REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 224/99

CHARLOTTE VUYISWA McCLAIN Plaintiff

and

H MOHAMED & ASSOCIATES Defendant

JUDGMENT DELIVERED ON 5 JUNE 2003

BLIGNAULT J:

[1] Plaintiff is a lawyer by training and occupation. On 15 January 1994 she was severely injured in a motor vehicle accident. After the accident plaintiff approached defendant, a firm of attorneys that practised at Athlone in the Cape, for legal advice and assistance. She is now suing defendant for breach of mandate.

The Pleadings

[2] Plaintiff claims damages in an amount of R4 249 436,00 plus interest and costs from defendant. The claim arises from a collision that occurred on 15 January 1994 on the national road between Bloemfontein and Winburg between motor vehicle BE 831 A, referred to as the first insured vehicle, driven by one Aaron Mahlalela ("the first insured driver"), and motor vehicle RXS 190 T, referred to as the second insured vehicle, driven by one Vladimir Rodney. Plaintiff was a passenger in the second insured vehicle at the time of the collision.

[3] Plaintiff alleged in her particulars of claim that the collision was caused by the negligence of Rodney. In and as a result of the collision, she alleged, she sustained bodily injuries consisting of:

i) a fracture of the 11th and the 12th thoracic vertebra with spinal cord damage at that level and complete motor and sensory paraplegia below the 12th thoracic vertebral level;

ii) a fracture of the left elbow;

iii) an injury to the first metacarpal of the left hand.

The sequelae of her injuries, she alleged, were the following:

i) she received medical treatment and incurred medical costs in the past and will do so in the future;

ii) she has suffered a loss of earnings/earning capacity in the past and will do so in the future;

iii) she has suffered a loss of amenities of life and experienced pain, suffering, disfigurement and disability in the past and will do so in the future.

[4] Plaintiff alleged that as a result of these injuries and their sequelae she suffered the following damage:

(i)	Estimated past hospital and medical expenses	R15 436,22
ii)	Estimated future medical and related expenses	R1 983 000,00
iii)	Past and future loss of earnings/earning capacity	R1 976 000,00
(iv)	General damage	R300 000,00
		R4 274 436,22

[5] Plaintiff alleged that the second insured vehicle was owned by and rented from Avis Rent-a-Car ("Avis"). She alleged further that by virtue of the provisions of the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989, she was entitled to recover from the Multilateral Motor Vehicle Accidents Fund ("the MMF") and as from 1 May 1997, by virtue of the provisions of the Road Accident Fund Act, 56 of 1996, from the Road Accident Fund ("the RAF"), her full proven damages in the event of her proving that the collision was caused by the negligence of the first insured driver. In the alternative she would have been entitled to recover R25 000,00 from the MMF or the RAF and the balance of her proven damages from Rodney in the event that the collision was caused by the negligence of Rodney. Rodney, she alleged, was indemnified in and by virtue of insurance policies held by Avis, for the benefit of Avis car rental drivers, against all damages or costs that he might have been liable to pay to plaintiff.

[6] Plaintiff alleged that she engaged the services of defendant on 3 May 1994 and instructed defendant, with regard to her injuries and damage suffered as a result of the accident, to investigate all claims available to plaintiff; to take all necessary steps to prosecute all possible claims; to ensure that all possible claims are instituted timeously ; and to properly advise plaintiff. Defendant, she alleged,

accepted her instructions.

[7] It was an implied, alternatively tacit, term of their agreement, plaintiff alleged, that defendant would exercise the reasonable skill, diligence and care to be expected of a practitioner in the field in which defendant was carrying out professional services on behalf of plaintiff. In terms of this mandate defendant purported to give legal assistance to plaintiff.

[8] Plaintiff alleged that defendant failed to exercise reasonable skill and diligence in the performance of professional services pursuant to the mandate. She alleged that defendant advised her of the legal position with regard to possible claims arising out of the collision and advised her that it was of the view that the collision was caused by the negligence of Rodney. Plaintiff thereupon instructed defendant not to pursue a common law claim against Rodney because she was engaged to him at the time and did not wish to expose him to such liability.

[9] Plaintiff alleged that defendant knew at the time that the Avis policies provided third party liability cover but that it acted negligently and in breach of its mandate by failing to inform plaintiff that if she prosecuted a common law claim against Rodney, the Avis policies would indemnify him in respect of his liability to her. Alternatively, she alleged, defendant would have discovered the existence of the Avis policies and the cover provided by it, had it undertaken reasonable investigations at the time. Plaintiff, she alleged, was unaware of the Avis policies and the indemnity coverage granted thereunder. Had she known of the policies and the cover provided thereunder, she would have instructed defendant to pursue a common law claim on her behalf against Rodney.

[10] Plaintiff received payment of damages in the amount of R25 000,00 from the RAF. She is now unable, she alleged, to recover any amount from Rodney because he is not subject to, nor willing to submit to, the jurisdiction of a South African court. Should he submit to the jurisdiction of a South African court he would probably forfeit his indemnity cover under the Avis policies. Any

claim against Rodney in New York, where he resides, she alleged, would have become prescribed three years from the date of the collision.

[11] Had defendant not breached its mandate or acted negligently, plaintiff alleged, she would have recovered her full damages, minus the amount of R25 000,00 received from the RAF, from Rodney by virtue of the cover provided under the Avis policies. She accordingly suffered damage in the amount of R4 249 436,20, for which defendant is liable.

