes, but that the period of limitation should be calculated in regard to the former class as from the date of promulgation".

Of course, the question to be decided in the present case is a different one, and the actual decision in the Curtis case does not itself provide the answer to it.

But the Court a quo did not rely on the decision in the Curtis case in so far as it related to the facts of that case. The Court a quo's reasoning was based on the recognition in the Curtis case of an exception to the general rule that statutes should be considered as affecting future matters only, and on the finding that the statute in that case by its nature fell within the ambit of the exception. As to the latter finding, it was said in the judgment of INNES CJ at 312 that the statute was in effect a statute of limitations, and that it must be taken as settled law "that statutes of limitations barring the remedy are portion of the law of procedure". As to the exception to the general rule against retrospectivity, INNES CJ said the following (at 312):

> "Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the

> cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective. Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose".

It is these considerations that the Court a quo applied in resolving the issue in the present case. Whether the manner of their application to the facts here was right or wrong will emerge when I come to discuss counsel's submissions in (c) and (d) above.

As to (b) above, the doubt which was voiced by JOUBERT JA in the Protea International case supra about the correctness of the decision in the Curtis case was related specifically to the principle of Roman-Dutch law formulated by INNES CJ in the first passage from his judgment quoted above (at 316). That principle is not directly in issue in this case, as I have already indicated. Nor was it in issue in the Protea International case, as was stated by JOUBERT JA himself (at 573 B). However, lest it be thought that I share the doubt, I feel bound to suggest, as my personal opinion, that the view of my learned Colleague might require reconsideration if the need should arise in a

future case to examine the Roman-Dutch law principle in question. The reasons for my suggestion are briefly as follows. JOUBERT JA's doubt, as expressed at 573 B, arose from the references in the judgments of INNES CJ and MASON J in the Curtis case to Paul Voet (De Statutis 8.1.3.6) and Van Wesel (Comm ad Nov Const Ult 21.53). These writers commented on a statute of Utrecht in which it was expressly decreed that a newly introduced period of prescription would apply to debts which arose before the passing of the statute, in such a way that the period of prescription commenced to run from the date of promulgation. JOUBERT JA said of the comments of Paul Voet and Van Wesel that they were "purely factual" (at 572 F). With respect to my learned Colleague, I do not agree. As I read these writers, they postulated a general principle, of which the express provision of the statute was merely an exemplification. The passage in Paul Voet commences with the statement of the principle, and then proceeds to refer to the statute of Utrecht, introducing this topic with a remark signifying that the principle is reflected in the statute ("Hinc patescit ratio artic 21. . ."). Van Wesel first states the provision of the statute and then observes that the position would ipso jure have been the same,

apart from the provision of the statute ('id quod el citra edictum ipso jure obtinuisset". In passing it is interesting to note, with a view to what is to be said later, that Van Wesel explains this position by saying that the statute does not apply to past matters, but only to prescription in the future — i e it operates prospectively and not retrospectively). In the Curtis case INNES CJ and MASON J relied on the statements of the general principle by the two writers, as is evident from the passages in the judgments at 315-6, 317 and 327-8. In his dissenting judgment SMITH J (at 322-3) did not call into question the majority's reading of these authorities (he declined to apply the writers' opinions to the law in question, because of its express wording). As was remarked by both INNES CJ and MASON J, Van Wesel refers to other writers in support of his statement of the general principle. However, since the principle is not in issue now, it is not necessary to pursue the matter any further.

As to (c) above, counsel pointed out that section 64 (1) of the 1981 Act provided in express terms that a claim against SATS would be extinguished by prescription after three years. The extinction of a claim by prescription, counsel said, is regarded as a matter of substantive law, and it followed that the

