

IN THE HIGH COURT OF LESOTHO

In the matter between:

ISAAC M. MOHLOTSANE

Plaintiff

v

PROTEA ASSURANCE CO.

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 4th day of December, 1989.

On 26th November 1986 the plaintiff sued out of the office of the Registrar summons in the form of Edictal Citation intended to be served personally on the defendant: Leave to sue having been granted on 17th November 1986.

This action was instituted against the defendant following a motor collision that occurred in Maseru on 3rd September 1984.

The defendant is alleged to be an insurer of a vehicle with registration numbers OB 26865 which was driven by one Daniel Mokhethi Tsoaela. The plaintiff was a passenger in a motor vehicle with registration numbers A 5310 which was involved in the collision with the other vehicle OB 26865.

The plaintiff sues the defendant for damages in the total sum of M78,300 on the basis of the negligence of the driver of the vehicle OB 26865 resulting in pain and suffering, loss of future earnings medical expenses and

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future medical expenses suffered and likely to be suffered by the plaintiff.

At the hearing of this matter last Friday the defendant relying on Rule 32(7) raised a special plea.

The Rule says:

"If it appears to the court mero motu or on the application of any party that there is in any pending action a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question is disposed of."

The defendant relied on this Rule because it maintained that

- (a) The claim form was not sent to the Defendant within the two year prescriptive period.
- (b) Summons was not served upon the defendant within the period of two years and sixty days as from the date of the accident.

On this basis the defendant accordingly prays that the plaintiff's claim be dismissed with costs.

The plaintiff opposes this application plus the consequent prayers.

In paragraph 1(d) of the pre-trial conference minutes it is admitted that the summons was served upon the defendant on 17th December 1986.

Head 1 of the defendant's heads of arguments sets out that the parties agreed that the question of the special plea be disposed of before any further proceedings can be embarked on in this matter.

The Lesotho Motor Vehicle Insurance Order No. 18 of 1972 provides in section 13(2) (a) as follows :

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"The right to claim compensation under subsection (1) from a registered company shall become prescribed upon the expiration of a period of two years as from the date upon which that claim arose:

Provided that prescription shall be suspended during the period of sixty days referred to in sub-section (2) of section fourteen."

Section 14 (2) says:

"No such claim (as referred to in S. 14(1)) 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)."

It was submitted on behalf of the defendant that the cause of action arose on 3rd September, 1984 which is the date of the accident. But the claim form was sent by registered post to the Insurance Company on 2nd September 1986. I may add that this is common cause.

It is also common cause that summons was issued from the High Court on 17th November 1986 and served on the 17th December 1986.

Defendant's counsel submitted that both these occurrences took effect more than 2 years and 60 days after the cause of action arose.

The plaintiff's counsel contends at page 3 of head 3 that

"in terms of section 13(2) a (read along with its proviso) the summons can be served upon the defendant any time after the expiration of 60 days and cannot be served upon the defendant within that period."

He submitted further that the

"Act does not provide the period within which summons should be instituted after the expiration of 60 days and therefore"maintains that one is entitled to assume"that any time thereafter the summons can be issued"

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and concludes that the instant proceedings justify the action taken by the plaintiff in that regard.

In CIV/T/363/86 Malee Emsley Putsoa vs The Attorney General (unreported) at p. 5 this court had occasion to consider the effect of section 4 of the Government Proceedings and Contracts Act 1965 on the application of section 6 thereof.

Section 4 of that Act provides that a month's notice has to be given and allowed to lapse before summons can be issued against Government.

Section 6 reads :-

"Subject to the provisions of sections 6 (through) 13 of the Prescription Act no action or other proceedings shall be capable of being brought against the (State) by virtue of the provisions of section two of this Act after the expiration of the period of two years from the time when the cause of action or other proceedings first arose."

But for the fact that the 1965 Act makes reference to one month's notice as against 60 days before the expiration of which no summons can be issued in the case falling under the Lesotho Motor Insurance Order No. 18 of 1972, I find that these laws stand in exactly homologous position of relationship with each other.

Although it seems that in the instant matter the claim itself cannot be faulted for having been submitted just a day before the two year period lapsed the fact remains that it did not entitle the plaintiff to institute proceedings by way of summons outwith the prescribed period of two years reckoned from the date when the cause of action arose, albeit that summons is precluded from being issued against and served upon the defendant before the 60 day period has run from the date when such cause of action arose.

Any submission to the contrary is regarded as a misconception, for as was stated by Aaron J.A. in C of A (CIV) No. 1 of 1987 Malee Emsley Putsoa vs The Attorney General (unreported) at p. 3.

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"The second misconception is as to the effect of the 30 - day period provided for in S. 4 of the Act. That does not mean that a demand may be delivered at any time during the 2 - year prescriptive period, and that it is then in order to issue the summons within 30 days thereafter even if this is outside the 2 - year period. It is the summons which is the starting point in the calculation, not the demand. It is correct ... that ss. 4 and 6 must be read together, but the correct reading is that summons may validly be issued only up to the end of the 24th month after the cause of action arose, and that it must be preceded by a letter of demand which must be delivered ..... by not later than the 23rd month after the cause of action arose."

It is important to note that the Court of Appeal in the above matter clearly indicated that

"it is common practice for a creditor to preserve his rights and avoid prescription by taking the formal step of issuing a summons, despite the fact that negotiations may be ensuing, and advising the debtor that this is being done merely to avoid prescription. Further proceedings can then be deferred by consent while the negotiations proceed."