[12] Defendant raised a number of defences in its plea. It pleaded that investigations undertaken by it at the time that it was acting for plaintiff, revealed that the collision was caused partly or solely by the negligence of the first insured driver. If the collision had been caused partly or solely by the negligence of the first insured driver, it pleaded, plaintiff would have been entitled to recover her full proven damages from the MMF or the RAF.

[13] Defendant pleaded that it had no knowledge of plaintiff's injuries, its sequelae or the damage allegedly suffered by plaintiff.
[14] Defendant did not dispute the existence or the terms of the mandate relied upon by plaintiff. It pleaded that the mandate was terminated with effect from 10 November 1997. Defendant admitted that it advised plaintiff that if the collision was caused wholly or partly by the negligence of Rodney, she would be entitled to claim R25 000,00 from the MMF and the balance of her full proven damages from Rodney. It pleaded that it also advised her that if the collision was caused wholly or partly by the negligence of the first insured driver, she would be entitled to recover her full proven damages from the MMF. Defendant admitted that plaintiff instructed it not to pursue the claim against Rodney. It denied that it acted negligently or in breach of the terms of the mandate.

[15] Defendant denied that it had any knowledge of the Avis policies

or the terms thereof and pleaded that it has no knowledge whether

plaintiff was aware of that policies or the terms thereof. Defendant finally pleaded that after plaintiff had terminated its mandate, she instituted an action claiming her full damages from the RAF in the Transvaal Provincial Division of the High Court of South Africa. On or about 19 November 1999 plaintiff withdrew that action against the RAF thereby rendering it impossible for her to obtain payment of her full proven damages from that source.

[16] Plaintiff filed a replication in which she alleged that she took all reasonable steps to mitigate her losses. Had she pursued the action against the MMF or the RAF the court would not have found that the accident had been caused by the negligence of the first insured driver. She alleged furthermore that defendant advised her to withdraw the action against the RAF and thereafter caused or contributed to such withdrawal. Defendant is accordingly prevented from or estopped from relying on such withdrawal.

[17] Defendant filed a rejoinder in response to the replication. It pleaded that the institution of plaintiff's claim against the RAF and the withdrawal thereof took place after plaintiff had terminated defendant's mandate.

[18] The parties agreed at a pre-trial conference that the issues of the merits of the claim and the quantum of damages would be determined separately.

The Evidence

[19] Plaintiff testified that she is a lawyer by training. She obtained the degree, Master of International and Administrative Law, at the University of Warsaw, Poland in 1988 and a LL.M. degree at Cornell Law School, Ithaca, New York in 1990. She returned to South Africa in 1993 and held the position of Senior Researcher, Children's Rights at the Community Law Centre, University of the Western Cape from 1993 to 1997. From 1997 to 1999 she was a Programme Officer at UNICEF (South Africa) in Pretoria. Since 1999 she has been a Human Rights Commissioner with her office in Johannesburg. In late 1993 she was engaged to Vladimir Rodney, a citizen of the United States of America. He was also a trained lawyer and about to commence practising law in New York. He came to visit her in South Africa towards the end of 1993. She hired a motor vehicle from Avis at the Cape Town airport for purposes of his visit. She did not have a driving licence and she accordingly advised Avis that Rodney and her brother Temba would be driving the vehicle. Her brother was in Johannesburg at the time but it was envisaged that they would be driving to Johannesburg to visit her family. After the agreement with Avis was concluded she was given a brown envelope by Avis that contained three documents. The first was the contract between her and Avis, the second a card with information regarding the vehicle and the third an Avis brochure. The contract contains only one driving licence number, which, she assumed, was Rodney's licence number. The first vehicle developed problems with its clutch and was replaced by another Avis vehicle with registration RXS 190 T. The date for the return of the vehicle was extended twice, on the latter occasion to 18 January 1994.

[20] Plaintiff and Rodney drove to Johannesburg to visit her family.

They returned on 15 January 1994. The collision took place on the National Road between Winburg and Bloemfontein. It was approximately 21h00 and already dark. The road was straight and there was a single lane for traffic in each direction. Rodney was driving. There was an ordinary motorcar in front of them and a huge truck in front of the car, all driving in the same direction. They had been following the truck for a while. The car in front of them started to overtake the truck and Rodney proceeded to follow close behind the car. When the car in front of them had passed the truck it returned to the left lane. At that point she suddenly saw lights in front of her. She screamed and raised her left arm to shield her face. Then the collision occurred. Their vehicle ended up on the right hand side of the road. She did not lose consciousness. She was taken to a hospital in Bloemfontein where she spent about two weeks in the intensive care unit. From there she was flown back to the Conradie Hospital in Cape Town.

[21] Plaintiff testified that the defendant firm was recommended to her by the director of the Community Law Centre where she was working at the time. Her first interview with a representative of the firm would have been before 27 April 1994. At that stage she was still in the Conradie Hospital. On 25 April 1994 she signed an authorisation in favour of the firm. The partner in the firm that handled her case was Mr Chohan. Her first meeting with him was in person at his Athlone office. She told him what had happened and they discussed possible claims that might be available to her. The possibility of suing Rodney was mentioned but she told Chohan that she was not keen to do so as she was engaged to him. She did provide him with a name of a New York law firm where she herself had previously worked. They also discussed the possibility of action against Avis, but Chohan told her that she did not have a claim against them because she had declined the insurances when she signed the contract with them. On 12 September 1994 she signed two claim forms for claims against the Aegis Insurance Company as agent of the MMF. The one claim was based on the negligence of the driver of the oncoming vehicle. The second claim was based on Rodney's negligence.

