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Reportable

CASE NO 103/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ENOCH MALINDI **Appellant**

and

COMMERCIAL UNION INSURANCE COMPANY LIMITED **Respondent**

COURT: E M Grosskopf, F H Grosskopf, Marais, Olivier and Plewman JJA

HEARD: 17 September 1996

DELIVERED: 27 September 1996

JUDGMENT

Olivier J A:

I have had the benefit of reading the judgment prepared by my brother, Marais JA. I agree with the conclusion reached by him, but would prefer to base

such conclusion on the approach set out hereunder.

The appellant was injured in a motor vehicle collision which occurred on 7 February 1987. A completed claim form was submitted to the respondent, the appointed agent in terms of the Motor Vehicle Accidents Act, 84 of 1986 ('the Act').

The respondent did not object to the validity of the claim form. On 19 December 1990 the respondent wrote to the appellant's attorneys as follows:

> 'We refer to the above matter and wish to advise that we are prepared to settle your client's claim as follows:
>
> **Quantum**
>
> **Future medical expenditure**
>
> We are prepared to contribute an amount of R2 250,00 towards your client's future medical expenditure.
>
> **Future earnings**
>
> We are not prepared to consider this portion of your client's claim as we are not satisfied with the documentary proof in this respect.
>
> **General Damages**
>
> We are prepared to contribute an amount of

R2 000,00 towards your client's general damages. In addition, we are prepared to contribute an amount of R300,00 towards your client's legal costs.

This offer is made without prejudice and must not be construed as an admission of liability on our part. It is made purely in order to avoid litigation. It will remain open for acceptance for a period of 60 days from the date hereof. If it is not accepted within this period, it will lapse. It is made subject to our being discharged in the normal manner.'

The appellant did not accept the offer contained in the letter and nothing further happened, until he instituted action during June 1993. The respondent then raised prescription as a defence and it pleaded that the said letter was a valid offer in terms of section 14 (2) of the Act, which had the effect of terminating the suspension of prescription 90 days after 19 December 1990, the date of the letter. Section 14 (2) reads as follows:

'(2) If an appointed agent does not within 60 days after receipt of a claim as set out in section 15 (1) object to the validity thereof, prescription shall, notwithstand-

ing the provisions of subssection (1) be interrupted until after the expiration of a period of 90 days from the date on which the appointed agent delivers to the claimant or his representative per registered post or by hand a notice to-

(a) repudiate liability; or

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

The appellant denied that the letter was a valid offer as required by sec 14 (2) of the Act. He averred that it was defective on two grounds:

(1) It was only open for acceptance for a period of 60 days. In the appellant's view, under section 14 (2) of the Act the offer must remain open for 90 days;

(2) The paragraph in the letter dealing with future earnings suspends the offer pending the submission by the appellant of proper documentary proof.

As far as paragraph (1) is concerned, the appellant based his case mainly on Ngantweni v National Employers General Insurance Co Ltd 1991 (2) SA 645

(C), which was followed in Lucas v Sentraboer (Co-operative) Ltd. 1995 (1) SA 334 (W). The respondent, however, relied on the contrary decision of Flemming DJP in Joka v Commercial Union Insurance Company of South Africa 1994 (3) 391 (W).

In Ngantweni's case two consecutive offers were made by the appointed owner. Both were made subject to acceptance within 30 days. De Kock J held that for an offer to satisfy the requirements of section 14 (2) (b) of the Act, it had to be 'unqualified and unconditional' (650 C-D) or 'open, unrestricted' (650 F - G). It must remain open for 90 days; the offers under consideration did not do so, and thus were not valid offers for the purpose of setting in motion the resumption of the running of prescription.

In Joka's case, the offer was open for acceptance within 60 days. Flemming DJP held that it was a valid offer for the purposes of section 14 (2) of the Act. The ratio of his decision was stated as follows (at 393 H - I):

> *'Section 14 (2) governs the running of prescription and not the period for which an offer must be open. It understandably leaves the parties to the common law. In the result, a defendant can make an offer which is open for 120*

days or for 20 minutes. Regardless of the period for which it is open, an offer can be 'an offer of settlement of the claim' as meant in sec 14 (2). It commences the countdown to the recommencement of ticking of the prescription clock.'