It stands to reason therefore that in the present matter the claim form should have been submitted not later than the 22nd month after the cause of action arose followed by summons issued only up to the end of the 24th month after the cause of action arose.

The defendant's counsel's submission that the delivery of a claim form within the 2 - year period suspends the prescription for 60 days from the date of such delivery, seems to me valid for it is on all fours with my interpretation of section 13 (2) (a) of the Lesotho Motor Vehicle Insurance Order 1972.

Thus after the expiry of the 60 - day period of suspension the prescription began again to run and could only be interrupted by service of summons upon the defendant.

At page 2 of the Court of Appeal decision in Putsoa above reference was made to Wessels, Law of Contract in South Africa 2nd Ed. paras 2804 and 2818 for in that case

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as in the instant matter no rule provides that the delivery of the demand or the delivery of a claim form interrupts prescription. Hence reference to the Common Law where Wessels says in para 2804

"By our common law the running of prescription is interrupted by an acknowledgement of debt ..... or by judicial interpellation .... .

In para 2818 he says

"when we say that by our common law prescription is interpreted by judicial interpellation, we mean that there must be a claim instituted before a Court of competent jurisdiction. It is not sufficient for the creditor to send a lawyer's letter or a letter of demand; he must actually institute action by a valid summons..."

The language used in SS. 13(2) and 14(2) of the Order is simple and the words in it should be given their natural and ordinary meaning. See Aspeling N.O. vs Alexander 1919 AD 139 at 146 (last line) to 147.

Pillay vs New Zealand Insurance Co. Ltd. 1957(1) SA 17 is authority for the view that

"The 'Claim for Compensation' referred to in subsection (2) of section 11 of Act 29 of 1942 means the institution of proceedings and not a letter of demand."

As stated above a letter of demand is to summons as a claim form is to legal proceedings commenced by the summons. See Kleynhans vs Yorkshire Insurance Co. Ltd. 1957(3) SA 544 re-affirming that

"prescription runs from date summons (was) served in the absence of (a) previous demand."

In President Insurance Co. Ltd vs Yu Kwam 1963(3) SA 766 at 779 is to be found the proposition that

"The plain and natural meaning of the words in section 11(2) 'shall become prescribed upon the expiration of a period of two years' is that the period of extinctive prescription for the claim to compensation under section 11(1) of the Motor Vehicle Insurance Act shall be two years."

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C/F section 13(2) a of the Motor Insurance Order 18 of 1972.

I find it rather difficult to grasp the content of the defendant's contention advanced in head 15 to the effect that

"A proper interpretation of SS. 13 and 14 is that the summons must be served within 2 years and 60 days of the date of accident, but not within the 60 day period after the claim was sent."

The phrase

"served within 2 ~~days~~<sup>years</sup> and 60 days"

is what presents me with difficulties because it appears to be what was specifically demurred at by the Court of Appeal in Putsoa above where in relation to the Government Contracts Act of 1965 it had been contended by the appellant that

"when that month expired, the two year prescriptive period started running again, and the action would not be time - barred until, in effect, 2 years and 1 month after the delivery of the letter of demand."

I think the axiomatic position is, in respect of the instant matter, that whatever the circumstances the 2 year and 60 day period should fall within 24 months beyond which no summons can validly be issued. But if issued within the 24 months then a minimum of 60 days should be allowed to run from the date when the cause of action arose and the insurer was notified or when the lodgment was made with the insurer before summons is issued and served. A creditor who goes about this in any other-way contrary can aptly be described as pursuing a friar's lantern.

In CIV/APN/57/86 Mamokhethi Mokhethi vs Lesotho National Insurance Co. (unreported) at p. 4 it was said

"Section 13(2)(a) and 14(2) make it quite clear that prescription begins to run from the date of the accident upon which the claim arises. If within two years from the date of the accident the 3rd party sends ... the claim form to the registered company (insurer), the prescription is suspended for a period

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of 60 days from the date the claim was sent ... in other words, the right to claim compensation from the registered company becomes prescribed upon the expiration of the two years. However, if the claimant lodges the claim form with the registered company within two years from the date of the accident, prescription shall be suspended for 60 days. It is common cause that in the present case the applicant's claim form was sent to and received by the respondent on the 4th December, 1985. Taking into account that the accident had occurred on the 7th November 1983 there can be no doubt that the claim form was lodged after the expiration of 2 years from the date of the accident ... the period of two years expired on the 6th November, 1985.

Now the crux of the matter is whether this Court has the power to condone the late filing of the claim for compensation or not. There is no provision in the M.V.I. Act 1972 giving the court the power to do so.

Likewise in the instant matter it is common cause that summons was served after the two year period had run after the cause of action arose. Although the claim form was sent a day before the completion of the two years it appears on the authority of Putson above the claimant would have done diligence and preserved his rights if he sent the claim form at the latest at the end of the 22nd month of the cause of action, and thus ensured that 60 days thereafter summons was issued for in the words of Aaron J.A.

"summons may validly be issued only up to the end of the 24th month after the cause of action arose."

The special plea is upheld with costs.

J U D G E.

4th December, 1989.

For Plaintiff : Mr. Mphalane  
For Defendant : Mr. Molyneaux.