[22] After lodging the claims she received letters from defendant from time to time. She was told that her claim against the MMF by reason of Rodney's negligent driving would be limited to R25 000,00 less costs. On 5 March 1996 she attended a consultation with Chohan. He showed her a report of an assessor which she did not read. According to him the report made it clear that there was no prospect of proving negligence on the part of the driver of the oncoming vehicle. Chohan thereafter wrote a few letters to her to which she did not reply. On 3 April 1998 he advised her that his taxed bill of costs in the matter amounted to R19 088,36 and that he was no longer prepared to act for her as she had not furnished him with further instructions. When she received this letter she consulted her present attorney, Mr Malcolm Lyons. On 1 June 1998 Lyons advised Chohan that she would take the R25 000,00 and that their costs could be deducted from that sum. She signed the discharge form on 6 July 1998. Defendant recovered taxed costs in the amount of R10 812,56 from the RAF and she ultimately received a nett amount of R16 016,19 from the defendant. On 16 September 1998 Chohan handed his entire file to Lyons. An action was then instituted on her behalf against the RAF on the basis of the negligence of the oncoming vehicle. That action was however withdrawn in November 1999. Her understanding was that the claim against the RAF had no prospect of succeeding.

[23] Ms Usha Rajcoomar testified that she had worked for Avis in Johannesburg from 1991 to 1998 as a claims technician. She worked with six colleagues in the same department. Ms Keri Bredenkamp was their manager. Their office dealt with claims from all the Avis stations in the country. Upon receipt of an accident report form they would open a file and allocate a number to it. They forwarded all relevant documents to their insurance brokers, PFV Insurance Brokers (Pty) Ltd, generally known as Price Forbes. In this case the accident report reflected Rodney as the driver and plaintiff as the injured person. It was submitted to Price Forbes under cover of a memorandum dated 23 February 1994, written by Ms Bredenkamp. In a column headed 'remarks' the following was noted: *'Possible*

Pass Liab Claim. No PAI." 'PAI', she testified, signifies 'personal accident insurance'. 'Passenger liability insurance', she said, was automatically included in all Avis car hire contracts. It is not specifically mentioned in the contract which the car renter signs. On 25 March 1994 Price Forbes advised Avis in writing that they had registered this claim. On this letter is a note, dated 22 April 1994, in her own handwriting. It reads as follows:

> *"Attorneys called from Cape Town - Mr M Hesse. They are handling MMF/MVA claim on behalf of Themba McClain who has been paralysed in the accident. He wanted our claim form, told him I am not at liberty to do so."*

She explained that she would have written this note immediately after the telephone conversation. It was their policy not to make claim forms available to third parties. On 30 May 1994 she made a note of a further telephone conversation which she placed in this file. It reads as follows:

> *"The attorneys called on behalf of injured person, wanted to know if there is any insurance covering passenger in the Avis vehicle. Told her that there is passenger liability cover. She is to submit a letter and medical reports."*

On 13 February 1995 Mr S le Roux, a colleague of her at Avis, wrote to Price Forbes in regard to the claim in question. It reads as follows:

> *"We refer to the above matter and your letter of 13/01/95 and would advice that the last communication which we received from the Third Party was a telephonic discussion between our Mrs Rajcoomar and Attorneys acting on behalf of the passenger.*

It was intimated in such telecon that a claim would be forthcoming in terms of the passenger liability extension of the policy as the passenger was paralysed as a result of said accident. The attorneys were to have submitted a formal claim together with the necessary medical report. We have to date not received any such communication from the attorneys.

We confirm that we will not be filing our papers for at least a further 12 months owing to the severity of the Passenger's injuries."

On 9 November 1996 Price Forbes advised Avis that they were closing their file as no further approaches had been made by the claimant.

[24] Mr Grant Small testified that he is the director of product services at Alexander Forbes, a company that carries on business as insurance brokers. The name of the company changed from time to time. In 1994 it was generally known as Price Forbes. He had been with Price Forbes from 1984 to 1989 and again from 1994. From 1994 he was the director of automotive services at Price Forbes. He was the servicing broker for Avis. The name of the company was Zeda Car Rental (Pty) Ltd but it traded under the name of Avis Rent-a-Car. He identified the policy issued by the SA Eagle Insurance Company Ltd ("SA Eagle") to Avis for the year 1 April 1996 to 31 April 1997. During the years 1984 to 1989 there were similar policies in

place. This kind of insurance, he said, is fairly common in the industry. The SA Eagle policy for the year from 1 April 1993 to 31 March 1994 could not be found, despite specific efforts to search for it. In his view it is highly likely that a policy on terms similar to those of the 1996/1997 policy, would have been in place during the 1993/1994 year. He confirmed that the following Lloyd's policies covering Avis were in force during the year 1 April 1993 to 31 March 1994. They provided excess cover over and above that of the SA Eagle policy:

A) Umbrella liability policy F3M0140 – R10 000 000,00 any one occurrence/claim and in the aggregate: In excess of R1 000 000,00 underlying insurance.