Legislature intended the whole of the section, including subsection (3), to deal

with substantive law. Accordingly, so the argument proceeded, when the Legislature said in section 64 (3) that "the defendant shall not be liable" unless a claim is lodged within three months, it meant to convey that the claim would be extinguished if it were not lodged within that period. The proviso meant, counsel argued, that if special leave were granted, the claim would be revived. Counsel sought to find support for his argument in the opening words of subsection (1), in which it is made subject to the provisions of subsection (3), and in cases decided in the context of other pieces of legislation dealing with time bars and applications for condonation. I do not propose to discuss the cases referred to, for I have no doubt that on the wording of sections 64 (1) and 64 (3) counsel's argument must be rejected. There is no warrant for taking the notion of the extinction of a claim from subsection (1) and transplanting it onto subsection (3). The two subsections deal with different matters, and the pronounced differences in the wording point strongly to differences in concept. It is clear, I think, that when the Legislature said that "no claim shall be enforced" it was stating the position from the point of view of the claimant, and

when it added "and the defendant shall not be liable", it meant no more than to state the same position from the point of view of the defendant. It is hardly conceivable that the Legislature would have wanted to bring about such an artificial situation as contended for by counsel, namely to provide for the extinction of the claim in one breath and in the next to provide for its resuscitation on special leave being granted. It is far more likely that the intention was merely to keep in suspense the enforceability of the claim, pending the granting or the refusal of special leave or, in the absence of either, the lapse of a period of two years and nine months. While the enforceability of the claim remained in suspense, the claim itself would continue to exist.

The point of counsel's argument on the interpretation of section 64 (3) was, of course, to show that the Court a quo was wrong in regarding the section as an enactment dealing with purely procedural matters, and thus to avert the applicability of the exception to the rule against retrospectivity as stated in the Curtis case. The rejection of the argument that section 64 (3) provided for the extinction of the claim entails the rejection of the argument that the section was, for that reason, a measure dealing with substantive law.

is necessary now to consider the consequences of the rejection. At this point it will be convenient to turn to the argument of counsel for the respondent.

Counsel for the respondent premised his argument on the distinction between the two different ways in which an enactment dealing with prescription, or a time bar, can operate: it can either extinguish the right of action itself or it can render the right unenforceable by merely barring the remedy. In the first case, the enactment is a measure of substantive law; in the latter, it is procedural in character. This categorization is well known in our case law. Its application in a context such as the present in fact derives from the Curtis case. More recently, in the Protea International case supra at 568 1-569 B, it was applied in contrasting the provisions of the old Prescription Act 18 of 1943 with the new Prescription Act 68 of 1969. Counsel for the respondent relied strongly on this categorization. Since section 64 (3) did not extinguish a claimant's right of action but merely suspended the enforcement of the remedy, the section fell into the category of procedural enactments and for that reason, counsel emphasized, its repeal operated retrospectively, with the consequence that it ceased to apply to all claims, including those that had arisen

before the repeal. In my opinion the argument oversimplifies the issues to be considered, for the reasons which follow.

To begin with, I would draw attention to INNES CTs explanation of the retrospective operation of a law dealing with procedure, in the Curtis case at 312. The passage is the second excerpt from the judgment which was quoted above. The learned Chief Justice was considering the straightforward case of applying the new procedure to a cause of action which arose before the date of promulgation. If no more than that is involved, the law is not being applied in a truly retroactive manner. The words in an old English case which have frequently been quoted with approval in our Courts are apposite: the law

> "... is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing".

(See eg Swanepoel v Johannesburg City Council; President Insurance Co Ltd v Kruger 1994 (3) S A 789 (A) at 793I-794A). Also opposite is the remark in another English case, which has again often been quoted with approval in our Courts:

> "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective".

(See eg Adampol (Pty) Ltd v Administrator. Transvaal 1989 (3) S A 800 (A) at 811 D-F). These considerations underscore the significance of INNES CJ's questioning whether it is accurate to say that a law dealing with procedure is retrospective, coupled with his observation that it is a convenient way of stating that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose. Of even greater significance, for present purposes, is his statement that, to the extent which the law must regulate the procedure even though the cause of action arose before the date of promulgation, "but to no greater extent", the law is said to be retrospective. It is implicit in the words I have emphasized that in a situation where more is involved than the straightforward application of the new procedure to a cause of action which arose before promulgation, the convenient way of saying that the law is retrospective is no longer appropriate, and that other considerations must come into play.

