88/98

REPUBLIC OF SOUTH AFRICA

REPORTABLE

evdw/

Case no : 555/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

ROAD ACCIDENT FUND Appellant

and

RAPHAEL SMITH NO Respondent

Coram : Van Heerden DCJ, Harms, Schutz JJA, Melunsky et Farlam AJJA

Date of hearing : 7 September 1998

Date of delivery : 28 September 1998

JUDGMENT

FARLAM AJA

The facts, the relevant statutory provisions and case law and the contentions of the parties are set out in the judgment of Van Heerden DCJ, which I have had the advantage of reading. My reasons for respectfully disagreeing with his conclusion follow.

A convenient starting point is a reference to the dictum of Miller J in *Apalamah v Santam Insurance Co Ltd*, 1975(2) SA 229(D) 234 A-B which was quoted with approval in *SA Mutual Fire and General Insurance Co Ltd v Eyberg* 1981(4) SA 318(A) 327 D-G. The proposition is that where the two statutes conflict on the *same topic* the generality of the Prescription Act must yield to the third party legislation. In this case the respondent contends that the references to an insane person in the former and to a person detained under the mental health legislation in the Agreement, pertain to the same topic. I have difficulty with this equation, as it seems manifest that, whatever the degree of overlap, not all insane persons are detained, and not all detained persons are insane. This is not one of the simple cases such as minority and subjection to curatorship where the same words are used in

both enactments and plainly the same topic is addressed.

A reference to the mental health legislation over the years tends to confirm that insanity and detention are not always to be identified. As far as this country is concerned the mental health legislation which Parliament must have had in mind when it enacted Act 69 of 1978 and again Act 93 of 1989 was the Mental Health Act 18 of 1973 (to which I shall hereinafter refer as "the 1973 Act"). The 1973 Act was enacted by Parliament following on the Report of the Commission of Inquiry into the Mental Disorders Act (the Van Wyk Commission) (RP80/1972).

A comparison between the 1973 Act and the main act which it repealed, the Mental Disorders Act 38 of 1916, makes it clear that the 1973 Act places as much (if not more) emphasis on the treatment of mentally ill persons as the 1916 Act placed on the compulsory detention of mentally disordered or defective persons. Mentally ill persons may be treated under the 1973 Act either in the community or as voluntary or consent patients who are accommodated in institutions on their own application or, if they cannot understand the meaning and effect of the application, without their objection and on the application of spouses or other near relatives.

This change in emphasis may be gathered from ss 3 and 5 of the 1973 Act (dealing with voluntary patients) and Chapter IV of the 1916 Act (dealing with voluntary boarders), s 4 of the 1973 Act (dealing with consent patients, there being no corresponding provision in the 1916 Act) and the provision now existing for community care (see regulation 1(1) of the Regulations to the 1973 Act, promulgated in GN 565 of 27 March 1975).

The change of emphasis is also apparent from a comparison of s 5(4) of the 1916 Act with s 9(3) of the 1973 Act, which, unlike its counterpart in the 1916 Act, requires a magistrate issuing a reception order to be satisfied that the person to be detained is "mentally ill to such a degree that he should be detained as a patient", which will normally only be the case if the person concerned will be a danger to himself or to others if he is not detained (*cf.* A Kruger in The Law of South Africa vol 17 paragraph 311). The new approach to the treatment of the mentally ill implemented in the 1973 Act was recommended by the Van Wyk Commission, which was presided over by the Hon Mr Justice JT van Wyk: see paragraph 3.8.2 of its Report and also A Kruger, Mental Health Law in South Africa, pp 25-28.

In the common law the principle was accepted that prescription did not run against a person under disability during such disability (see *President Insurance Co Ltd v Yu Kwam* 1963(3) SA 766(AD) 773 F-G). The policy of the law in this regard was expressed in the maxim *contra non valentem agere non currit praescriptio*, (prescription does not run against one who has no capacity to institute action): see eg De Groot, Inleiding 3.46.4; Voet 44.3.11; Van Zurck Codex Batavus sv Praescriptie, Verjaring, Verloop van tyd, n. XIII; Wessels, The Law of Contract in South Africa, 2nd ed, vol 2, para 2764.

