REPORTABLE

CASE NO: 397/96

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

S A EAGLE INSURANCE COMPANY LTD APPELLANT

and

LYNNE PRETORIUS RESPONDENT

CORAM: SMALBERGER, MARAIS, SCHUTZ, SCOTT and PLEWMAN JJA

DATE OF HEARING: 18 NOVEMBER 1997

DELIVERY DATE: 27 NOVEMBER 1997

JUDGMENT

SMALBERGER JA:

The Multilateral Motor Vehicle Accidents Fund Act 93 of 1989

("the Act") was, prior to its being repealed and replaced by the Road Accident Fund Act 56 of 1996, the latest in a line of statutory enactments dating back to 1942 designed to compensate persons injured, or the dependants of persons killed, through the negligent driving of motor vehicles. The intention of the legislature from the outset was to give such persons the greatest possible protection (Aetna Insurance Co v Minister of Justice 1960(3) SA 273 (A) at 285 E-F). Initially this was sought to be achieved by providing for compulsory insurance. This necessarily lead to distinctions being drawn between instances involving insured and uninsured vehicles. After the enactment of the Motor Vehicle Accidents Act in 1986 it was no longer required of individuals that they procure insurance cover. The Fund established by that Act, operating mainly through authorised agents, became primarily liable for

the payment of compensation. It was financed for this purpose by means of a fuel levy. The identity of the vehicle, as opposed to its driver or owner whose alleged negligence had given rise to a claim for compensation, assumed less significance. Although since 1942 legislative amendments and new enactments were required from time to time in order to adapt to changing needs, and to refine and improve the whole system of compensation, the principles and object underlying the 1942 Act and its successors have remained unaltered. In the result the Act was also intended to provide the protection referred to in the Aetna Insurance Co case (supra), and it must be interpreted accordingly.

The present appeal concerns a plea of prescription. The matter has its origin in a collision which occurred between two motor vehicles on 30 April 1990. The respondent ("the plaintiff") was injured in the

collision. The circumstances were such as to render the provisions of the Act applicable.

The Act incorporates within a schedule an agreement ("the Agreement") establishing a fund ("the MMF") for the payment of compensation for certain loss or damage unlawfully caused by the driving of certain motor vehicles. Article 40 of the Agreement provided at the relevant time:

> "The MMF or its appointed agent, as the case may be, shall subject to the provisions of this Agreement be obliged to compensate any person whomsoever (in this Agreement called the third party) for any loss or damage which the third party has suffered as a result of-
>
> (a) any bodily injury to himself;
>
> (b) the death of or any bodily injury to any person,
>
> in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place within the area of jurisdiction of the Members of the MMF, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Agreement called the driver) or

> of the owner of the motor vehicle or his servant in the execution of his duty."

The wording of article 40 clearly imposes an obligation upon the MMF or its appointed agent to compensate a third party who has suffered loss and has otherwise satisfied the pre-conditions for compensation.

The appointment of agents to the MMF is provided for in article 13. Sub-article (b) further provides that an appointed agent shall be competent

> "(i) to investigate or to settle on behalf of the MMF the prescribed claims contemplated in Article 40 of the Agreement, arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof has been established; or
>
> (ii) to commence, conduct, defend or abandon legal proceedings in connection with such claims."

It follows that where the identity of the owner or driver of the vehicle concerned cannot be established the obligation to compensate is solely

that of the MMF. Conversely, where such identity is capable of being established, and has been established, the obligation to compensate rests on the appointed agent.