In this context it is advisable, I consider, to emphasize once again that the fundamental and decisive enquiry is always directed at ascertaining the intention of the Legislature (see Adampol's case supra at 809 F-J and

Swanepoel's case supra at 794 A-C). To place the categorization of the statute, as being either one of substantive or one of procedural law, in the forefront of the enquiry, may lead one astray. Curtis's case is no warrant for falling into error in this respect. Indeed, in Euromarine International of Mauren v The Ship Berg and Others 1986 (2) S A 700 (A) at 709I-710E MILLER JA, after referring to passages in the three judgments delivered in the Curtis case, concluded as follows:

> "... what is clear from the several judgments is that primarily, in every case, the inquiry must be into the language of the enactment and the purpose and intent of the Legislature which emerges therefrom".

MILLER JA proceeded at 710E-I to quote a passage from the judgment of LORD BRIGHTMAN in Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All E R 833 (PC) at 836. Apart from stressing the importance of determining the intention of the Legislature (and, it may be noted, with a view to what is to follow, of the relevant provisions of any interpretation statute), the passage quoted contains observations which are very pertinent in the present case.

LORD BRIGHTMAN said, inter alia, that the expressions "retrospective" and "procedural" can be misleading, and that an Act which is procedural in one

sense may in particular circumstances do far more than regulate the course of the proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

Looking at section 64 (3) in this light, it will be convenient to divide it up into its three main component parts: (i) the claimant must lodge the claim within three months; (ii) the sanction for non-compliance with (i) is that the defendant shall not be liable; (iii) the sanction will be lifted if the claimant applies for and obtains special leave to lodge the claim out of time. Part (i), when considered in isolation, can be said to be procedural in character. But the same can certainly not be said of part (ii). If the claimant should bring an action after the lapse of three months and the claim has not been lodged, the sanction of part (ii) confers a complete defence on the defendant. Although the defence arises from the failure to comply with what may be termed a procedural requirement, the defence itself is not a procedural matter; it is sufficient to ward off the claim and is therefore a matter of substantive law.

As to part (iii), while the application for special leave may be regarded as a procedural step, the granting of special leave has more than merely procedural

consequences: it not only terminates the suspension of the enforceability of the

claim, but also deprives the defendant of the substantive defence of which he could previously have availed himself. And if special leave is refused, the condition upon which the enforceability of the claim was contingent (the granting of such leave) fails, with the consequence that the claim is in effect, and in substance, extinguished. This will also be the position after the expiry of two years and nine months, if no application were made within that period.

Superimposed on the aforegoing considerations there is this important feature of the present case, that we are enquiring into the effect of the repeal of section 64 (3). It follows from the above analysis of the section that the stage at which the repeal takes effect is of vital importance in determining its consequences. If the repeal comes before the expiry of the three months' period stipulated in part (i) above, its effect would be to abolish prospectively the need for lodging the claim and thus to remove the possibility of the defendant in the future acquiring a defence based on the failure to lodge it. It would be the straightforward kind of situation discussed by INNES CJ in Curtis's case. But

it is immediately apparent that different considerations will come into play if

the repeal comes after the expiry of the three months' period, without a claim having been lodged. The position is no longer straightforward. The sanction under (ii) above has come into operation, by virtue of which the defendant has acquired a defence to the claim. At the same time the claimant was entitled, before the repeal, to apply for special leave to lodge the claim in terms of (iii) above. The effect of the repeal in this situation is, of course, the problem which falls to be addressed in the present case.

It follows from what has been said above that the attempt to categorize section 64 (3) as procedural is of no assistance in resolving the problem. The solution must be found elsewhere. As mentioned under (d) above, counsel for Transnet argued that the wording of the 1989 Act did not disclose an intention on the part of the Legislature that the repeal of section 64 (3) of the 1981 Act was to be retrospective. The importance of finding the intention of the Legislature in resolving questions of retrospectively has already been discussed. But here we are dealing with the simple repeal, without more, of section 64 (3), wiping out the whole structure which had been set up by it. The repealing Act

silent about what the consequences were intended to be. No guidance can be obtained from its wording. What must be done, is to examine the position in which the respondent and SATS found themselves immediately before the repeal, and to consider the possible effects of the demise of the structure on the parties, substituting Transnet for SATS (because of the simultaneous transfer of rights and obligations). In this context counsel for Transnet advanced a further argument, which must now be considered. The thrust of this argument was that the solution to the problem was to be found in the provisions of section 12 (2) of the Interpretation Act 33 of 1957. I agree.