B) Umbrella liability policy F3M0141 – R30 000 000,00 any one occurrence/claim and in the aggregate: In excess of R10 000 000,00 any one occurrence/claim and in the aggregate: Which in turn in excess of R1 000 000,00 underlying insurance.

C) Umbrella liability policy F3M0142 – R50 000 000,00 any one occurrence/claim and in the aggregate: In excess of R40 000 000,00 any one occurrence and in the aggregate: Which in turn in excess of R1 000 000,00 underlying insurance.

The Lloyd's policies, he testified, broadly followed the terms and conditions of the underlying SA Eagle policy. He pointed out that the only requirement in the S A Eagle Policy regarding the qualification of the driver as an insured driver is that he drove the vehicle with the permission of the insured. He expressed the view that he has no doubt that there was passenger liability cover in respect of Avis rental cars during the year 1993/1994. Under cross-examination he confirmed that the premiums for the insurance in the year in question had been paid by Avis to the S A Eagle and Lloyd's.

[25] Small's evidence was supplemented by the following written statement made by him on 15 May 2003, which was admitted by defendant:

> *"a) This is to certify that, as requested from me during my evidence in Cape Town, I have investigated the payment of premiums by Avis in respect of Motor Third Party Policy including Passenger Liability coverage affected with SA Eagle and with Lloyds of London in the total sum of R91m as explained in my evidence.*
>
> *b) As the Servicing Broker of Avis I have verified:*
>
> *(i) that Avis paid a total premium of R285 000 to SA Eagle Insurance Company in compliance with its obligations under Policy No. SSMP 7796 (under which Passenger Liability Insurance) was effected for the period 1 April 1993 to 31 March 1994 as aforesaid; and*
>
> *(ii) that Servgro (including Avis) further paid a total premium of R184 465,33 (net of VAT) to or for the account of Lloyds of London and Specialised Risks Underwriters in compliance with its obligations*

under the Excess Layer (follow on) Liability covers which it held under Policy No's F3M140, F3M141 and F3M142 in respect of the period 1 April 1993 to 31 March 1994."

[26] Plaintiff called Mr Ronald Bobroff to give evidence as an expert. He has been practising as an attorney since 1973. He is at present the senior partner of attorneys, Ronald Bobroff & Partners Inc, a firm practising in Rosebank, Johannesburg and specialising in personal injury claims. He personally has extensive experience of this kind of work. He was the chairperson of the Gauteng Law Council from 1999 to 2002 and he served as the chairperson of the motor vehicle insurance (personal injury) committee of that council from 1996 to 2000. He testified that an attorney holding himself out as having extensive experience in the field of personal injury claims, should, when faced with the situation that confronted defendant in this case, have investigated whether comprehensive insurance and particularly passenger liability insurance was available to the driver of the vehicle in which plaintiff was a passenger. Such an attorney should have advised the client of the existence of the passenger liability cover before a decision is taken to institute action against the driver. If such cover existed the attorney should have advised her to institute a claim against the driver wherever he might be found. In his view it would have been unreasonable for the attorney not to have taken such steps. He stated further that such an attorney should have known, or discovered through reasonable investigation, that there was generally automatic passenger liability cover for the driver of a rental car, such cover being commonly provided by the major car rental companies of which Avis is one. If the office of such an attorney had been advised by Avis that such cover existed in respect of plaintiff's rental car then it would have been unreasonable for that attorney to fail to investigate the nature and extent of such cover.

[27] Mr Eugene Tome has been employed by Avis for the last five years as its national legal manager. His functions include the giving of legal advice on all kind of legal issues. His attention was drawn to the fact that, in the car hire contract that was signed by plaintiff, Rodney's name appeared in a block with the heading 'remarks' and not in the block where it should have appeared. He testified that this was an obvious error and that Avis would have accepted that Rodney was an authorised driver. He referred in his evidence to an Avis brochure which contained the Avis rates for the period 1 November 1998 to 31 October 1999. He explained that this document would have been distributed internationally to tour operators. Under the heading "Insurances – Passenger liability and third party motor cover" there is a statement that "Total Cover" is R91 000 000,00. Below that in the brochure appears the following statement:

> *"The Avis Rental Agreement covers the renter and any other authorized driver against any claims instituted by Third Parties against the renter or authorized driver for damages as a result of accidental death, injury, or illness and/or loss or damage to their property (which includes their vehicle) caused by the renter or driver."*

Mr Tome explained that the rules of the European Economic Community require the disclosure of this kind of information to travel operators. Before testifying Mr Tome had examined existing records of Avis brochures that would have been readily available to members of the public in South Africa. The brochure that was in effect during

December 1993, contained the following clause:

"***Insurance***

Rates include limited coverage of passenger liability and third party motor liability: Such cover being subject to the terms and conditions of the Avis policy and insurance as is customary in this country. Cover for loss by fire is also included together with cover for damage to the Avis car but may not include loss or damage through civil unrest."

This clause is similar to the clause in the brochure that was handed to plaintiff when she hired the Avis car on December 1994 (that brochure is now part of exhibit 'B'). The Avis brochure that was effective from March 1994 contained an identical clause. Mr Tome said that the attitude of Avis has always been that they would assist any claimant pursuing a claim under this kind of insurance. He confirmed that he had looked for the S A Eagle policy for the period 1 April 1993 to 31 March 1994 but that it could not be found. He testified that the premiums in respect of the S A Eagle and Lloyds policies in question would have been paid by Avis.