In the present matter a Full Bench (Eloff JP, Preiss and Claasen JJ) put its seal of approval on the Joka case. Eloff JP formulated the *ratio decidendi* of the court as follows:

'It will be seen that section 14 (2) does not specifically say for what period the offer is to remain open to effectively bring about the termination of interruption of prescription. The reasoning in support of plaintiff has perforce to be that an implication has to be read into it. Is it a necessary implication? I think not. All that the legislature required an appointed agent to do to revive the running of prescription is to repudiate the claim or to make an offer. The period of 90 days was fixed to allow the plaintiff to take timeous steps to interrupt the complete running of prescription by instituting action. There is, with respect to the views expressed in Ngantweni's case, nothing in the wording used in the Act to support the conclusion

that the legislature intended to accord the plaintiff the luxury of considering an offer of settlement for 90 days. Nor can I agree that the intention of the legislature would be frustrated unless the claimant be allowed 90 days in which to conclude the offer.'

Pursuant to leave granted by that court, the matter is now before us.

'In my view, Eloff DJP followed the correct jurisprudential approach. Section 14 (2) of the Act does not state for what period the offer is to remain open. The plain and ordinary meaning of the words of section 14 (2) does not justify the conclusion that the offer should be kept open for 90 days. Such a qualification can then be read into the section only if it is a necessary implication, which it will only be if in the absence thereof, the application of the plain and ordinary meaning would lead to some absurdity, inconsistency, hardship or anomaly, which from a consideration of the enactment as a whole, a court of law is satisfied the legislature could not have intended (see Bhyat v Commissioner for Immigration 1932 AD 129). This principle was encapsulated by Lord Bramwell in Cowper Essex v Acton Local Board 14 AC 153 at 169 in the rule:

'The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity.' (See also Land- en Landboubank van Suid-Afrika v Rousseau NO 1993 (1) SA 513 (A) at 518 H).

In the present case, the adoption of the ordinary and grammatical meaning of the words leads to no absurdity, inconsistency or inequity whatsoever. The manifest object of the whole of section 14 (2) is to place a duty on the insurer either to make an offer or to repudiate liability if it wishes to terminate the suspension of the running of prescription. By not qualifying the words 'offer' or 'repudiating' further, the legislature clearly intended these terms to bear their ordinary meaning. A valid offer requires such certainty that mere acceptance would result in a contract. According to the common law, an offeror can stipulate the life of the period for which the offer is open for acceptance. There is nothing in section 14 (2) to indicate that the insurer cannot likewise limit the period for which the offer is to remain open. If the plaintiff does not accept it within the stipulated period, his remedy is to institute action. As he or she is the claimant who has already prepared full particulars of the claim for purposes of lodging the prescribed claim, the institution of action is merely a formal step. There

are thus no considerations of sufficient force to override the plain and unambiguous language used in section 14 (2) (a) of the Act.

The second ground on which reliance was placed, is without any merit whatsoever. The rejection of the claim in respect of future earnings was unambiguous. The fact that an explanation was given for such rejection did not change the rejection into an invitation to re-open negotiations or to provide further proof of these claims. There is, moreover, no evidence that the letter was so understood by the appellant.

The appeal is dismissed with costs.

P J OLIVIER J A

Concur:

E M Grosskopf

F H Grosskopf

E H Plewman

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MALINDI : ENOCH **Appellant**

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CORAM:	E M Grosskopf, F H Grosskopf, Marais Olivier *et* Plewman JJA
HEARD:	17 September 1996
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J U D G M E N T

MARAIS JA/

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The issue for consideration in this appeal is one which has given rise to conflicting decisions in the Provincial Divisions. Section 14 of the Motor Vehicle Accidents Act No 84 of 1986 ("the Act") governs the prescription of claims made under the Act. The relevant provisions are these:

"**14. Prescription of claim.** - (1) (a) Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of paragraph (b) of this subsection, the right to claim compensation under section 8 from an appointed agent in respect of claims referred to in section 6 (1) (a) (i) shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the periods referred to in subsection (2) of this section and section 15 (2).