For the purposes of the appeal the following facts are common cause and were the foundation of a stated case in the Court below:

1) The appellant ("SA Eagle") was at the relevant time an appointed agent of the MMF;

2) The plaintiff was the driver of one of the vehicles involved in the collision;

3) The vehicle with which the plaintiff collided ("the other vehicle") was a Volkswagen Golf with registration letters and number NMP147T;

4) The name of the owner or driver of the other vehicle at the time of the collision was unknown to the plaintiff;

5) On 23 March 1992, in purported compliance with the provisions of article 62 of the Agreement, to which reference will be made below, the plaintiff's attorney submitted claims for compensation on the prescribed forms to both the MMF and SA Eagle;

6) Under the heading in the forms "Particulars of motor vehicle which caused the loss or damage" the vehicle in question was described as a Volkswagen Golf Sedan NMP 147 T;

7) Under the same heading questions relating to the "name and address of owner" and "name and address of driver at time of accident" were left blank;

8) The claims were received by the MMF on 27 March 1992 and by

SA Eagle on 30 March 1992;

9) On 2 April 1992 the SA Eagle returned the claim forms to the plaintiff's attorney under cover of a compliment slip on which it was stated that the name and address of the driver or owner of the other vehicle was needed;

10) The returned documents were in turn sent by the plaintiff's attorney to the MMF on 13 April 1992 and were received by it on 16 April 1992;

11) Thereafter correspondence followed between the plaintiff's attorney and the MMF;

12) In due course the MMF appointed an assessor with a view to establishing the identity of the driver or the owner of the other vehicle;

13) On 15 September 1994 the MMF informed the plaintiff's attorney

that the identity of the driver or owner of the insured vehicle had been established, and repudiated the claim made against it;

14) The plaintiff instituted action against SA Eagle on 21 March 1995 and against the MMF on 25 March 1995.

Apart from pleading on the merits SA Eagle filed a special plea in the following terms:

"1. Die botsing het plaasgevind op 30 April 1990, en word die aksie beheers deur die bepalings van die Multilaterale Motorvoertuigongelukkefondswet, Wet no. 93 van 1989 (soos gewysig).

2. Ingevolge Artikel 13 van die Wet is die Verweerder as benoemde agent slegs bevoeg om die eise bedoel in Artikel 40 van die ooreenkoms wat ontstaan uit die bestuur van 'n motorvoertuig in die geval waar die identiteit van of die eienaar of die bestuurder daarvan vasgestel is, te ondersoek of te skik.

3. Ten tyde van die indiening van die oorspronklike eis op 25 Maart 1992, is die naam van die eienaar of bestuurder van

die betrokke voertuig nie voorsien nie.

4. Die identiteit van die versekerde bestuurder is eers op 22 September 1994 aan die Verweerder voorgele, nadat 'n tydperk van drie jaar soos bedoel in Artikel 53 van die Wet reeds verstryk het vanaf die plaasvind van die botsing.

5. Gevolglik het die Eiseres se eis teen die Verweerder verjaar."

In its plea MMF pleaded, inter alia, "dat die bestuurder van die ander motorvoertuig wat in die botsing betrokke was wel geidentifiseer is, en dat die Verweerder gevolglik nie aanspreeklik is vir die bantering van die Eiseres se eis is nie".

The issue of prescription raised by SA Eagle in its special plea, and the issue raised by MMF in its plea as set out above, were, by agreement, heard jointly by way of a stated case which incorporated the common cause facts to which reference has been made. The learned

trial judge (Swart J) granted an order:

1) Dismissing SA Eagle's special plea of prescription as being bad in law while upholding the defence raised by the MMF;

2) Declaring that SA Eagle was accordingly liable to the plaintiff for damages but the MMF not;

3) Directing SA Eagle to pay the plaintiff's costs of action in the one case; and directing the plaintiff to pay the MMF's costs in the other.

SA Eagle was refused leave to appeal by the trial judge, but was subsequently granted leave by this Court pursuant to a petition to the Chief Justice.

Article 62(a)(i) of the Agreement provides that a claim for compensation and accompanying medical report shall be set out in the prescribed form "which shall be completed in all its particulars". In

terms of article 62(d)(i), any form not so completed "shall not be acceptable" as a claim under the Agreement. (Contrast the provisions of article 48 where liability of the MMF or an appointed agent is specifically excluded if a claimant refuses or fails to comply with certain prescribed requirements.) There has been a provision worded similarly to article 62(d)(i) in existence since 1978. Prior to that the wording used was "is not acceptable". In my view there is, in the context in which they appear, no difference in substance or meaning between the two phrases; nor does the difference in wording signify any change in legislative intent with regard to the position before and after 1978. The Afrikaans version "is nie ... aanvaarbaar nie" remained unaltered. Had any change been intended one would have expected more explicit phraseology.