[28] Towards the end of plaintiff's case she was recalled in order to give evidence of certain statements made by Rodney in the course of a telephone conversation that took place on Thursday 16 May 2003. One of her legal representatives spoke to Rodney on a loudspeaker telephone and she could hear his answers. The following questions and answers were recorded by her:

"1. Q Mr Rodney, will you or will you not submit in any manner whatsoever to the jurisdiction of a South African court in relation to any claim against you by Charlotte McClain or anyone else arising from the motor vehicle accident in South Africa on 15 January 1994? What is your response?

A My response will be no.

2. Q Does that refusal apply only now, or does it stand for the future?

A It does stand as well for the future.

3. Q Do you agree to physically come to South Africa and be subject here to service of process, or do you refuse to do so?

A I do not agree.

4. Q Does that refusal apply only now, or does it too stand for the future?

A It also stands for the future.

5. Q Do you own any tangible or intangible assets in South Africa?

A No, I do not."

An affidavit deposed to by Rodney was subsequently telefaxed to plaintiff's attorney in which he confirmed these responses in writing.

[29] Mr Jamie, representing defendant, objected to the admissibility of this evidence on the basis that it is hearsay. After hearing argument I admitted the evidence in question and informed the parties that I would provide my reasons for that decision at a later stage.

[30] The following admissions by defendant were also recorded:

"1. Any claim by the Plaintiff against Mr Rodney personally arising from the collision on 15 January 1994 would, if pursued in the United States of America (where Rodney resumed residence as from February 1994 to date), became time-barred by March 1997.

2. At all material times Mr Mark Hess (with whom Mrs Usha Rajcoomar of Avis spoke on 22 April 1994) was a candidate attorney of the Defendant firm, and Mr M Mulligan (to whom reference is made in the Defendant's letters) was also an employee of defendant.

3. The cover afforded by the South African Eagle Insurance Company policy referred to in evidence of Mr Small was in place during the period 1 April 1993 to 30 March 1994."

[31] Finally a letter written by Mr L van der Meer on behalf of SA Eagle, was admitted by defendant. It reads as follows:

*"**Re Charlotte McClain/H Mohamed & Associates***

I am duly authorised to state the following on behalf of SA Eagle Insurance Company Ltd [SA Eagle]:

A valid insurance policy [policy number SS MP 7796] providing passenger liability coverage on the same terms and conditions as SA Eagle policy no SS MP 96529 for the period 1 April 1996 to 31 March 1997, existed as between SA Eagle Insurance Company and Zeda Car Rental (Pty) Ltd trading as Avis Rent-A-Car (Pty) Ltd for the period 1 April 1993 to 31 March 1994.

a. All premiums relating to the above described policy for the period 1 April 1993 to 31 March 1994 were duly paid by Avis to SA Eagle and such policy was of full force and effect in respect of the said period.

b. In the event of:

1) A claim having been submitted to SA Eagle, under the abovenumbered policy;

2) By the insured being Zeda Car Rental Pty Ltd;

3) On behalf of the driver/hirer of an insured vehicle in respect of a passenger in an Avis rental car that was hired in the period December 1993 to January 1994, with regard to personal injuries caused by the negligent driving of a driver who was operating the car with Avis' permission (and whose liability was not excluded by the policy);

4) And all the terms and conditions of the policy having been complied with;

5) And liability on the part of the driver/hirer having been established by a Court of law [or to SA Eagle's satisfaction) then;

SA Eagle would have met the claim subject to the terms and conditions of the aforesaid SA Eagle policy."

[32] Defendant closed its case without adducing any evidence.

Breach of Mandate

[33] The terms of defendant's mandate are not in issue. On the pleadings it is in issue whether defendant acted in breach of these terms. In my view it clearly did. On 30 May 1994 Ms Rajcoomar spoke to a person representing defendant on the telephone and informed that person that Avis had passenger liability insurance in place. That information was apparently not taken any further by defendant. Defendant was in any event handed the Avis brochure by plaintiff where passenger liability insurance was specifically referred to. Mr Bobroff expressed the view that an attorney in defendant's position would have been negligent if he did not pursue the question of possible insurance cover under the Avis contract. I have no reason to doubt his opinion on this aspect of the matter. Defendant elected not to call any witnesses. In these circumstances I have no hesitation in finding that defendant indeed breached the terms of its mandate in the respects alleged by plaintiff.

Was Rodney covered by Insurance?

[34] Mr Mitchell, who appeared with Mr Jamie on behalf of defendant, did not in argument dispute that Rodney drove the vehicle in a negligent manner or that such negligence contributed to the cause of the collision in which plaintiff was injured. He did call into question, however, the existence and extent of the insurance cover that would have covered Rodney's liability to third parties. Turning to the SA Eagle policy first, the relevant part of the clause in question reads as follows:

"The company will also, in addition to the limit of indemnity stated herein

1 pay all costs and expenses incurred with their consent (which shall not be unreasonably withheld) and shall be entitled at their discretion to arrange for representation at any inquest or enquiry in respect of any death which may be the subject of indemnity under this Section or for defending in any magistrate's court any criminal proceedings in respect of any act causing or relating to any event which may be the subject of indemnity under this Section.

2 Indemnify (in terms of and subject to the limitations of and for the purposes of this Section) any person who is driving or using such Vehicle on the Insured's order or with the Insured's permission."