(b) .....

(2) If an appointed agent does not within 60 days after receipt of a claim as set out in section 15 (1) object to the validity thereof, prescription shall, notwithstanding the provisions of subsection (1), be interrupted until after the expiration of a period of 90 days from the

date on which the appointed agent delivers to the claimant or his representative per registered post or by hand a notice to -

(a) repudiate liability; or

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

(3) .....

(4) .....

(5) .....

(6) ....."

The general scheme of things appears with reasonable clarity. Barring exceptions to the general rule, prescription commences to run against a would-be claimant from the date of the accident. If nothing is done by either party which would interrupt or suspend the running of prescription, the claim will prescribe two years later. If a claimant lodges a claim in the manner prescribed by section 15 of the Act, and the recipient does not object to its validity within 60 days after its receipt, the running of prescription against the claim

will be suspended indefinitely and will resume running only if the recipient of the claim does one of two things. It may either repudiate liability or convey an offer of settlement of the claim to the claimant or his representative. In either event, the running of prescription against the claim will resume 90 days thereafter. Inasmuch as the lodging of a claim in terms of section 15 of the Act is a condition precedent to a claimant's right to sue, it follows that a claimant who lodges such a claim will always have a **minimum** period of two years and 90 days available within which to institute legal proceedings in a court of law and, in practice, the period will probably be longer, as it is highly unlikely that a repudiation of liability will occur or an offer of settlement will be made on the same day that a claim in terms of section 15 is received.

It will be gathered from this that while a claimant is able

unilaterally to suspend the running of prescription by the mere lodging of a claim, the recipient is able unilaterally to cause prescription to resume running either by repudiating liability or by making an offer of settlement. It goes without saying that if the recipient adopts the latter course, the offer which it makes must be an offer of the kind contemplated by section 14 (2) (b) of the Act. If it is not, it will not trigger the resumption of the running of prescription against the claim. The issue which has given rise to dissension is whether or not an offer to settle the claim which affords the claimant a period of less than 90 days within which to accept the offer is such an offer. It was held that it was not in **Ngantweni v National Employers General Insurance Co** 1991 (2) SA 645 (C) and **Lucas v Sentraboer (Co-operative) Ltd** 1995 (1) SA 334 (W). It was held that it was in **Joka v Commercial Union Insurance Co of SA Ltd** 1994 (3) SA 391 (W) and *in casu* by

the Court *a quo* (Eloff JP, Preiss J and Claasen J). The issue comes before us by virtue of leave to appeal granted by the latter Court.

The courts which held that an offer of settlement which gave the claimant less than 90 days to accept the offer was not an offer of the kind contemplated by section 14 (2) (b) of the Act, did so solely on the strength of what they considered to be the purpose of the provision, namely, not only "to give even greater protection to third parties against losing their right to recover compensation than they had before", but also "to afford the claimant the same opportunity to consider an offer of settlement during the full period of suspension under section 14 (2) that is allowed the agent by section 15 (2) (a)". The words quoted are those of de Kock J in **Ngantweni's** case, *supra,* at p 650 E-F. The latter purpose, so it was said, would be frustrated if an offer could be made "which the claimant is unable to convert into

a settlement of his claim through acceptance thereof at any time during the 90-day period". (**Ibid** at p 650 F)

With all due respect, I am unable to agree. Conclusions regarding the purpose of the relevant provisions cannot rest upon *a priori* assumptions as to what was intended, and what policy considerations motivated the legislature in so intending. They must be derived from the language of the legislation. I can find nothing in the language of the relevant provisions which lends any support to the notion that one of the objectives of the legislation was to compel recipients of claims under the Act, when making offers of settlement, to keep them open for acceptance for 90 days on pain of such offers being inefficacious to trigger the resumption of the running of prescription, if they were not so kept open. The provisions deal explicitly with the subject of prescription and nothing else. They do

not purport to lay down a prescribed *spatium deliberandi* which must be accorded to a claimant when an offer of settlement is made to enable him or her to decide whether or not to accept the offer. Giving the language of the provisions its ordinary meaning, all that they do is provide a claimant who is faced with such an offer with a reasonable period of time within which to consider the offer **and to sue if it be rejected.** The very fact that the institution of legal proceedings may also have to be accomplished within the period of 90 days if prescription is to be averted, demonstrates that the legislature could not have intended that the entire period of 90 days had also to be available for the consideration of the offer. *Ex hypothesi* it could not be if summons might have to be issued within the same period in order to avert prescription of the claim.