Notwithstanding the wording of article 62(d)(i) and the corresponding wording of its predecessors, in a long line of decisions in this and other courts pre- and post-1978 it has been held that (1) the submission of a claim form is a peremptory requirement; (2) the prescribed requirements in regard to completion of the form are directory; and (3) what is required is substantial compliance with such requirements. (See Rondalia Versekeringskorporasie van Suid-Afrika Bpk v Lemmer 1966(2) SA 245 (A); Nkisimane and Others v Santam Insurance Co Ltd 1978(2) SA 430 (A), particularly at 435 F - 436 E; A4 Mutual Insurance Association Ltd v Gcanga 1980(1) SA 858 (A) at 865 B-F; Evins v Shield Insurance Co Ltd 1980(2) SA 814 (A) at 831 B-F and Guardian National Insurance Co Ltd v Van der Westhuizen 1990(2) SA 204(C), where the relevant principles are conveniently and concisely

set out at 210 B - 211 F, and Moskovitz v Commercial Union Assurance (Co of SA Ltd 1992(4) SA 192 (W).) In Nkisimane's case (supra) at 436 E - F, Trollip JA doubted that it was ever the intention that a defectively completed form could be relied upon as an additional defence to a claim for compensation.

It also appears from the authorities to which I have referred that the test for substantial compliance is an objective one (AA Mutual Insurance Association Ltd v Gcanga (supra) at 865 H). Broadly speaking, the question must be posed whether sufficient particularity has been furnished to enable a reasonable insurer to consider its position in relation to the claim before it becomes involved in litigation, and to enable it to investigate the claim, if necessary. Differently put, would a reasonable insurer have been prevented by any omission or inaccuracy

in the claim form from properly investigating the claim and determining its attitude towards it?

In the recent case of Multilateral Motor Vehicle Accidents Fund v Radebe 1996(2) SA 145 (A) at 152 E-I, Nestadt JA said:

> "It is true that the object of the Act is to give the widest possible protection to third parties. On the other hand the benefit which the claim form is designed to give the fund must be borne in mind and given effect to. The information contained in the claim form allows for an assessment of its liability, including the possible early investigation of the case. In addition, it also promotes the saving of the costs of litigation. . . These various advantages are important and should not be whittled away. The resources, both in respect of money and manpower, of agents and particularly of the fund are obviously not unlimited. They are not to be expected to investigate claims which are inadequately advanced. There is no warrant for casting on them the additional burden of doing what the regulations require should be done by the claimant. There can be no (substantial) compliance where the claimant has merely indicated to the fund how it, through its own efforts, can obtain the necessary information or documents."

While these remarks are, generally speaking, also apposite to a

matter such as the present, they were made with specific reference to whether there had been substantial compliance with regulation 9(l)(b)(ii) of the regulations made in terms of sec 17 of the Motor Vehicle Accidents Act 74 of 1986. They must be viewed in that context.

Whether or not in a given case there has been substantial compliance with the provisions of article 62(a) and (d) will in the first instance depend upon the facts of the particular case. It will also depend upon the nature of the information sought - is it general or specific? The degree of particularity required may depend upon whether there are explicit requirements that have to be satisfied (as was the position with regulation 9(l)(b)(ii) dealt with in Radebe's case (supra) which required that the claim form shall be accompanied by certain prescribed documentary proof). An omission or inaccuracy per se does not

necessarily mean that there has not been substantial compliance with the prescribed requirements, nor is there any provision in the Act or the Agreement which renders a claim form a nullity simply because of a failure to answer questions of the kind under consideration. It would lead to an absurdity if a non-consequential omission or inaccuracy were permitted to invalidate a claim.