[35] This type of clause, Mr Mitchell submitted, is found in many comprehensive motor insurance policies. It does not, however, he submitted, create any legal liability on the part of the insurance company. It is binding in honour only. Mr Mitchell referred in this regard to **Gordon and Getz The South African Law of Insurance 4th edition** by **Davis** at 443 – 446. This author suggests that there

are two reasons why the standard clause is not legally valid. The first is that there is no direct contractual relationship between the insurer and the driver and the wording of the standard policy negatives any intention on the part of the driver to enter into a contract with the driver. The second reason is that the insured has no insurable interest in the driver's contingent liabilities for whose negligence he could not be made liable. The author concludes as follows:

> *"For both the above reasons the clause does not confer any enforceable rights on the authorized driver. It is binding in 'honour' only. But as Lord Wright has observed 'honour policies' are common in insurance business, and any insurer which failed to fulfil its 'honourable obligations' would be liable to pay in business reputation. In practice insurers do meet these obligations provided that, as a matter of construction, a claim falls within the terms of the clause."*

In the light of the author's statement of what happens in *'practice'*, Mr Mitchell conceded that, as a matter of fact, the S A Eagle would probably, as an *'honourable obligation'*, have met a claim by Rodney for an indemnity under its policy. Mr L van der Meer's letter indeed makes it plain that the S A Eagle would have met such a claim.

[36] Different questions, however, arise under the Lloyd's policy as its wording differs from that of the S A Eagle policy and there is no

suggestion that Lloyd's would have met any *'honourable obligation'*. It is therefore necessary to look more closely at the reasons given by **Davis** ***loc cit*** for his statement that the standard motor policy does not create legal rights in the hands of the authorized driver. The relevant clause in the S A Eagle policy differs somewhat from the standard clause discussed by **Davis**. It is clause 9 of the general conditions and reads as follows:

"***9 Rights to other persons***

unless otherwise provided, nothing in this policy shall give any rights to any person other than the Insured. Any extension providing indemnity to any person other than the insured shall not give any rights of claim to such person, the intention being that the Insured shall claim on behalf of such person. The receipt of the Insured shall in every case be a full discharge to the company."

The *stipulatio alteri* (contract for the benefit of a third person) is an established legal concept. It is a contract whereby one person agrees with another to perform something for the benefit of a third person. See the following passage quoted with approval in **JOEL MELAMED AND HURWITZ v CLEVELAND ESTATES (PTY) LTD; JOEL MELAMED AND HURWITZ v VORNER INVESTMENTS (PTY) LTD** 1984 (3) SA 155 (A) at 172 B-C:

"... in the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third

person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two (cf Jankelow v Binder, Gering and Co 1927 TPD 364)... the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A."

On the face of it clause 9 of the SA Eagle general conditions indeed evidences an intention to create a right for the benefit a third party namely the authorised driver. The only qualification of the driver's right in this clause is that the insured must put the claim forward on the driver's behalf. In the present case that requirement would not have created any legal or practical difficulty.

[39] In his doctoral thesis entitled **Die Regte van Derdes Ingevolge Versekeringskontrakte (1990) , Dr P J Bouwer** analyses, at 289 – 293, the legal nature of the typical extension clause in a standard South African motor policy whereby liability cover is extended to an authorised driver of the vehicle. He concludes, convincingly in my view, that it fits the construction of an enforceable *stipulatio alteri* (contract for the benefit of a third party). The insurer undertakes to the insured that it will indemnify the authorised driver in certain defined circumstances. The driver can then accept this indemnification, either expressly or by implication when he enforces his rights against the insurer. The qualification in the standard clause

that the insured must institute the claim on behalf of the driver is a procedural provision that does not affect the parties' substantive rights. (The views expressed by **W G Schulze** in **SA Merc LJ (1997) Vol 9** 64 at 74-75, I may add, are to the same effect.) **Bouwer, *op cit***, deals at 293 -295 with the second reason mentioned by **Davis**, namely the lack of an insurable interest. He points out, correctly in my view, that once the construction of a *stipulatio alteri* is accepted, the question is not whether the insured has an insurable interest in the contingent liabilities of the driver. The only question then is whether the driver himself has such an interest. The answer to that question is obviously in the affirmative.

[38] It is my view therefore that the SA Eagle would in any event have been legally bound to indemnify Rodney. Mr Mitchell submitted, however, that it has not been shown that Lloyd's would have indemnified Rodney in terms of any of the relevant policies. The Lloyd's policy, he pointed out, does not have an extension clause that is similar to that of the S A Eagle policy.

[39] The wording of the Lloyd's policy is indeed different. (In this regard the three policies appear to be similarly worded.) The schedule to the policy contains a description of "the assured". It includes a number of subsidiaries of Servgro International Limited including Zeda Holdings operating as Zeda Car Rental (Pty) Limited. The insuring clause in the policy reads as follows:

> *"1.1 The assured is indemnified up to the Indemnity Limit against the legally enforceable consequences of causing Injury, Damage or Malice or providing Negligent Advice (all as defined in Clause 2) in the course of carrying out the Business, but only in respect of resultant claims made by others for compensation, damages and costs, fees and expenses.*

1.2 All costs reasonably and necessarily incurred in defending or settling such claims will also be paid by Underwriters, as will costs of legal or similar representation at any inquest or other official enquiry into any incident which Underwriters agree might give rise to a valid claim under this Policy, subject to Clause 4.7 ("Defence Costs")."