It is abundantly clear that the selfsame period of 90 days

following upon a repudiation of a claim for which section 14 (2) (a) of the Act provides, is afforded solely to enable a claimant to decide whether or not a resort to litigation should be had, and if so, to institute the litigation. Again, the need to actually institute the litigation within the period of 90 days if prescription is to be averted, will diminish *pro tanto* the period of time available to decide whether or not to sue. This shows that the legislature was not concerned to provide a *spatium deliberandi* of any particular length in either section 14 (2) (a) or (b); it was concerned to provide a period of time within which a resort to legal action could be had if that were necessary to avert prescription.

On the face of it, a period of 90 days is a far longer period than would be regarded as reasonable for the consideration of an offer of settlement. That too points away from the purpose of the

provision being to provide a specific *spatium deliberandi* of 90 days for the consideration of an offer of settlement.

Acceptance of the contrary proposition would not necessarily be beneficial for claimants. Indeed, it could have results quite different from those which its supporters envisage. If only an offer which is open for acceptance for 90 days will provide a claimant with a corresponding 90 days within which to institute a claim which might otherwise prescribe, then an offer which is open for acceptance for a lesser period will not provide that claimant with the 90 days within which to institute action which the legislature intended to be the consequence of the making of an offer of settlement in the form provided by section 14 (2) (b). To illustrate: A claimant lodges a claim six months after an accident. Prescription will thus have run for six months. The recipient repudiates liability within a week. For 90

days thereafter the running of prescription is suspended but it resumes running on the 91st day and continues running. The claimant does nothing to pursue his claim and a point is reached when the claim is about to be extinguished by prescription. On that very day the recipient of the claim delivers to the claimant by hand an offer of settlement which is open for acceptance for 60 days. If that is not to be regarded as an offer of settlement within the meaning of section 14 (2) (b), what will the consequences be for the claimant? Prescription will continue to run against his claim because the offer will not provide him with another 90 days during which the running of prescription against his claim will be suspended. The claim will therefore prescribe on that day notwithstanding the making of the offer of settlement, unless he issues and serves summons on that day. He will therefore not only have had virtually no time to consider the offer

before issuing summons, he will also have had no additional time within which to actually issue summons. The same result follows if one postulates, instead of a repudiation of liability, followed much later by an offer which was open for acceptance for 60 days, an early offer of settlement which does give 90 days for its acceptance, followed by a much later offer which was open for acceptance for only 60 days. In these circumstances therefore, the contention is subversive of the very benefits which its adherents consider it is intended to provide.

Support for the contention that the offer had to remain open for acceptance for 90 days was sought in the decision of this Court in **Santam Insurance Limited v Williams** 1992 (2) SA 273 (A). The issue in that case was whether the making of a second offer of settlement had the effect of providing a claimant with a further

period of 90 days during which the running of prescription against his claim would be suspended. The conclusion was that it did. It is true that the court considered that the 90 day period in question was intended *inter alia* to afford a claimant an opportunity to consider the offer, but I do not understand the decision as laying down that the entire period of 90 days must be made available for that purpose before the offer will qualify as an offer within the meaning of section 14 (2) (b) of the Act. That was not the issue which was before it, and when the judgment is considered in its entirety, I think it is plain that the court was doing no more than laying down that a new offer, irrespective of how long it might be open for acceptance, would result in the claimant acquiring another period of 90 days during which the running of prescription against his claim would be suspended, and during which it would be open to him to issue summons. That of

course would be an interpretation of the relevant provision which would enlarge the scope given to a claimant to avoid the barring of his claim by prescription and that is manifestly the purpose of the provision as has been frequently recognised by the courts.

