CIV/T/449/90

IN THE HIGH COURT OF LESOTHO

In the matter of:

PUSO MOSETSE — Plaintiff

vs

DR. MUSTAQ ANWARY — Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 6th day of December, 1994

The Plaintiff claims against Defendant, as a result of Plaintiff's minor child Noozi Mosetse's injuries and incapacitation, the following amounts for damages:

(a)	Medical expenses (present and future)	M29,981.45
(b)	Disability (permanent)	M30,000.00
(c)	Mental shock	M10,000.00
(d)	Pain and suffering	M20,000.00
	Total	M89,981.00

It is alleged in the summons that the negligent driving of the Defendant caused the collision as a result of which the said child was injured. No other vehicle was involved.

Having been served Defendant entered appearance to defend and requested further particulars which were furnished by the Plaintiff. The Defendant took up a special plea in abatement which is to be shown in its entirely, if only to make for clarity and better understanding of the proceedings and arguments. The said plea was as follows:

" (1)

At all times relevant to the above action the motor vehicle B1200 was properly insured pursuant to the provisions of the Motor Vehicle Insurance Order No.18 of 1972, certain Declaration and Token No. 16124 having been issued in respect thereof by Lesotho National Insurance Company (Pty) Limited on 16th December, 1985, in respect of the period of insurance extending from 1st January, 1986 to 31st December, 1986.

(2)

By virtue of the provisions of section 16 of the said Order, Plaintiff is not entitled to claim damages from Defendant but can only claim from the said Insurance Company, as provided for in the said Order."

The Annexure "A" to further particulars requested by the Defendant shows very clearly that the Defendant's vehicle was insured in the respects shown in paragraph (1) of the special plea. This Annexure A is the Lesotho Mounted Police Motor

Vehicle Accident Report form that was duly filled by police officer no. 3303 L/Sgt Moruti around the 21st April 1987 according to the office rubber stamp impression.

It is necessary to observe that, while having alleged at paragraph three of the Plaintiff's declaration that: "on or about 10 April 1986 Defendant was driving along Butha-Buthe Leribe public road motor vehicle B1200 in respect of which there was no token of insurance pursuant to Motor Vehicle Insurance Order 1972," the Defendant was able to furnish the Annexure "A" when so requested by the Plaintiff which amply shows the distinct probability that the Defendant's vehicle must have had knowledge of the existence of the token of insurance. I discounted the probability that the police got the information somewhere else or other than at the scene of the accident. It was not explained why, if ever, the plaintiff was not able to get the information timeously either. The point is that the Plaintiff seems to have been possessed of this information. This is significant.

The section 16 of the order is framed as follows:

> 16. When a person is entitled under section 13 to claim from a registered company ..... the first mentioned person shall not be entitled to claim compensation ..... unless the registered company is unable to pay the compensation" (my underlining).

The Plaintiff acknowledges that it is correct, that a claim has to be made first to the registered Insurance Company (the Insurer). But the Plaintiff counters that this is so only if the amount claimed from the company does not exceed a sum of M12,000.00. This appears in the Plaintiff's plea to Defendant's Special Plea in Abatement as follows:

"1

AD PARAGRAPH 1 and 2

The said damages claimed from Defendant are over and above the M12,000.00 claimable from the insurance company in terms of the said order."

Plaintiff submits that to that extent the requirement is not binding and his claim ought not to be set aside.

I do not accept that this Plaintiff's plea to Defendant's Special Plea is valid. I am here referring to his contention that: Plaintiff was entitled to proceed against the Defendant without first claiming against the company because his claim was over M12,000.00. I am not persuaded. I knew of instances where in the Courts of Republic of South African various claims were made in which interpretation was sought over a similar section of the Compulsory Motor Insurance Acts where multiple claims were made involving maximum claims. These have always been multiple claims. In other claims it was where the Compulsory Motor

Vehicle Acts provided for a maximum amount for which insurance companies would be liable but where no provision was made for the manner in which sum was to be divided amongst claimants from the maximum amount. In all these cases it has never been a defence nor has it been an approach nor justification by the Plaintiff to proceed against the Plaintiff outright without first having hed recourse to the still solvent insurer (See Mali vs Shield Insurance Co Ltd 1984(2) 798 SECLD, Mazubane v SA Murual and General Insurance Co. 1984(4) 485 DCLD Mambi v Mutual and Federal Insurance Co. Ltd 1992 (2) 476 (TK)).