Clause 4 of the Lloyd's policy reads as follows:

"In respect of any claim which (during the Period of this Policy) is partially indemnified by any Scheduled Underlying Insurance, this Policy operates to the extent that the claim is not met by such Underlying Insurance because of the inadequacy of the underlying indemnity limit. Underwriters agree to follow the interpretation of such Underlying Insurer subject always to the Insuring Clause and the terms, Conditions and Exclusions of this Policy."

Clause 7.2 of the Lloyd's policy provides as follows:

"The indemnity given to the Assured is also extended to any person or party to the extent that any contract entered into by

the Assured requires that such indemnity is given."

[40] A first point of interest is that, unlike the position under the SA Eagle policy, the car renter is not included under the definition of 'assured' under the Lloyd's policy. The assured is Avis itself (and certain other companies). Protection to other parties is extended under clause 7.2. It seems to me that it can hardly be disputed that the car renter would be covered by clause 7.2, nor can it be disputed that its position would be that of a beneficiary under a contract for the benefit of a third party. Once that is accepted the only question then in this regard is whether there is a contract whereby Avis undertook to provide the same kind of indemnity to the driver. The evidence put forward by plaintiff in this case established in my view that there was. The content of the Avis brochure handed to plaintiff made it clear that passenger liability insurance was included in the rates charged by Avis. Avis agreed that drivers other than the car renter might drive the vehicle. There is no suggestion that lower rates would have applied in the event of another person driving the vehicle. There is furthermore no suggestion in the brochure or in the evidence given by

the Avis witnesses that the authorised driver would not have enjoyed the same cover as the car renter.

[41] It seems to me therefore that the Lloyd's policy also contained a contract for the benefit of the driver as a third party which Rodney could have accepted, for example, by claiming to be indemnified under the policy.

Jurisdiction in respect of the Claim against Rodney

[42] Mr Mitchell submitted next that plaintiff has failed to prove that she is unable to recover compensation from the insurers by means of an action against Rodney. Although defendant accepted that any claim against Rodney in a New York court would have prescribed by now, a claim in South Africa would not yet have prescribed as Rodney has been absent from South Africa since February 1994. All that is required is for Rodney to submit to the jurisdiction of a South African court. There is no reason, he submitted, why he should not submit to jurisdiction provided plaintiff provides an indemnity to him in order to make it clear that she is merely suing him in order to be able to benefit from the indemnities provided by the insurance companies.

[43] Plaintiff relied in this regard on Rodney's own assertions for the submission that he is not likely to come to South Africa or to submit to the jurisdiction of a South African court. I admitted the evidence of these assertions in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 which reads as follows:

> *"3. Hearsay evidence.—(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—*

… … …

c) the court, having regard to—

(i) the nature of the proceedings;
(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

Mr Gauntlett, who appeared, with Mr J Trengove, on behalf of plaintiff, submitted that the assertions in question must be seen against the background of a number of facts that are in any event not

in dispute. Rodney is a citizen of the United States of America with no known connection with South Africa other than a relationship with Plaintiff which ended eight years ago. Rodney has been practising in New York as an attorney and still does so. He was on a visit to South Africa when the accident occurred on 15 January 1994; he returned to New York a few weeks later and he has never returned to South Africa. Before the accident Plaintiff and Rodney were engaged to be married. Rodney's relationship with Plaintiff terminated early in 1995 and they have not communicated since then. Rodney has no assets in South Africa. Defendant has formally admitted that Rodney resumed his residence in New York from February 1994 to date (and that the claim against him became time-barred in New York by March 1999). In the light of these facts, he submitted, the accuracy, veracity and reliability of Rodney's assertions can hardly be doubted. Defendant's principal objection to the admission of the assertions was that it deprived its counsel of the opportunity to cross-examine Rodney in order to illustrate the potential benefit of the proposed submission to jurisdiction, namely that plaintiff could sue him in that event and the insurers be called upon to honour their respective

indemnities.

[44] It seems to me that it is necessary in this regard to distinguish between two different questions. The first is the factual question whether, independently of any possible insurance cover, Rodney is likely to visit South Africa or to submit to the jurisdiction of a South African court. The second question is whether he could be persuaded to submit to jurisdiction or come to South Africa for that purpose. The first question depends entirely upon the facts and the probabilities. In this regard Rodney's assertions fit in perfectly with the probabilities. It seems highly unlikely that he would of his own accord ever visit South Africa or submit to its jurisdiction. For that reason I was prepared to admit his assertions as evidence.

[45] Defendant's counsel's argument that defendant might be persuaded to travel to South Africa or to submit to the jurisdiction of a South African court, is superficially attractive. It seems to me, however, that this argument overlooks the nature of the duties that are owed by Rodney to the insurers. In terms of the policies the insurers would be entitled to conduct the defence of any claim brought against Rodney. Clause 5(a)(ii) of the general conditions of the SA Eagle policy provides as follows:

> *"… take over and conduct in the name of the insured the defence or settlement of any claim and prosecute in the name of the insured for their own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim. No admission, statement, offer, promise, payment or indemnity shall be made by the Insured without the written consent of the company."*

Clause 11.3 of the Lloyd's policy provides as follows:

> *"In respect of any claim not covered at least in part by the Underlying Insurances Underwriters may take over and conduct in the name of the Assured the defence or settlement of any claim or prosecute in the name of the Assured for their own benefit and will have full discretion in the conduct of any proceedings and in the settlement of any claim. The Assured will give all necessary information and assistance."*

