IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

NOEL THATHIWE SEKHONDE Appellant

v

LESOTHO NATIONAL INSURANCE CO. Respondent

HELD AT MASERU

Coram:

MAISELS, P.
SCHUTZ, J.A.
GOLDIN, J.A.

J U D G M E N T

Maisels, P.

The appellant was a fare paying passenger in a taxicab which was involved in a collision with two other motor vehicles. All three vehicles were insured by the respondent, a registered insurer within the meaning of the Motor Vehicle Insurance Order 18 of 1972 hereinafter referred to as the Order. As a result of the collision which the appellant alleges was caused by the negligence of one or more or all the drivers of the vehicles in question, the appellant in her declaration claims to have suffered damages in the sum of R7821-28 as a result of injuries to her person sustained in the accident. These damages are computed as follows:

"(i)	Medical and hospital expenses	R150,00
(ii)	Estimated future medical expenses	200,00
(iii)	Loss of earnings(from date of accident to date hereof)	353,04
(iv)	Estimated future loss of earnings	2118,24
(v)	General damages for pain and suffering and loss of amenities of life	5000,00
		R7821,28 "

By virtue of the provisions of section 13 and alleging compliance with section 14 of the Order the appellant claims

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that the respondent is liable to compensate her for the damages set out above. The respondent raised as one of its defences that is never received a duly completed form MVI13 within the prescribed period of two years laid down in the Order. The accident occurred on the 22nd April 1978 but there is no doubt from documents which form part of the stated case that a form MVI13 was received by the respondent well within the two year period, the real complaint being that the form delivered was not in compliance or substantial compliance with the Order. The pleadings in the action have been closed but pursuant to Rule 32(1) of the High Court Rules 1980 the parties submitted to the High Court a special case for adjudication.

The statement of agreed facts in terms of Rule 32(6) reads as follows :

"1. The motor accident giving rise to the claim in this matter occurred on the 22nd April, 1978.

2. As a result of the said accident the Plaintiff claims from the Defendant compensation for personal injuries in terms of Section 13 of the Motor Vehicle Insurance Order No.18 of 1972 ("the Order").

3. In terms of Section 14(2) the Plaintiff was obliged to send or deliver to the Defendant a "claim for compensation" as contemplated by Section 14(1) of the Order within a period of two years from the 22nd April, 1978, as provided by Section 13(2) of the Order.

4. The "form prescribed by Regulation" to which Section 14(1) of the Order refers is the form MVI13 prescribed by Regulation 6(1) of the said Regulations.

5. By letter dated the 15th January, 1980(Annexure"A" hereto) the Plaintiff's Attorneys sent a form MVI13 to the Defendant, and such form was received by the Defendant within the prescribed period of two years.

6. By letter dated 28th January, 1980(Annexure "B" hereto) the Defendant returned the said form to the Plaintiff's Attorneys requiring

   (a) "that correct answers are given to questions 3(a) and 5(b)(i) and 5(b)(ii)" thereof, and

   (b) "that the medical report at the back of the form be completed in detail by the doctor attending (the Plaintiff) immediately after the accident, as required by Order 18 of 1972".

7. A copy of the Form MVI13 as submitted to the Defendant by the Plaintiff is annexed hereto marked "C".

8. The form of medical report referred to in Section 14 of the Order and in the said Form MVI13, a copy of which is annexed hereto marked "D" was not

completed in any respect nor signed by any doctor.

9. Instead a certificate by doctor P.C.F.M.Gondrie, of which a copy is annexed hereto marked "E", accompanied Annexure "C", and no further medical report or certificate was or has been submitted by the Plaintiff or her Attorneys to the Defendant or any representative of the Defendant.

10. The particulars contained in paragraph 3 and 5 of the Form MVI13 (Annexure "C") are accepted by the Defendant as constituting substantial compliance with Section 14 of the Order in so far as it relates to the said paragraphs .

