

IN THE HIGH COURT OF LESOTHO

In the matter of :

QOBOLOANE RAKOENA

Plaintiff

V

NGAKA MOFOLO

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 27th day of August, 1982.

According to the declaration the plaintiff's claim against defendant is for damages for personal injuries allegedly caused by defendant's negligence as a result of the latter's vehicle colliding with the plaintiff.

Defendant filed a notice to defend the action.

There were the usual requests for further particulars but of a particular interest in this case are the answers furnished by the plaintiff to the defendant's request for further and better particulars which were phrased as followed (with plaintiff's answers in brackets after each request):

1.

Was the Defendant in this matter served with a prescribed claim form in terms of Order 18 of 1972 being the motor vehicle Insurance Order, if so copy thereof is required.

(Defendant was not so served).

2

Has plaintiff complied with s. 14 of Order XVIII of 1972 as amended being the motor vehicle Insurance Order.

/(No)

(No).

3.

Was the Defendant served with a prescribed statutory medical report in terms of the regulations to Order XVIII of 1972, if so, when, give the dates please.

(Defendant not served).

4.

Why is the Defendant sued personally in this matter?"

(He is personally liable).

The replies to the above questions go to the very root of the issue to be decided at the moment because the defendant has filed a plea in abatement which has as its object the quashing of the action in this particular case because the obligatory provisions of the law have not been complied with.

It was conceded by counsel for the plaintiff that defendant's vehicle had been insured at the time the cause of action arose. However, plaintiff did not proceed against the insurance company because he had been prescribed and by that he meant the period within which action ought to have been initiated had expired. No proof was placed before this Court that the Insurance Company had indicated that it had closed all avenues of negotiations with plaintiff.

Section 16 of Order 18 of 1972 reads, in part :

"When a person is entitled under section 13 to claim from a registered company any compensation in respect of any damage resulting from any bodily injury arising out of the driving of a motor vehicle insured under this Order by the owner thereof or by any other person with the consent of the owner, the first mentioned person shall not be entitled to claim compensation in respect of damage from the owner or from the person

/who

who drove the vehicle as aforesaid or if that person drove the vehicle as a servant in the execution of his duty from his employer unless the registered company concerned is unable to pay the compensation." (My underlining).

The section is very clear. Where a vehicle is insured and while so insured, through its damages are caused which result in bodily injuries, the Insurance Company must first be served with a claim by whoever wishes to claim. Before that is done the owner of the vehicle; the person who drove it, with his consent, nor his servant in the execution of his duties, may be personally sued or a claim made against them. That can only occur only where the company concerned i.e. insurance company, has been proved to be unable to pay the compensation.

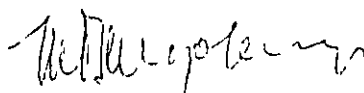
In the present case, as stated earlier, it has been conceded that the provisions of section 16 of Order 18 (supra) are applicable but it has not been proved that the provisions of this section have been complied with. Indeed, the answer to the fourth request, as quoted earlier in this judgment, places this beyond any doubt. The defendant is being sued because he is personally liable. That will only be allowed by the law when the company concerned is unable to pay compensation. In this case there is no such proof as there was no such an attempt on the part of the plaintiff.

It was therefore with no surprise when, half-way his argument, Mr. Moorosi, counsel for the plaintiff informed the court that he no longer wished to oppose the inevitable. It takes a man to surrender. It was a wise decision under the circumstances.

The plaintiff's summons as amplified by further particulars is hereby quashed.

/The party

The party have requested that there be no order as to costs and consequently the court makes no order for costs as per request.


J U D G E.

For the Plaintiff : Mr. M. Moorosi
For the Defendant : Mr. O.K. Mofolo.