Mr Bezuidenhout, for the appellant, contended that the plaintiff's failure to answer the questions relating to the owner or driver of the other vehicle involved in the collision rendered the claim form ipso facto invalid as against SA Eagle, as it conveyed to it that the claim was one which related to an instance where such driver or owner could not be identified.

Assuming negligence, the plaintiff was entitled to compensation

from either the MMF or SA Eagle. The latter's liability, however, was dependent upon the identity of the owner or driver of the other vehicle being established. In the claim form the plaintiff furnished details of the make, type and registration number of the other vehicle. In addition a line was put through paragraph (d) of the section in question headed "If the claim is made in terms of Regulation 3". (Regulation 3 deals specifically with the liability of the MMF.) Those factors, taken in conjunction, provided in my view a clear intimation to SA Eagle that the plaintiff was not proceeding on the basis that she would be unable to establish the identity of the owner or driver in due course despite her inability to do so, for one reason or another, at the time she submitted her claim form. A reasonable insurer in the position of SA Eagle would have realised that the plaintiff was looking to it for compensation. At

the same time, such information relating to the vehicle as was furnished, coupled with information concerning the time, date and place of the collision and the police station to which it was reported, would reasonably have enabled SA Eagle to make successful enquiries, as MMF later did on the strength of the same information, as to the identity of the owner or driver. It is true that nothing precluded the plaintiff from embarking upon an investigation to establish the identity of the owner or driver before submitting the claim form. And one would normally expect a prudent plaintiff to do so. Failure in this regard could lead to a plaintiff instituting action against the wrong defendant and being non-suited or at least, through uncertainty, incurring costs that could have been avoided (as was ultimately the case here where the plaintiff's uncertainty lead to her instituting action

against both SA Eagle and the MMF - in the case of the latter unsuccessfully and at cost to herself which could have been avoided). This is not a case where the information not furnished was peculiarly within the knowledge of the plaintiff. The information was as accessible to the plaintiff as to SA Eagle, perhaps more so to the latter given its expertise and greater resources.

The question remains whether, given the circumstances of the matter, and having regard to the purpose the claim form was sought to serve, there was substantial compliance. Although the matter is not one free from difficulty, in my view, as previously mentioned, the information contained in the claim form was sufficient to convey to SA Eagle that the plaintiff intended looking to it for compensation. It reasonably afforded the latter a proper opportunity to consider its

position in relation to such claim and to carry out such investigation as it deemed necessary or appropriate. SA Eagle thus effectively received the benefit the claim form was designed to give it. That being so, the fact that the plaintiff might have done more than she did is in itself not sufficient to justify the conclusion that her claim was inadequately advanced and the claim form accordingly invalid (See the unreported Transvaal Provincial Division Full Bench decision in Ziphora Manne v Allianz Versekeringsmaatskappy Bpk - case no A1589/92, judgment delivered on 12 August 1993 - where the same conclusion was reached on similar facts.) It follows that there can be no question of the plaintiff's claim having prescribed.

2 The appeal is dismissed with costs.

J W SMALBERGER
JUDGE OF APPEAL

SCHUTZ JA) CONCUR
SCOTT JA) PLEWMAN JA
)

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HEARD: 18 NOVEMBER 1997

DELIVERED: 27 NOVEMBER 1997

J U D G M E N T

MARAIS JA/

MARAIS JA:

I would uphold the appeal. In Radebe's case (cited in the judgment of the majority) this court held that the provision of certain information to the fund or its agent prior to the commencement of litigation against cither was made an essential prerequisite by the legislature for the reasons set forth at page 152 A - I. It is inherent in those reasons that it is the claimant who is required in the first instance to assemble and provide the relevant information. That docs not mean that the claimant has to guarantee its accuracy or correctness. It is sufficient that the information is given in good faith. If it proves to be wrong, so be it. It will not result in the fund or the agent, as the case may be, being freed from liability if liability does in fact exist. It is no doubt so that a failure to furnish some of the less important information which the form seeks to elicit will not result in the claim

form failing to pass muster. However, it does not follow that as long as information (however important) which is not supplied, can be obtained by the fund or its agent if it sets about making enquiries, the claim form will necessarily pass muster. To merely provide possible sources of information and not the information itself is not what the legislation enjoins. If that were always to be regarded as substantial compliance, one of the important purposes of the legislation articulated in Radebe's case would be largely defeated. An agent is not liable to investigate a claim, let alone meet it, unless the identity of the driver or owner of the vehicle involved in the collision is known. Where a claimant asserts a claim against an agent and fails or refuses to identify the driver or owner notwithstanding that the prescribed form specifically requires that to be done, and notwithstanding that identification of the owner or driver is critical to the very existence of

a claim, I find myself unable to say that there has been any, let alone substantial, compliance with the legislation. In the language of Radebe it is a claim which has been "inadequately advanced". Does the fact that the make and registration number of the vehicle driven by the offending driver was given in this case enable one to say that the lacuna was filled? I think not. It is common knowledge that vehicles often remain registered with the licensing authorities in the name of a particular person despite a change of ownership. Once that is so, there is no room for saying that the giving of a registration number is tantamount to identifying the driver or owner. It provides no more than a spes that an enquiry directed to the licensing authority may lead

to the identification of the owner or driver. That falls far short of the information which is called for in this form. Nor is it relevant whether

in a given case information given regarding the make and

registration

number of a vehicle did or did not lead to the identification of the driver or owner. The fund or agent must be able to say by reference to the claim form alone whether or not there has been an adequately advanced claim before it is required to set enquiries in train and incur the expense associated therewith. The answer cannot depend on the difficulty or ease with which the fund or agent managed to establish the identity of the driver or owner after it embarked upon the enquiry. That is putting the cart before the horse.

With respect, I derive little assistance from contrasting certain provisions in article 48 with article 62 (d) (i) as an aid to the interpretation of the latter. They fulfil entirely different functions. Thus article 48 (f) provides a substantive defence in the circumstances there postulated; it provides for a forfeiture of the claim. A failure or refusal to comply with a provision such as article 48 (f) is not

remediable. It results in forfeiture of the claim. Article 62 (d) (i) is very different. A failure to comply with it does not result in forfeiture of the claim. It is remediable and, if it is remedied before prescription of the claim has occurred, the claimant will be in the same position as he or she would have been if the form had been properly completed when first submitted. If it is not remedied before prescription has run its course, the claim will be prescribed and it will be too late then to rectify the claim form. In my view, article 62 (d) (i) cannot be construed to mean that no matter what information a claimant fails or refuses to furnish, the obligations imposed by article 62 (d) (i) must be regarded as having been substantially complied with provided only that the recipient of the claim would realise that the claim was being made, and that the recipient would be able to obtain the missing information by its own endeavours by tapping sources of information

furnished by the claimant. Any such interpretation would frustrate the attainment of one of the objects which the legislature plainly set out to achieve, namely, that articulated at page 152 A - I of Radebe's case. Generalised and loosely expressed dicta to be found in the cases to the effect that it was not the object of the legislature to provide the fund or its agents with new defences cannot be taken too literally for, if they were, they would fly in the face of the plain language of the legislation. For example, article 48 (f) plainly and unambiguously provides the fund or its agent, as the case may be, with a defence in the circumstances there postulated. There is little reason to believe that the respondent in the present case will have been hard done by if she is non-suited. It is reasonably clear that the respondent had no good reason for not obtaining the necessary information before submitting the claim. The appellant did not acquiesce in the failure to

furnish the information. It sent the claim form back to the respondent's attorneys and drew their attention to its inadequacy. Despite that, no attempt was made by the respondent to obtain and provide the information. That task was simply left to the appellant and the fund. I am unable to accept that that was intended by the legislature to be permissible and that it was consequently an adequately advanced claim.

R M MARAIS JUDGE
OF APPEAL