The only issue submitted for adjudication is :

'Whether the plaintiff's failure to deliver a completed medical report in the prescribed form (Annexure D) and delivery, in its stead, of Annexure E hereto, constitutes compliance, or substantial compliance, with s.14 of the Order'".

The form MVI13 referred to in para 7 supra as well as the certificate by Dr. Gondrie referred to in para 8 supra are hereto annexed marked C and E respectively.

Section 14 of the Order reads :

"(1) A claim for compensation under section 13 shall be set out on the form prescribed by regulation in such manner as may be so prescribed and shall, accompanied by such medical report or reports as may be so prescribed, be sent by registered post or delivered by hand to the registered company at its registered office or local branch office, and the registered company shall, in the case of delivery by hand, at the time of the delivery acknowledge receipt thereof and of the date of such receipt in writing.

(2) No such claim shall be enforceable by legal proceedings commenced by a summons served on the registered company before the expiration of a period of sixty days from the date on which the claim was sent or delivered, as the case may be, to the registered company as provided in sub-section (1)."

The prescribed form is to be found in Legal Notice No.34 of 1972 (Vol. XVII Laws of Lesotho p. 384 at p. 402 et seq) and is the form Annexure C hereto.

It should here be stated that the Lesotho Order and particularly section 14 thereof is to all intents and purposes as are the prescribed forms, the same as section 25 of the South African Legislation dealing with Compulsory Motor Vehicle Insurance and the forms prescribed by regulation thereunder. As stated by the learned Chief Justice, decisions of South

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African courts on the matter with which this case is concerned are of great persuasive authority. The learned Chief Justice after considering certain of these authorities came to the conclusion that there had not been substatial compliance with the requirements of section 14 of the Order and he consequently answered the question put to him in favour of the respondents.

It will be observed that I have referred to the finding that there had not been substantial compliance with the requirements of section 14. It was common cause both in the Court a quo and before us that all that was required was substantial compliance with the requirements of the section in question. That this is undoubtedly so appears from numerous authorities of the highest court in South Africa e.g. Rondalia Versekeringskorporasie Bpk v Lemmer 1966(2) SA 245(A) at 257 H - 258 H; Nkisimane and others v Santam Insurance Co. Ltd 1978(2) SA 430(A) at 435. AA Mutual Insurance Association Ltd v Gcanga 1980(1) SA 858(A) at 865.

Before considering whether there has been substantial compliance in this case,it is, I consider, desirable to set out two principles which should govern one's approach to this question. The purpose of having MVI13 completed and submitted to the insurer before litigation is commenced is as stated in Nkisimane's case supra at 434 F-G and the authorities there cited -

> "to ensure that, before being sued for compensation, an authorized insurer will be informed of sufficient particulars about the claim and will be given sufficient time so as to be able to consider and decide whether to resist the claim or to settle or compromise it before any costs of litigation are incurred".

As is pointed out in Gcanga's case supra at 865 D, "obviously in order to consider the claim properly the insurer may also have to investigate it. MVI13 is also designed to invite, guide and facilitate such investigation" Several authorities are referred to in support of this statement. On the other hand as is pointed out in Gcanga's case at 865 E the general object of the Act is to afford to third parties the widest possible protection by way of compensation for any loss sustained by them for bodily injuries or to death of others resulting from the negligent or unlawful driving of motor vehicles cf Nkisimane's case at 434 E-F. Indeed this aspect of the matter is emphasized by the Appellate Division of South Africa in the recent case of Union and South-West Africa Insurance Co. Ltd v. Fantiso 1981(3) SA 294(A) at 300 A-C. It is also

well in my opinion to bear in mind what was said by Innes JA(as he then was) in Benning v Union Government (Minister of Finance) 1914 A.D. 180 at 185 (a case drawn to my attention by my brother Schutz)," Conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law should be strictly construed and not extended beyond the cases to which they expressly apply".

In Nkisimane's case at p 433 Trollip JA deals with the procedural requirements under section 25 of the South African Act, and mutatis mutandis they would seem to apply to section 14 of our Act. He states them as follows :

(a) The submission of the claim: the claim for compensation must be submitted to the authorised insurer.