[46] The rights and obligations of the parties in terms of this kind of clause are akin to those under the doctrine of subrogation. This is the doctrine whereby an insurer which has indemnified its insured under a contract of indemnity insurance, is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss. Apart from the specific content of particular clauses it is a general principle of subrogation that the insured is obliged to refrain from acting in a manner that would prejudice the insurer's rights against the third party. See

MacGillivray and Parkington on Insurance Law 8th edition para 1200:

> *"…the assured may not actively deal with rights against third parties to the prejudice of the insurer. Consequently he will be liable to the insurer in damages for the value of any right wrongfully renounced or any claim wrongfully settled."*

See also **LAWSA First Reissue Vol 12 *sv* Insurance para 391.**

In my view a similar principle would apply to the insurers' rights in this case who are entitled to have a *"full discretion in the conduct of any proceedings"* against Rodney. The position at present is that Rodney would be able to rely upon a defence of prescription if sued by plaintiff in New York. Any submission by Rodney to the jurisdiction of a South African court (either directly or indirectly by visiting South Africa for the sole purpose of allowing plaintiff to establish jurisdiction) would be tantamount to the waiver of a valuable defence (probably his only defence) to such an action. In my view such a waiver would clearly prejudice the insurers. It would entitle them to refuse to indemnify Rodney under their respective policies. The proposed submission to jurisdiction would accordingly, from plaintiff's point of view, be self-defeating.

[47] Mitchell, I should mention, sought to rely in this regard on the judgment of Lord Hewart C J in **DICKINSON v DEL SOLAR, MOBILE AND GENERAL INSURANCE COMPANY LIMITED (Third Parties)** [1930] 1 KB 376. The motor policy in that case provided that the insurer would indemnify the insured against legal liability to

members of the public arising from the driving of the insured vehicle. The insured was an employee of the Peruvian Delegation in London. The car which he was driving was involved in an accident and a third party was injured. The insurer refused to indemnify the insured on the ground that he was immune from civil process. Lord Hewart C J held that the insured had submitted to the jurisdiction of the court on the instructions of his Minister whom he was bound to obey as the diplomatic privilege vested in the Sovereign by whom the diplomatic agent is accredited. The reason for the Minister's decision was that at the time of the accident the vehicle had been used not for official but for private purposes. The insurance company was accordingly held to be obliged to indemnify the insured. It seems to me, however, that the **DICKINSON** is clearly distinguishable. The Peruvian agent was forbidden by his Minister to rely upon diplomatic immunity because his vehicle had been used for private purposes. The position of Rodney in the present case is considered on the hypothesis that he voluntarily submits to the jurisdiction of a South African court for no other purpose than to allow plaintiff to sue him so that she can enjoy the benefit of the indemnities provided by the insurance companies.

The Claim against the RAF

[48] Mr Mitchell submitted finally that plaintiff did not suffer any loss as she would have been entitled to claim the full amount of her loss from the RAF on the grounds of the negligence of the driver of the oncoming vehicle (referred to in the pleadings as the first insured driver). This claim, he submitted, had not become prescribed prior to the termination of the mandate of the defendant firm. Plaintiff had in fact instituted such a claim but it was withdrawn in November 1999.

[49] There are in my view two obstacles in the path of this submission. Firstly, there is no direct or indirect evidence before the court to suggest that the first insured driver was indeed negligent.

Plaintiff was the only person to give direct evidence in regard to this aspect of the matter. On the strength of her evidence I cannot find that the first insured driver was negligent at all. There is also indirect evidence. Plaintiff testified that she was advised by defendant that she had no prospect of proving negligence on the part of that driver.

[50] The second difficulty facing defendant's submission is a legal one. In **NEDCOR BANK LTD t/a NEDBANK v LLOYD-GRAY LITHOGRAPHERS (PTY) LTD** 2000 (4) SA 915 (SCA) the Supreme Court of Appeal confirmed that a claimant in delict is entitled to recover the full amount of its loss from any one concurrent wrongdoer for purposes of calculating the quantum of that loss. The right of action against the other joint wrongdoer must be disregarded. In calculating plaintiff's loss in the present case any possible right of action of plaintiff against the RAF by reason of the negligence of the first insured driver, must accordingly be disregarded.

[51] I am accordingly of the view that plaintiff is entitled to the relief sought by it in this action.

[52] The defendant firm notified plaintiff's attorneys in terms of the provisions of rule 14 that the following persons were partners in the firm at the relevant date: Hoosain Mohamed, Ahmed Ayoob Chohan, Jerome Ramages and Sulaiman Chotia.

[53] In the result I make the following orders:

(1) It is declared that defendant is liable to plaintiff for her damages (less the amount of R25 000,00 recovered from the RAF).

(2) It is directed that the quantum of damages is to be determined in subsequent proceedings.

(3) Defendant is ordered to pay plaintiff's costs, including the cost of two counsel. In this regard it is declared that plaintiff, Small, Bobroff, Rajcoomar and Tome were necessary witnesses.

4) It is declared, for purposes of applying the provisions of rule 14, that the following persons were partners in the defendant firm at the relevant date: Hoosain Mohamed, Ahmed Ayoob Chohan, Jerome Ramages and Sulaiman Chotia.

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A P BLIGNAULT