If the legislature did intend to restrict the right which the recipient of a claim would have at common law to make such offers of settlement as it thought fit, it has given scant indication of any such intention in the Act. Thus it has not prohibited the making of oral offers of settlement, nor has it decreed that any such offer shall remain open for acceptance for any particular period of time. Oral offers of settlement would obviously not be offers of the kind contemplated by section 14 (2) (b) for the latter are to be made by way of a "notice" delivered to the claimant or his representative "per registered post or by hand". Yet they may be made. They will afford the claimant no

relief in the form of a suspension of prescription if prescription is running when they are made. It is so of course that, if such an offer is made at a time when the running of prescription is suspended, it will not trigger the resumed running of prescription, but the fact remains that the legislature has not sought to shield a claimant against the making of an oral offer which allows less than 90 days for acceptance even although prescription is running against the claimant. In the light of that, there is little, if any, reason to suppose that it intended to do so in the case of the written offers referred to in section 14 (2) (b) of the Act. The provision is resoundingly silent on such matters as the terms upon which such offers may be made.

If an offer is to qualify as an offer within the meaning of section 14 (2) (b) and have the consequences spelt out in section 14, it will obviously have to be a *bona fide* offer, the time for acceptance

of which is not so short as to render the offer illusory, and it will have to be an offer which, if accepted, will dispose of the claim. It will also have to be conveyed to the claimant or his representative by notice by registered post or by hand. But there is no warrant for reading into the provisions of the Act any other requirements with which the offer will have to conform. There are certainly no such other requirements expressly spelt out in the Act and it is trite that they cannot be regarded as having been impliedly required unless such an inference is quite inescapable. That is manifestly not the case.

In the instant case the offer made was open for acceptance for 60 days which can hardly be described as a derisory period of time, indicative of a lack of *bona fides*. It was an offer which, if accepted, would have disposed of the claim and it was made in the manner required by the Act. It served therefore, after the lapse of 90

days after the date upon which it was made, to trigger the resumption of the running of prescription and by the time the claimant (now the appellant) instituted action, prescription had supervened and the claim was prescribed. The Court *a quo* before which the issue was raised by way of a stated case, was therefore correct in upholding the plea of prescription and in dismissing the appellant's action with costs. The cases of **Ngantweni** and **Lucas**, *supra*, must therefore be regarded as having been wrongly decided in this respect, and the case of **Joka**, *supra*, as correctly decided.

It remains to dispose of a further contention raised by the appellant for the first time in this Court. It was that the offer made by the respondent was not an offer which, if accepted, would have disposed of the claim. It was based upon a paragraph of the letter in which the offer was made, which read:

"FUTURE EARNINGS

We are not prepared to consider this portion of your client's claim as we are not satisfied with the documentary proof in this respect."

Apart from the fact that this contention was not raised for consideration in the stated case, and can therefore not legitimately be raised in these proceedings, there is no merit in the contention. The opening paragraph of the letter reads:

> "We refer to the above matter and wish to advise that we are prepared to settle your client's **claim** (my emphasis) as follows:-"

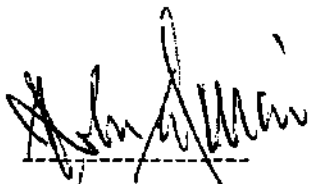
The concluding paragraph reads:

> "This offer is made without prejudice and must not be construed as an admission of liability on our part. It is made purely in order to avoid litigation. It will remain open for acceptance for a period of 60 days from the date hereof. If it is not accepted within this period, it will lapse. It is made subject to our being discharged in the normal manner."

It was plainly intended to be an offer which, if accepted, would put an

end to the appellant's claim in its entirety. The reference to inadequate documentary proof of the claim for future earnings was simply the respondent's explanation for making no offer under that head and, when read in the context of the letter as a whole, not an invitation to the appellant to submit further evidence to enable the respondent to reconsider this particular head of alleged damage.

The appeal is dismissed with costs.



R M MARAIS

E M GROSSKOPF JA)
F M GROSSKOPF JA) CONCUR