Section 12 (2) provides as follows:

"12.(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not—

(a) ...

(5) ...

(6) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(7) ...

(8) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability,... as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, ... as if the repealing law had not been passed".

For convenience, in considering the impact of these provisions on the

facts of this case, I shall at first leave out of account the substitution of SATS by Transnet and refer to the position of the claimant in this case and the defendant generally under section 64 (3) in a situation like the present. Taking first the position of the defendant, it is clear from my earlier analysis of section 64 (3) that the defendant as at the date of the repeal had a complete defence to the claimant's claim, based on the claimant's non-compliance with the requirement of lodging the claim within three months. The defendant was exempt from liability, immune against the enforcement of the claim. In short, the defendant was vested with the right to resist the claim. That right had accrued to the defendant under section 64 (3), and it was enforceable against the claimant in the particular relationship which had arisen between the two parties.

Seeking to avert the conclusion that the defendant's right fell within the ambit of section 12 (2) (c) of the Interpretation Act, counsel for the respondent argued that it was not a "final" right until the expiry of a period of two years and nine months, because within that period the claimant would have been

entitled, but for the repeal, to obtain special leave to lodge and so to restore the

enforceability of the claim. But that is neither here nor there. If full and unqualified effect were to be given to the repeal, the defendant would be deprived of its then existing right to resist the claim, and that is precisely what section 12 (2) (c) of the Interpretation Act in effect prohibits. It can make no difference to the applicability of this section that the right might for some reason have ceased to be effective at some time in the future. Counsel for the respondent also argued that, if section 12 (2) (c) were to be applied, the defendant would be better off than before the repeal, because the claimant was no longer entitled to apply for special leave after the repeal. I do not agree, as will appear from what follows.

Turning then to the position of the claimant, counsel for the respondent's argument was that her right to apply for special leave under section 64 (3) was a purely procedural matter, and as such fell away on the repeal of the section; that she had no right to obtain special leave, but only a hope that the court might grant it, because the court's power was discretionary; and that, for these reasons, the claimant had no accrued "right" within the ambit of section 12 (2)

(c) of the Interpretation Act. For these submissions counsel relied on Director of Public Works and Another v Ho Po Sane and Others [1961] A C 901 (P C). The argument must be rejected. I do not consider it necessary to analyse the case referred to; it suffices to say that it turned on statutory provisions and facts which differed in a number of material respects from those in the present case (cf Gunn and Another NNO v Barclays Bank DCO 1962 (3) S A 678 (A) at 684 D-F), and that I am satisfied, on a consideration of section 64 (3), that counsel's argument cannot be sustained. Its basic fallacy lies in its designation of the court's power to grant special leave as "discretionary", on which counsel based the further submission that the court would decide whether the claimant "should be given the right to lodge the claim". This submission implies that the court has a discretion in the narrow sense as apposed to the wide sense, as explained in Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor") 1992 (4) S A 791 (A) at 796 G-I and 800 C-G. But it is the other way round. If the requirements for obtaining special leave are established (no prejudice to the defendant and special circumstances showing that she could not reasonably

have been expected to have lodged timeously) the court is obliged to grant

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special leave (cf Webster and Another v Santam Insurance Co Ltd 1977 (2) S A 874 (A) at 881C-882D). For the purpose of determining the applicability of section 12 (2) (c) of the Interpretation Act one must, of course, postulate the claimant's ability to satisfy the requirements for obtaining special leave (cf Gunn's case supra at 686 D-E). On that supposition there can be no doubt, in my view, that a right under section 64 (3) to be granted special leave had accrued to the claimant within the purview of section 12 (2) (c) of the Interpretation Act. That being so, it does not avail the respondent's counsel to point to the procedural nature of the right to apply for special leave, for that right is expressly catered for and protected by the provisions of paragraph (e) and the concluding words of section 12 (2) of the Interpretation Act.

