

IN THE HIGH COURT OF LESOTHO

In the Application of :

NONE K. MONARE

Applicant

v

LESOTHO NATIONAL INSURANCE CO.

Respondent

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. Justice  
J.L. Kheola on the 9th day of March, 1984

This is an application for an order in the following  
terms:-

1. Rule Nisi be issued and returnable on a date and time this Honourable Court may order, calling upon the Respondent to show cause, (if any) why:
  - (a) He should not be ordered to issue a token of insurance to Applicant;
  - (b) He should not be ordered to pay damages incurred or occasioned by Applicant for Respondent's refusal and delay to issue that token of insurance;
  - (c) He should not be ordered to pay costs of this application;
  - (d) Further and/or alternative relief.
2. That prayer 1(a) and (b) above should operate as an immediate interim order.

The applicant has supported this application with an affidavit which sets out the facts as follows: On

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the 25th January, 1984 he went to the offices of the respondent company to report the loss of his token of insurance No. 1884. He was given "a lost token affidavit" form which he duly completed. He was then instructed to go to a Commissioner of Oaths for his signature and attestation. He went to the Law Office where one Mr. Kamalanathan the Principal Crown Counsel duly signed and attested the form. The applicant took the said form back to the offices of respondent company where he was told that he should have gone to the Police Commissioner of Oaths, and he was asked to sign another form and take it to a Police Commissioner of Oaths. He refused to do this on the ground that there was nothing on the form to show that it had to be signed and attested by a Police Commissioner of Oaths.

The applicant alleges that the refusal by the respondent company to issue him a token of insurance is prejudicial to him since he is a businessman and has to go to Johannesburg from time to time to attend to his business matters. He is going to lose money if he does not go to Johannesburg. He has attached to this affidavit a "Lost Token Affidavit" duly signed by him and sworn before Mr. Kamalanathan at the Law Office on 25th January, 1984.

On the 26th January, 1984 Mofokeng J. granted the interim order and made the rule nisi returnable on the 30th January, 1984, on that date the rule nisi was

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extended to the 9th of March, 1984.

The General Manager of the respondent company has filed the opposing affidavit in which he has taken the point in limine that the application be dismissed with costs on the ground that the applicant has cited the wrong respondent. He says that his inquiries have revealed that the applicant has been dealing with Minet Kingsway (Pty) Ltd. whose business premises are at Development House, Kingsway, Maseru, and who place by far the bulk of third party insurance business with the respondent company. There are other brokers in Lesotho who place business with the respondent e.g. Bowring Barclays Insurance Brokers who operate from Barclays Bank branches.

He says that Minet Kingsway (Pty) Ltd. are insurance brokers in terms of Section 53 of the Insurance Act No.18 of 1976 as amended. He denies that it is proper for the applicant to treat the actions of Minet Kingsway (Pty) Ltd. as if they are those of the respondent. In any case if it is the applicant's case that Minet Kingsway (Pty) Ltd. are agents of the respondent then he says that such contention is so fundamental to applicant's case that it should have been specifically alleged in the founding affidavit. Failure to allege it is fatal defect which cannot be cured by a Replying affidavit.

In the alternative the General Manager of the respondent company alleges that even if the Court comes

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to the conclusion that Minet Kingsway is an agent of the respondent company then it was necessary that the applicant must prove to Minet Kingsway and the respondent that the token of insurance No. 1884 has been lost as required by Section 5(4) of the Motor Vehicle Insurance Order of 1972. He goes on to say that they have instructed their agents that no replacement token should be issued unless and until they are satisfied that the loss or theft has been reported to the police or the destroyed token is produced and surrendered to such agent or broker who must forward it to the respondent.

It will be seen that nowhere in his papers does the applicant allege that his case is based on Agency. He merely alleges that he has an insurance contract with the respondent; and that on the 25th January, 1983 he went to the offices of the respondent to make a report of a lost token of insurance and asked that it be replaced. It is the respondent who alleges that the people with whom the applicant had been dealing are Minet Kingsway (Pty) Ltd. who are brokers who place by far the bulk of third party insurance with the respondent. A broker is a kind of an agent who is to be licenced under Section 53 of the Insurance Act No.18 of 1976. He (broker) is a middle-man between the parties for the purpose of negotiating a contract, he is the agent of both for the purpose of settling the final terms of the contract and is authorized

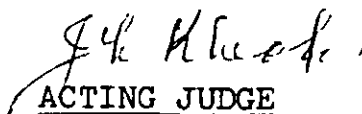
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to bind both in so far as he does not exceed his instructions. (See Benoni Produce & Coal Co., Ltd. v Gundelfinger, 1918 J.P.D. 453). The respondent has admitted that Minet Kingsway is their agent in the sense that they are brokers with whom they have substantial business. The respondent has not denied that a contract of insurance established by token of insurance No. 1884 still subsists between them and the applicant. In my view, the respondent company is bound by the actions of their agent unless it can be shown that the agent acted beyond his authority.

Section 5(4) of the Motor Vehicle Insurance Order of 1972 provides that a person who has lost a token of insurance must prove such loss before a replacement token can be issued. It appears that in order to facilitate compliance with this provision the respondent has designed a form named "Lost Token Affidavit". This form has to be sworn to before a "Commissioner of Oaths". The applicant was given this form and he went to the Law Office where Mr. K.C. Kamalanathan, Principal Crown Counsel made him swear to the affidavit. In my view, the respondent or his agent behaved in an unreasonable way when they refused to accept the affidavit on the ground that the applicant ought to have gone to a Police Commissioner of Oaths. Commissioners of Oath are the same and it is beyond my understanding why the respondent or his agent had a feeling that an affidavit sworn before a Police Commissioner of Oaths is a better proof of the loss of a token of insurance as required by Section 5(4) of the Order. If in addition to the affidavit the applicant had been asked to go and report the loss of the token to the police

a further precaution against fraud, that would have been a different matter. There is nothing in Section 5(4) of the Order which requires that the affidavit should be sworn before a Police Commissioner of Oaths. I come to the conclusion this requirement by the respondent through their agent was entirely unwarranted and that the applicant cannot be blamed for having refused to comply with it.

For the reasons stated above the Rule is confirmed in terms of prayer 1 (a) with costs. I do not wish to say anything about prayer 1 (b) which was never argued before me.

  
ACTING JUDGE  
9th March, 1984

For the Applicant : Miss. Ramahloli  
For the Respondent : Mr. Moilola