(b) The form of the claim: "the prescribed form" is to be used - i.e. in this case Form MVI13.

(c) The contents of the claim are to be set out in the manner prescribed by the regulations.

(d) The manner of submitting the claim is as set out in the subsection.

Trollip JA held that requirement (a) was peremptory and (c) was directory. (see page 435A). However although (c),which is the one with which the Court is concerned in the present case, was held not to be peremptory but directory, it could not be ignored;but substantial compliance therewith was sufficient.

As stated above both counsel were in agreement that compliance of this kind was sufficient. I turn therefore to the argument of the respondent on this point and his contentions that there had not been substantial compliance. I do so not because I consider there is an onus on the respondent to prove non compliance but because I consider this the most convenient way of tackling the problem in this case.

Mr. Newdigate who appeared for the respondent quite properly drew attention to the statement in Nkisimane's case at page 434 G that the object of Form MVI13 is not only to enable the insurer "to consider and decide whether to resist the claim or to settle or compromise it before any costs of litigation are incurred" but it is also aimed at enabling the insurer to give realistic consideration to the computation of the amount of compensation. (Nkisimane's case 435 H to 436A)

Mr. Newdigate however did not suggest that the medical information required was intended to enable the insurer to make an accurate assessment of the question of damages. Indeed I

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venture to suggest that it would be quite impossible in the vast majority of cases to attempt to make an accurate assessment when it is borne in mind that there is almost invariably in any claim of substance a figure claimed for general damages. Any practitioner with experience of running down cases and certainly every insurer knows that it is almost an impossible task to forecast with any degree of certainty what amount a Court is likely to award for pain and suffering and loss of amenities of life. What seems to me to be important in this connection is to recognize what was said by Trollip JA in Gcanga's case supra that MVI13 was designed not only to enable the insurer to investigate the claim, but also to invite, guide and facilitate such investigations. I entertain no doubt that minimal investigation by the insurer in this case, possibly after obtaining the consent of the appellant, would have enabled it by enquiring from the medical practitioners whose names and addresses are stated in the answer to paragraph 6 (l and m) to obtain any further information required as to the injuries sustained and the medical prognosis of the appellant in addition to that given in Dr. Gondrie's medical certificate which is annexed. I am unable on a consideration of Form MVI13 supplied in this case to say that any lack of information that there was, or may have been, really frustrated or materially impaired the ability of the insurer either to assess quantum or to determine the extent of any future investigations it may require Cf. Davids v Protea Assurance Company Ltd 1980(4) SA(C) 340 at 344A. I quite agree as Mr. Newdigate suggests that the insurer should at least have sufficient information to enable it to draw reasonable conclusions and that it is not required to guess. I am bound to say however that as demonstrated above further information and sources of information were disclosed and were readily at hand.

Mr. Newdigate agrees that the insurer in reading a form MVI13 must use its intelligence; this is stating the obvious and I shall consider Mr. Newdigate's complaints if they may properly be so called seriatim.

Mr. Newdigate says that on the body of the Form the appellant states she was attended by Dr. Gondrie (Leribe) Dr. Israel (Ficksburg) Dr. King (Delmas Transvaal). I should have thought this was most valuable and important information of which intelligent use could have been made by the insurer had it really bona fide wanted to investigate the claim, and to endeavour to compromise it before action was instituted. It is not irrelevant that the sixty day period during which

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prescription is suspended (section 14(2)(b) is obviously inserted in the Order to give the insurer time to investigate.

Then there is a complaint that although the appellant states she was treated after the accident in the Hlotse and Maluti hospitals, she does not state the period for which she received treatment in either. I find it difficult to attach the slightest importance to this, particularly having regard to the almost derisory claim of R150 for medical and hospital expenses and the fact that a simple enquiry at the hospitals in question would undoubtedly have elicited this information if it was really required. Then there is the valuable information given that the appellant was not suffering from any physical defects or infirmities prior to the accident.