The conclusion is that section 12 (2) had the effect of preserving the status quo and that the rights of both the claimant and the defendant survived the repeal of section 64 (3). Turning then to the simultaneous transfer of rights and obligations from SATS to Transact, it is clear that such transfer cannot detract from the conclusion as stated; the only effect of the transfer was that

the identity of the defendant changed. If anything, section 3 (2) of the 1989

Act supports the conclusion, for it is likely that the Legislature contemplated that by the transfer of SATS's rights and obligations to Transnet the latter would be placed in no better nor in any worse position than SATS had been.

It follows that the Court a quo erred in making a declaratory order in terms of the respondent's alternative prayer. It should have considered and pronounced upon the relief sought in the main prayer, i e an order granting the respondent special leave to lodge her claim.

Anticipating the possibility of such a result, counsel for the respondent urged us to consider and come to a decision on the main prayer. Counsel for Transnet opposed this course and said that the matter should be remitted to the Court a quo, but for no other reasons than that the Court a quo had not given any decision on the facts and that Transnet had brought the appeal to this Court only on the point of law decided below. I do not consider that these are grounds for not acceding to the proposal of the respondent's counsel. Counsel for Transnet properly conceded that he could not rely on any prejudice to Transnet if this course were followed, and he did not suggest that this Court

would not be in as good a position as the Court a quo to decide the matter on the record. I can see no reason for further delaying a decision upon the respondent's right to the relief claimed in the main prayer by sending the matter back to the Court a quo, with the attendant possibility (of which counsel for the respondent reminded us) of a further appeal ensuing later.

In the respondent's founding affidavit it is said that she sustained severe injuries to her left leg and foot in the accident, which, it will be recalled, happened on 15 August 1989. She was taken to hospital and her leg was amputated below the knee. Complication set in which required treatment. She was initially discharged from hospital on 24 August 1989. During September her mother on her behalf consulted an attorney with a view to claiming damages from SATS. The mother reported that the attorney wished to see the respondent personally. She was, however, unable to attend upon the attorney because she was suffering much pain and was quite unable to move about freely. In December she was provided with a below-knee prosthesis which she was required to wear permanently. This caused a great deal of pain and she remained incapable of freely moving about. She was first able to see the

attorney at the end of February 1990.

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From affidavits attested to by the respondent's attorney it appears that the respondent's mother consulted him on 13 September 1989. Since she had not witnessed the accident, she was unable to provide any details of it. The

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attorney was told that the respondent was unable to see him because of her injuries, whereupon he told the mother that the respondent should call on him as soon as possible. He meanwhile initiated enquiries to the South African Police and to Livingstone Hospital where the respondent had been treated, in order to obtain information to enable him to assess the merits and the quantum of the claim. The police notified him on 25 September 1989 that they had no record of the incident. He succeeded in obtaining a medical report from the hospital only on 22 February 1990. The respondent called on him at the end of February, and on 7 March 1990 he wrote to SATS, lodging the claim, as was mentioned earlier. The letter also requested SATS to condone the late notice

of the claim, on the grounds that SATS would not suffer prejudice and that the respondent's injuries had precluded an earlier notification of the claim. SATS responded in an undated letter, saying that it could not condone non-compliance

with section 64 (3) and that only a court could grant special leave to lodge a claim.

In the answering affidavit filed on behalf of Transnet the deponent states that he has no knowledge of the allegations made by the respondent and her attorney concerning the former's disability and the latter's attempts to gather information, but he submits that in any event the respondent has not shown special circumstances as envisaged by section 64 (3). As to prejudice, the respondent's averment that there was none is denied, on the ground that at that stage (i e the stage when the application to court was launched, in May 1991) it was not possible for SATS to obtain any evidence relating to the occurrence. A thorough investigation by an official of all possible sources of information proved fruitless. In this regard it should be mentioned that the respondent annexed to her replying affidavit a letter written on 6 October 1989 to her attorney by the Station Commander at New Brighton station. The letter states that "a railways charge has been lodged as per CR B5-08-89 - climbing on a train whilst in motion", and that "case has been finalised and is to be forwarded to the SPP for decision". On the basis of this letter the respondent alleged in

her replying affidavit that SATS must have preferred a charge against her,

supported by affidavits of its employees, and that accordingly it was inconceivable that Transnet was unable to obtain information of the occurrence. No attempt was made by Transnet to refute these allegations.

