

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

LESOTHO NATIONAL INSURANCE COMPANY

Applicant

and

TSEPO SEKHESA

Respondent

HELD AT MASERU

Coram:

MAHOMED, P
KOTZE', J.A.
LEON, J.A.

J U D G M E N T

LEON, J.A.

The appellant is the defendant in an action in the High Court in which the respondent is claiming damages against it as a registered insurer in terms of the Motor Vehicle Insurance Order 1989.

On or about the 8th July 1989 the respondent's wife was killed in consequence of a collision with a motor vehicle. Alleging that the sole cause of the collision was the negligence of one MASASA QOPANA the driver of motor vehicle A3079 the respondent claimed

damages from the appellant. Although it is not expressly alleged the plaintiff's declaration infers that the appellant was the registered insurer of the motor vehicle A3079.

The respondent has alleged that his late wife assisted him in the maintenance and upbringing of the two children of the marriage in the sum of M200-00 per child per month. He alleges further that by reason of the death of his wife he has been deprived of her assistance in the care, clothing and upbringing of the children for the next twenty-two years.

The respondent has claimed damages as follows :-

- (a) Maintenance and assistance in respect of the child BALESENG who was aged 11 at the time of her mother's death
 $M200 \times 12 \times 10 = M24,000-00$
- (b) Maintenance and assistance in respect of the child MAKHALE who was aged 7 at the time of her mother's death
 $M200 \times 12 \times 14 = M33,600-00$
- (c) Funeral expenses = M 4,000-00

TOTAL = M61,600-00

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The appellant filed two special pleas and a plea on the merits to the plaintiff's declaration. By consent it was agreed that argument be heard on the special pleas separately and before any evidence was led. The special pleas were both dismissed by the trial Judge and it is against that Judgment that this appeal is

brought.

The first Special Plea reads as follows :-

- 1.1 The cause upon which the plaintiff's action is based arose on the 8th July 1989 being the date of death of Mantolo Sekhesa.
- 1.2 The claim in the prescribed form which plaintiff was required to deliver to defendant in terms of Section 14 of the Motor Vehicle Insurance Order 18 of 1972 as amended, was delivered to the defendant on the 5th June 1991, alternatively, 20th May 1991, as per annexure "A" hereto.
- 1.3 Summons was served upon the defendant on 9th July 1991.
- 1.4 The defendant pleads that the period of 60 days which must be allowed in terms of Section 14(2) of the Motor Vehicle Insurance Order had not expired when summons in this action was served on the defendant.
- 1.5 In the premises, the defendant pleads that plaintiff's claim is unenforceable and the summons is a nullity. wherefore, defendant prays that plaintiff's claim be dismissed, with costs".

The Second Special Plea reads thus:-

"The plaintiff served a further summons upon the defendant on the 24 September 1991 and in respect of the second summons the defendant pleads that the plaintiff's claim prescribed prior to the second service of summons on the 24th September 1991 and that the plaintiff's claim has thus prescribed in terms of Section 13 and 14 of the Motor Vehicle Insurance Order 18 of 1972.

Wherefore defendant prays that plaintiff's claim in her (sic) personal capacity and representative capacity, alternatively in her (sic) personal capacity alone has prescribed and that the claim should be dismissed, with costs".

The appeal is brought on the following grounds:

- "4.2 The Honourable Trial Judge misdirected himself as far as the common law position is concerned regarding prescription in Lesotho
- 4.3 The Honourable Trial Judge erred by finding that in Lesotho prescription is interrupted by the issuing of a summons and not by service of summons.
- 4.4 The Honourable Trial Judge misdirected himself as far as the interpretation of Sections 13(2) and 14 of the Motor Vehicle Insurance Order No.18 of 1972 is concerned.
- 4.5. The Honourable Trial Judge misdirected himself as far as the prescription period set out in the Motor Vehicle Insurance Order, No.18 of 1972 is concerned"

With regard to the first special plea it is clear from the authorities to which I shall presently refer that a summons served at the time as that which was served in the present case is not a nullity; while the action is unenforceable the summons may be re-served.

In Marine and Trade Insurance Co. Ltd vs Reddinger 1966(2) SA 407(A) it was held that the issue of a summons prior to the expiration of the period of sixty days as required by Section 11 bis (2) of Act 29 of 1942 for the purpose of enforcing a claim for damages under the Act does not offend against the provisions of the section. A summons which is so served is not a nullity and there is no objection to the re-service of a properly issued summons without the leave of the Court (see particularly the judgment of Wessels, J.A. at page 414E-415A). That case followed the judgment

of Smit J.P. in BORE vs PARITY INSURANCE COMPANY LIMITED 1965(2)SA 75(0).

The Marine and Trade case was approved both in the majority Judgment of Holmes J.A. in S.A.N.T.A.M. INSURANCE COMPANY LTS vs VILAKASI 1967(1)SA 24b(A) (at p 253C) and in the minority Judgment of Trollip A.J.A. at page 255 F-G. In the latter case the majority held that premature service under Section 6(1)(b) of the Prescription Act, 18 of 1943 cannot institute an action within the meaning of Section 6(1)(b) of the Prescription Act and therefore does not interrupt prescription. But that case did not decide or suggest that the premature service of a summons under the Motor Vehicle Insurance Act is a nullity. It is not a nullity because in terms of the Marine and Trade case it may be re-served.

The first Special Plea prays for the action to be dismissed on the ground that the premature service of the summons is a nullity. In the light of the authorities this special plea has been misconceived and the Court a quo was correct in dismissing it.

I turn now to the second special plea. With regard to the claims (a) and (b) i.e. the claims excluding funeral expenses the learned Judge a quo was under the misapprehension that the respondent was suing in his representative capacity as father and natural guardian of the two minor children of the marriage. As prescription cannot run against minors that part of the second

special plea had to fail. However it is clear from paragraph 9 of the Declaration that it is the respondent himself who claims to have suffered damages and it is in his personal capacity that the plaintiff has claimed all the damages in this case. Nor is it or could it be disputed that the respondent's claim has prescribed under the Motor Vehicle Insurance Order.

I should add that the learned Judge arrived at his conclusion with respect to the Second Special Plea also because it was his view that under the common law of Lesotho it is the issue of the summons and not its service which is decisive. That approach was not supported by Counsel for the respondent on appeal. In this regard the learned Judge relied upon Voet but that reliance does not rest upon any firm foundation. Indeed the full passage from Voet as well as the authorities referred to in the appellant's Heads of Argument show that the contrary is correct.

In my judgment the second special plea should have been upheld. As that special plea disposes of the respondent's action the appellant should have its costs both in the Court a quo and on appeal.

In my judgment the following order should be granted :-

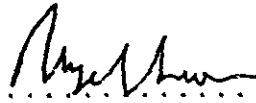
1. The appeal against the dismissal of the First Special Plea must be dismissed.
2. The appeal against the dismissal of the Second Special plea must be upheld and the judgment

of the Court a quo altered to read :-


"Second Special plea is upheld with costs".


- 3. The respondent is ordered to pay the appellant's costs both in the Court a quo and on appeal.

As a footnote I would suggest that if the respondent were to bring an enforceable claim against the appellant in his representative capacity on behalf of his minor children that claim would not be prescribed.



 R. N. LEON
 Judge of Appeal

I concur

 I. MAHOMED
 President

I concur

 G.P. KOTZE'
 Judge of Appeal

Delivered at MASERU on.....this.....day of January 1995