The Prescription Act also protects persons under disability (including those who are insane) from the consequences of the running of prescription, no longer by suspending the running of prescription but by delaying its completion until a year has elapsed since the disability in question has ceased to exist: see s 13(1)(a) and (i).

If Parliament in enacting the 1989 Act, with the Agreement as a schedule, which was to have the force of law as if it were an Act of Parliament (see s 2(1) of the 1989 Act), or before that in enacting the 1978 Act, had intended to deprive

persons who had been protected from the running of prescription under the common law and later were protected under s 13(1)(a) of the Prescription Act of any protection at all from prescription, I would have expected much clearer language than the language which was used. Put bluntly the intention attributed to Parliament by the appellant is that an insane person who has not been detained, will, otherwise than at common law and under the Prescription Act, be exposed to the full rigours of prescription. This notwithstanding that Parliament must be taken to have been aware of the fact that a result of the change of policy regarding mentally ill persons which it approved when it passed the 1973 Act was that a large number of persons previously described as insane would not be detained under the mental health legislation. Such an interpretation as the appellant proposes would in my view be profoundly unjust. It is one that is to be avoided by the application of the presumption against unjust legislative intent: see eg *Principal Immigration Office v Bhula* 1931 AD 323 (at 337). The only reason inspiring Parliament to legislate the drastic curtailment of rights contended for is suggested by the appellant to be that the law would become more certain and more easy to administer. This argument seems

to me a mere makeweight, quite inadequate to counter-balance the presumption referred to.

The fact that in 1978 and 1989 Parliament clearly intended to alter the manner in which prescription was to run in the case of minors and persons subject to curators (and at least to an extent in the case of insane persons) does not alter my view. In those cases where there was a change a fair alternative form of prescription was substituted. But protection against prescription remained. What the appellant contends for in this case is that substantial numbers of insane persons were to be stripped of all protection, for the sake of some administrative convenience. Such an intention requires clear expression.

In my view the approach of Foxcroft J (with whom Conradie J concurred) in *Kotze NO v Santam Insurance Ltd*, 1994(1) SA 237 (C) 246-247, is to be preferred to that contained in the judgment of Friedman J in *Terblanche v South African Eagle Insurance Co Ltd* 1983(2) SA 501(N) and that of LC Steyn J in *Van Rhyn NO v AA Onderlinge Assuransie Assosiasie Bpk*, 1986(3) SA 460(O).

I do not think that the problems posed in my learned colleague's judgment as

to what the legal position would be if Sibiya were detained under mental health legislation some time after the collision and was released some years later should impel one to a conclusion different from that stated above. Persons are detained under mental health legislation because they are already suffering from mental illness and the degree of such illness is such that they should be committed to an institution. Parliament must accordingly have been aware that in all cases where insane persons are detained under mental health legislation the delayed completion of prescription enjoyed by such persons under s 13(1) (a) and (i) of the Prescription Act will be overridden by Article 56 of the Agreement, with consequences sometimes more favourable to them (because they will have more than a year after their recovery and discharge to bring their claims) and sometimes less favourable (because they will have less than a year to bring their claims). But it is reasonably clear in my view that once Article 56 takes the place of s 13(1)(a) the legal position set out in the Agreement prevails. However, the exact resolution of these admittedly untidy problems will have to await resolution on another day. In the meantime there is an urgent need that Parliament should make quite clear exactly how it wishes that

the potential conflicts between the Prescription Act and the third party legislation should be resolved. This is an old problem that daily affects many people.

Be that as it may, I cannot accept that merely because these conundrums can arise, Parliament is to be taken to have legislated with the unjust intent contended for by the appellant.

The appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel.

FARLAM AJA

Concur

Schutz JA
Melunsky AJA

88A/98

Case no: 555/96

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In the appeal of

Road Accident Fund Appellant

and

R Smith N.O. Respondent

COURT: **Van Heerden DCJ, Harms, Schutz JJA and Melunsky, Farlam AJJA**

Heard: **7 September 1998**

Delivered: 28 September 1998

JUDGMENT

VAN HEERDEN DCJ:

On 27 May 1989 Mr VN Sibiya sustained bodily injuries when two motor vehicles collided in Soweto. Some five years later the respondent was, in terms of an order of court dated 14 June 1994, appointed as curator ad litem to Sibiya by reason of his mental derangement. Shortly thereafter the respondent, on behalf of Sibiya, lodged a claim for compensation in terms of Article 62 of the Schedule ("the Agreement") to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("the 1989 Act"). This claim was lodged with the Multilateral Motor Vehicle Accidents Fund ("the Fund") whose rights and obligations subsequently devolved upon the present appellant under s 2(2)(a) of the Road Accident Fund Act 56 of 1996.

During September 1995 the respondent instituted action against the

VAN HEERDEN DCJ:

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During September 1995 the respondent instituted action against the

Fund in the Witwatersrand Local Division. On behalf of Sibiya he claimed damages in respect of the aforesaid injuries. In a special plea the Fund averred that the claim had become prescribed on 26 May 1991, i.e. two years after the date of the collision. To this plea the respondent replicated as follows:

> "2.1 By virtue of the provisions of the Prescription Act No. 68 of 1969 prescription does not run against an insane person or a person under curatorship and Sibiya is both insane and a person under curatorship as contemplated in the aforesaid Act;
>
> 2.2 Furthermore, Article 56 of the Multilateral Motor Vehicle Accidents Fund Act provides that prescription shall not run against a person under curatorship and Sibiya is a person under curatorship as contemplated."

The replication evoked an exception by the Fund. Its bases were that Article 56 of the Agreement, which does not provide for suspension of prescription in respect of a claim of an insane person, regulates the running

of prescription under the 1989 Act to the exclusion of the Prescription Act 68 of 1969 ("the Prescription Act"), and that at the time of the respondent's appointment as curator ad litem the claim had already become prescribed.

The matter came before Schabort J who found that because Sibiya was insane the period of prescription prescribed by Article 55 of the Agreement had not been completed when action was instituted by the respondent. Consequently he dismissed the exception with costs but subsequently granted the Fund leave to appeal to this court. Still later the Road Accident Fund was substituted as the appellant in the appeal.

It will have been observed that in the replication it was alleged that "Sibiya is insane" (present tense). At the hearing of the appeal we were informed, however, that the parties had agreed (i) that Sibiya was in fact insane from the date of the collision, and (ii) that a judgment on the

exception will finally dispose of the issues raised by it.

As adumbrated above, the main issue in the court a quo, and also before us, was whether the running of prescription in respect of Sibiya's claim under the 1989 Act was governed solely by the provision of Articles 55 and 56 of the Agreement, or whether s 13(1) of the 1969 Prescription Act also was applicable. Article 55, as originally enacted, made provision for a period of prescription of two years "from the date upon which the claim arose". This Article was not amended until 1 November 1991 (Proclamation 102 of 1991 published in GG 13597 of that date), i.e. more than two years after the date of the collision.

On appeal it was rightly common cause:

(a) that originally Sibiya's claim lay against an agent appointed under Article 13 of the Agreement;

(b) that no claim for compensation was lodged prior to June 1994,

and

(c) that, if the provisions of s 13(1) of the 1969 Prescription Act, relative to insane persons, did not apply, Sibiya's claim would have become prescribed on 26 May 1991.