In terms of section 64 (3) the Court is required to be satisfied that Transnet is in no way prejudiced by reason of the failure to lodge the claim within three months, and that, having regard to special circumstances, the respondent could not reasonably have been expected to have lodged the claim within such period. On the evidence summarized above I am satisfied on both scores. As to the latter, special circumstances are in my view constituted by the respondent's inability because of her injuries to call upon her attorney and the latter's lack of success in looking elsewhere to obtain the information he required for formulating the claim (cf Webster's case supra at 882 E-F). The respondent was entitled to look to her attorney to do everything that was necessary to pursue the claim (cf Webster's case at 883 G) and, having regard to her physical condition, she could not reasonably have been expected to do more. As to the attorney's conduct, counsel for the respondent argued that at

worst for the respondent the attorney was negligent in not submitting a claim timeously, which in itself would be a special circumstance (cf Webster's case supra at 883 H-884 B). It is not necessary to consider whether or not the attorney was negligent. If he acted reasonably in waiting for a personal interview with the respondent and for a medical report, then a fortiori this requirement is satisfied.

As to prejudice, the allegations contained in the respondent's papers were sufficient to make out a prima facie case that Transnet was not prejudiced by the delay, and in my view Transnet's bald reply that it was unable to obtain any information about the incident was inadequate to meet that prima facie case. Nothing is said about what the position was in March 1990 (some four months after the expiry of the prescribed three months), when SATS was alerted to the need to make enquiries. More importantly, nothing is said about what the position would have been had the claim been lodged just before the expiry of the prescribed period. The whole thrust of Transnet's opposition was directed solely at the position as at May 1991. No attempt was made to show that the position was then any worse for Transnet than it would have been for

SATS in November 1989 when the three months expired. For all we know, the

same difficulties might have been encountered in gathering information in 1989. The test of section 64 (3) is prejudice by reason of the failure to lodge within three months. Transnet's opposition was not directed at that question. The respondent's prima facie case was not met.

In my judgment, therefore, the Court a quo should have granted an order in terms of the respondent's main prayer. Counsel were agreed that, if that were to be the result, an order in those terms should be substituted for the order issued by the Court a quo, with costs in the Court a quo to the respondent. The prayer in question fixes a time for the lodging of the claim; it is proper, I think, to extend that time in the order to be issued by this Court.

Finally, as to the costs of the appeal, both parties have achieved partial success. Transnet has procured the setting aside of the order made by the Court a quo, but has not staved off the substition of another order in its place. Counsel for Transnet properly conceded that, from a purely practical point of view, Transnet is not in a better position, as far as this particular case is concerned, than it would have been had the order to be substituted been granted

in the first instance, but he pointed out (and I accept) that the legal issue decided by the Court a quo was a matter of principle, of far greater importance to Transnet, with a view to other pending matters, than the factual basis of the order to be substituted. On the other hand, the respondent failed in her defence of the order granted a quo, but succeeded in obtaining substituted relief. In all the circumstances I consider that it would be fair to order each party to bear its or her own costs of the appeal.

The order of the Court is as follows:

(9) The appeal is allowed.

(10) The order of the Court a quo is set aside, and there is substituted for it an order as follows:

"(a) Special leave is granted to the applicant in terms of section 64 (3) of Act 65 of 1981 to lodge her claim in writing by hand or post with the respondent within 20 days after judgment is delivered herein.

(b) The costs of the application are to be paid by the

respondent".

(11) The time mentioned in paragraph (2) (a) above is extended to 20 days after delivery of this judgment.

(12) It is ordered that the appellant and the respondent shall each bear its and her own costs of the appeal.

AS BOTHA JUDGE
OF APPEAL

CONCUR

VAN HEERDEN JA
HEFER JA
NIENABER JA
HOWIE JA