I took the view that no amount of stretch in interpretation of Section 13(b) (i) (ii) (iii) and (iv) would justify the Plaintiff's inability to claim against the Insurer. I do not see that there is any good reason why the Plaintiff could have been able to arrive at a decision that the insurer was unable to pay the compensation in terms of said section 16 without having first claimed against the Insurer. This is the only common sense approach acceptable. This is more so because in order to determine whether the Insurer is unwilling to pay, there must have been a claim filed with the Insurer. In Barlow (Eastern Province) vs Bouwer 1950 (4) 385 EDL the learned Judge Reynold J. in dealing with a situation where an act of insolvency was alleged and where applicant conceded respondent's ability to pay, said at page 393 H "It is quite true that the refusal or

unwillingness to pay must occasion a delay in the creditor getting his money by judgment and execution, but that occurs even when a debtor just refuses to pay his just debt without saying anything about inability to pay, and the mere adding of words that he is unable to pay when all shows to the knowledge of the creditor that the debtor is merely unwilling to pay cannot alter the facts." (my underlining) The point I am making is that the plaintiff by his failure to file a claim against the insurer actually made it difficult to determine if the insurer was unable to pay as provided for in section 16. Furthermore had the Plaintiff filed a claim against the insurer then it would have been revealed if the insurer company was able to pay but unwilling to pay for whatever reason. May be one of the reasons, to be revealed, could have been that the claim is in excess of M60,000.00 as Mr. Nathane has variously submitted. I cannot decide that for the purpose of this judgment. This question of the distinction between inability to pay and unwillingness to pay has been considered in various South African Case mostly to do with insolvency claims and judicial management of companies. (see South African Spice Works vs Spies 1957 (1) SA 681 TPD, Rabie vs Van der Merwe and Bezeidenhout Pty Ltd 1939 (2) PH3). This distinction is useful in the instant matter to show that for the purpose of the interpretation of section 16 of on Motor Vehicle Insurance Act 1972 one can only be able to prove inability to pay as against unwillingness to pay by actual filing

of a claim against the Insurer.

I need to develop the above point further in adopting a passage at page 473 of the judgment of Centlivers JA in Roses Car Hire (Pty) Ltd v Grant 1948 (2) SA 466 AD, the learned Judge Janes J. in Palmer v Joe Borgs Transport and Another 1963(4) SA (188 (418) at 490 F-H had this instructive statement to make: "As I have read this passage it means that the Insurance Company is obliged to pay all it can, and the owner of the vehicle can only be sued for so much as the Insurance Company cannot pay. I am fortified in my belief that this is the proper interpretation to be placed to section 13 of the Act because if it were not so the owner of a car who had insured it, compulsorily, with an Insurance Company which found itself in financial difficulties, would receive no advantage from the compulsory act of insurance. If he alone were sued and judgment were given against him for the total amount of the compensation he would have no recourse against the Company under the Act, even if the Company would have been able to pay ninety five cents in the rand if it had been sued. On the other hand Mr. Pape readily conceded, there would be nothing to stop a claimant who found himself in a position of the Plaintiff from joining both the Insurance Company and the owner and authorized driver of the vehicle in one action and claiming from the latter so much compensation of the Company was found to be unable to pay:" (my underlining). I do not propose

to deal with the wisdom of joining both the Plaintiff and the Insurance Company although this was debated by Mr. Buys for Defendant and Mr. Nathane for Plaintiff. In my mind what stood to be determined was the true entitlement of the Plaintiff to have claimed against the Defendant in the face of the provisions of the said section 16 of our law. It means that the insurer must actually indicate whether it can or it cannot pay and what the reasons therefor are.

Furthermore in Conradie vs Erasmus and Son 1951 (4) SA 29 the Court was seized with an appeal against a magistrate's dismissing an exception to the Special Plea. The exception was that the car in question was insured with a registered company under the provisions of the Motor Vehicle Insurance Act No. 29/1942 and therefore by virtue of Section 13 of the Act read with Section 11, the Plaintiff had no right to claim against the defendant, unless the Insurance Company was unable to pay the claim, which was not the case. To this special plea the Plaintiff excepted to the plea on the ground that it disclosed no defence. The learned judge de Villiers J allowed the appeal and held that the magistrate was correct in dismissing the exception.

In the instant case I make a finding that there was no proof on the facts that the Insurance Company was unable to pay the

compensation, on the interpretation of the said Section 16 (which is similar to the South African Section 13). The Plaintiff's claim must fail and the Defendant's Special Plea is allowed with costs.

T. MONAPATHI
JUDGE

For the Plaintiff : Mr. Nathane

For the Defendant : Mr. Buys