In so far as material for present purposes Article 56 provided:

"Prescription of a claim for compensation . . . shall not run against:

(a) a minor;

(b) any person detained as a patient in terms of the provisions of mental health legislation . . .

(c) a person under curatorship."

It is immediately apparent that save where (b) or (c) applied, Article 56 made no provision for the suspension of the running of prescription against an insane person.

The material provisions of s 13(1) of the Prescription Act read:

"13(1) If—

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription . . . ; or

. . . . . .

(h) The creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a). . . or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

Three observations are apposite. First, unlike Article 56 of the Agreement, s 13(1) of the Prescription Act does not provide for a suspension of prescription properly so called. It does, however, provide for an extension of the period of prescription. (I shall revert to this at a later stage). Second, in the case of inter alia an insane creditor the completion

of prescription is delayed whether or not he is detained in terms of mental health legislation. Third, if s 13(1) governed the running of prescription in respect of Sibiya's claim, it could not have become prescribed by 26 May 1991.

Before dealing with the precursors of the 1989 Act it is convenient to draw attention to s 16(1) of the 1969 Prescription Act. Subject to a proviso which is not material to this appeal, it provides that:

> "(1) . . . . .the provisions of this chapter [which includes s 13] shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act."

In parenthesis I should mention that the Agreement is stricto jure not an Act of Parliament. In terms of s 2(1) of the 1989 Act it does, however,

have the force of law and falls to be applied as if it were an Act of Parliament.

Prior to its amendment by Act 69 of 1978, The Compulsory Motor Vehicle Insurance Act 56 of 1972 ("the 1972 Act") did not provide for suspension of prescription. Nor did the Motor Vehicle Insurance Act 29 of 1942 ("the 1942 Act"). Subsequent to the amendment, however, s 24(1)(b) of the 1972 Act contained provisions virtually identical to those of Article 56 of the Agreement. So did s 14(1)(b) of the Motor Vehicle Accidents Act 84 of 1986 ("the 1986 Act").

The question whether the amended s 24(1) of the 1972 Act precluded the application of common law rules relating to the suspension of prescription of claims under the 1972 Act, was considered in Terblanche v South African Eagle Insurance Co Ltd 1983 (2) SA 501 (N). In that case

the court was asked to assume that for an uninterrupted period of 30 days following upon a collision the plaintiff was non compos mentis, and that this was a condition which, at common law, would suspend the running of prescription against the creditor concerned. The question for decision was formulated as follows by Friedman J (at 502 F): "whether the category of persons referred to in s 24(1)(b) of the MVA Act [the 1972 Act] is exhaustive of those against whom prescription in terms of the Act does not run or whether the common law relating to the suspension of prescription applies to claims for compensation under the MVA Act."

Friedman J decided that the categories of persons mentioned in the amended s 24(1)(b) of the 1972 Act were exhaustive in the above sense. The main thrust of his reasoning may be thus summarised:

(1) The amended s 24(1) had about it every appearance of being

self-contained and exhaustive in so far as the prescription of claims for compensation under the 1972 Act was concerned (at 502 H).

(2) The listing in the amended s 24(1)(b) of specified persons against whom prescription would not run afforded an indication of an intention to exclude all others from such protection (at 503 E).

(3) Prior to the amendment of s 24(1) of the 1972 Act there were clear judicial pronouncements to the effect that both the Prescription Act and the common law relative to interruption and suspension of prescription applied to the prescriptive provisions of the unamended section and its precursor , s 11 of the 1942 Act. Yet, when it passed the amending Act the

> legislature categorised two classes of persons (minors and persons under curatorship) who in any event enjoyed common law protection against the running of prescription. The only reason for doing so was an intention to bring about a change in the law as previously applied in regard to the prescriptive provisions of s 11(2) of the 1942 Act and the unamended s 24(1) of the 1972 Act (at 504 C-H).