Mr. Newdigate then correctly summarised the information given on the medical certificate given by Dr Gondrie. I should have thought as a layman that this gives the essential ~~facts of the injury~~ sustained by the appellant and the period during which she was not able to work as a result of the injuries she sustained. It is true that there is no medical report that the appellant would not be able to work for a period in the future, but the claim made in this respect clearly shows that this is alleged to be the case, although the period of such inability to work is not stated. This is a matter which experience shows is frequently in dispute in matters of this nature.

Turning now to the Medical Report which, as will be seen, is blank Mr. Newdigate fairly concedes that the insurer was reasonably able to derive the answers to questions 1 and 2. He also concedes that the failure to answer question 3 is not really material, and further concedes with regard to question 4 that from the information supplied that the injuries were not minor. Question 5 he admits was answered. Question 6 requires full details of the injuries to be given. This was supplied in Dr. Gondrie's certificate. There is however no information given as to any complications, a matter raised in question 6. The submission made in this regard is that the respondent was not reasonably able to assume that there were no complications particularly since subsequently the appellant was attended by Dr. Israel of Ficksburg and Dr. King of Delmas. Quite apart from the point I have already endeavoured to make that there is no reason to suppose that if asked the appellant would have refused permission to the

insurer to make enquiries of these doctors, one should, I suggest, look at the figure claimed for medical and hospital expenses and estimated future medical and hospital expenses. I find it difficult to take this point seriously. The remarks made by Trollip JA in Nkisimane's case at p. 438 E to F seem to me to be to a certain extent apposite to this complaint as well as to the real one that no information was given as to treatment to date. It is stated that it must be assumed that the dislocation was reduced but whether this was done simply or by surgery is not described. The point made is that this would have a material influence on damages for pain and suffering as would information as to immobilisation in plaster or traction. Surely a simple enquiry from any of the doctors would have solved the difficulty.

Then it is said that question 7 requires information as to whether permanent disability is anticipated and this is not answered. The point is made that the question of permanent disability is most material to the assessment of quantum as also the nature and extent of the permanent disability. There is also it is stated an enquiry as to whether the appellant's condition has become stabilised; this it is said is relevant to a consideration by the insurer as to whether the appellant has reached the stage of recovery at which she may fruitfully be examined by a practitioner of the Insurer's choice.

I consider that during the investigating period of which I have spoken above, an enquiry to Dr. Israel or Dr. King should well have resulted in the requisite information being made available.

The fact that question 8 was not answered is rightly not relied upon by the insurer.

Question 9 which required full details of the nature and anticipated duration of any future treatment was unanswered. If one looks at the answer to 9(a)(ii) in the body of the form I find it difficult to treat seriously the point made under this head of argument.

It is admitted by the respondent that the answers to questions 10 to 16 are reasonably derivable from the other information supplied.

It is true that a comparatively large amount is claimed

for general damages for pain and suffering and loss of amenities of life and no particulars are given under this heading. I have to some extent dealt with this question. I cannot believe that any insurer is in any way prejudiced by a failure to split up the amounts so as to show how much is claimed for pain and suffering and how much for loss of amenities of life. More often than not in my experience these claims are lumped together by the Court when it awards general damages.

The remainder of the points raised by the respondent seem to me to be largely repetitive of matters previously raised and I do not propose to deal with them again.

Looking at the case as a whole I am satisfied, although it is a border line one, that there has been substantial compliance with the respondents of the Order. I am and I trust the respondent is mindful of the dicta referred to above that the prime object of the Act is to afford protection to persons who are injured as a result of negligence of drivers of motor vehicles.

It follows that, in my judgment, the question submitted to the Court a quo should have been answered in favour of the appellant and it is so ordered. The respondent is further ordered to pay the costs of the appellant in this Court and in the High Court.

I.A. MAISELS
President

I agree

B. GOLDIN
Judge of Appeal

Delivered this // day of October 1982 at MASERU

For Appellant : Adv. Kuny
For Respondent: Mr. Newdigate