In (3) above Friedman J was, of course, directing his mind to the question whether the amended s 24(1) of the 1972 Act excluded the application of common law rules relating to suspension of prescription. It is clear, however, that he was of the view that the amended subsection also excluded the application of 13(1) of the Prescription Act.

In Van Rhyn N.O. v A A Onderlinge Assuransie Assosiasie Bpk

1986 (3) SA 460 (O) 461 I, LC Steyn J expressed agreement with the view of Friedman J "dat art 24 van Wet 56 van 1972 nou die uitsluitlike kenbron is ten opsigte van verjaring van eise gegrond op daardie Wet." However, that view was not shared in Kotze NO v Santam Insurance Ltd 1994(1) SA 237 (C) 246-7. Foxcroft J, in whose judgment Conradie J concurred, held (at 248E) that since s 14 of the 1986 Act did not specifically deal with insane persons, it did not preclude the application of s 13(1) of the Prescription Act in respect of claims of such persons under the former Act.

In Terblanche Friedman J made no reference to s 16(1) of the 1969 Prescription Act. It will be recalled that in terms of that subsection the provisions of inter alia s 13 of the Act shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which an action in respect of a debt is to be

instituted, apply to any debt arising after the commencement of the Act. The subsection therefore calls for what may conveniently be termed a consistency evaluation. Because he did not make such an evaluation, Friedman J failed to consider whether the provisions of s 13(1) of the Prescription Act in respect of e.g. deceased creditors and creditors who are prevented by superior force from interrupting the running of prescription, were inconsistent with the provisions of the amended s 24(1) of the 1972 Act. His conclusion that that subsection was intended to be fully comprehensive on the subject of prescription of claims under the 1972 Act must therefore be open to doubt.

What has been said above, is to some extent borne out by a finding in Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd 1990(2) SA 693(A) 697. In that case Goldstone AJA considered the question

whether the amended s 24(1) of the 1972 Act was a self-contained provision to the exclusion of the terms of the Prescription Act. Having said that an affirmative answer found some support in a dictum in Terblanche (encapsulated in (3) above), Goldstone AJA, with reference to s 16 of the 1969 Prescription Act, concluded that the dictum was too widely cast.

It follows that in every case in which a plaintiff under the 1989 Act relies upon a provision of s 13(1) of the Prescription Act, the cardinal question is whether that provision is inconsistent with Article 56 of the Agreement.

Before dealing with the submissions of counsel for the appellant, I revert to the effect of s 13(1) of the Prescription Act. I have already said that, unlike Article 56 of the Agreement, s 13(1) does not provide for suspension of prescription. In respect of claims of each class of creditors

mentioned in s 13(1)(a) to (h) prescription does run, subject to the proviso that if the period of prescription would otherwise be completed before, or on, within one year, after the day on which the impediment has ceased to exist, that period shall not be completed before a year has elapsed after that day. Hence, a three year period of prescription does run against a 17 year old minor but is not completed before the lapse of one year from the day on which he attains majority. The three year period thus in effect becomes a five year period. Had s 13(1) suspended the running of prescription, the period of prescription would, of course, have come to an end only when the erstwhile minor became 24 years of age.

The main submission of counsel for the appellant was that there is an inconsistency between the provisions of s 13(1) of the 1969 Prescription Act and Article 56 of the agreement; at least as regards the three classes of

persons mentioned in that Article. In support of this submission counsel for the appellant postulated the following examples.

(a) In terms of s 13(1) a minor may have only one year after attaining majority before the period of prescription is completed; under Article 56, however, that period would only begin to run after he ceases to be a minor.

(b) Similarly, a person who was under curatorship may be better off if the completion of the period of prescription is governed by Article 56 rather than by s 13(1).

(c) If an insane person is detained under mental health legislation and Article 56 is applicable, the running of prescription will be suspended for the full period of his detention. However, if s 13(1) were to apply, the period of prescription may be

completed one year after he regains sanity.

I have little doubt that there is an inconsistency between the two sets of provision as far as minors and persons under curatorship are concerned (cf Erasmus v Protea Assuransiemaatskappy Bpk 1982 (2) SA 64 (N)). As regards insane persons, it is, of course, true that they are not specifically referred to in Article 56. On the other hand, it can safely be assumed that a substantial number of insane persons are in fact detained under mental health legislation, and that by far the majority of persons so detained are in fact insane.

A submission of counsel for the respondent initially appealed to me. The argument was that since Sibiya was never detained, no inconsistency between Article 56 and s 13(1), in its application to insane creditors, could have arisen in casu. On further consideration I am of the view, however,

that an inconsistency exists if the provisions of s 13(1) are potentially incompatible with those of Article 56.

Now, assume that Sibiya was detained under mental health legislation 21 months after the collision; that he was released three years later, and that he regained sanity shortly prior to his release. If s 13(1) applied, the period of prescription would have been completed one year after he regained sanity. If, on the other hand, Article 56 governed the running of time from the date of Sibiya's detention, the prescriptive period would have terminated three months after his release.

Consider a further example. Assume that Sibiya was detained four years after the collision; that he became sane again a month or so later, but that he remained in detention for another two years. If both s 13(1) and Article 56 were to apply, how does one determine when the period of

prescription will be completed?

In the result I am of the view that there is indeed a potential inconsistency between the provisions under consideration. In this regard it is pertinent to bear in mind a dictum of Miller J in Apalamah v Santam Insurance Co Ltd 1975(2) SA 229 (D) 234 A-B, which was quoted in SA Mutual Fire and General Insurance Co Ltd v Eyberg 1981 (4) SA 318 (A) 327 D-G. It reads thus:

> "Where the Prescription Act has a voice on an aspect relating to prescription in respect of which the 'other' Act is silent there is not necessarily inconsistency between the two Acts and the voice of the Prescription Act must needs be heeded. But it is a far cry from that to say that where both Acts deal with the same topic . . . the general provisions of the Prescription Act on that aspect prevail over or affect the specific provisions of the other Act."

Article 56 is not silent on the running of prescription against an insane person. If he is detained the Article finds application.

The history of Article 56 furthermore affords an indication that the legislature did not intend article 13(1) of the Prescription Act to govern the running of prescription in respect of insane creditors. As was pointed out by Friedman J in Terblanche (see (3) above), prior to the amendment of s 24(1) of the 1972 Act clear judicial pronouncements were to the effect that the Prescription Act, relative to inter alia suspension of prescription, applied to the prescriptive provisions of the unamended s 24(1) and its precursor. As amended s 24(1) (b) - which, as said, is virtually identical to Article 56 - provided that prescription would not run against a minor, a detained person and a person under curatorship. At the time of the amendment the first three distinct categories of creditors mentioned in s 13(1)(a) of the Prescription Act comprised (i) minors, (ii) insane persons and (iii) persons under curatorship. Yet, when amending s 24(1) the

legislature in para (b) deliberately included only the first and third categories. In place of the second category it substituted a somewhat different category, i.e. persons detained under mental health legislation, who would usually be insane persons. It would therefore appear that the legislature intended s 24(1)(b) to apply to the exclusion of the provisions of s 13(1) of the Prescription Act in relation to claims of at least the above three categories of creditors.

Adapting the language of Foxcroft J in Kotze (at 247 J), the question may be asked whether Parliament could have intended an insane person to be in a position where prescription would not run against him once he was detained, but would run against him prior to his detention. Of course, should s 13(1) of the Prescription Act be applicable, prescription would run against an insane person, whether detained or not. However, as

submitted by counsel for the appellant, the more weighty answer is that the legislature may well have intended to avoid, for the purposes of enforcement of "third party" claims, a difficult enquiry into the condition of a man's mind.

I would therefore have allowed the appeal.

HJO VAN HEERDEN
Deputy Chief Justice

Concur:

HARMS JA