CIV/T/601/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTHATISI 'MAPHENENE LEPHOLE **PLAINTIFF**

and

LESOTHO NATIONAL INSURANCE COMPANY **1ST DEFENDANT**
NKOPANE MOTŠOARI **2ND DEFENDANT**
RAPAKA MAKOLOANE **3RD DEFENDANT**

JUDGMENT

To be delivered by the Honourable Mr. G.N. Mofolo,
on the 17th day of March, 1998.

In this case the plaintiff issued summons claiming M16,699-00.

(a) against Second Defendants jointly and severally the one paying the other to be absolved.

ALTERNATIVELY

(b) against First and Third Defendants jointly and severally the one paying the other being absolved.

The case revolved around 3rd Party Insurance claim in terms of Motor Vehicle Insurance Order No.18 of 1972. In her declaration plaintiff alleged that she had complied with provisions of Order No.18 of 1972. With respect this allegation is rather tersely and roundly couched making it difficult to say exactly in respect of what provision of the Act plaintiff has complied with.

The matter had been defended, an exception to the summons made and summons amended accordingly. In his plea 1st Defendant had made a special plea couched as follows:

> The first Defendant pleads specially that Plaintiff has failed to comply with the provisions of Section 9 of the Motor Vehicle Insurance Order 26 of 1989 in one or more of the following respects:-
>
> 1.1 She refused or failed to submit to the First Defendant, together with her claim for or within a reasonable period thereafter and while she was in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim were fully set out.
>
> 1.2 She refused or failed to furnish the First Defendant with

copies of all statements and documents, such as statements of witnesses, within a reasonable period, after having come into possession thereof.

1.3 She refused or failed to furnish in writing within a reasonable period, an affidavit setting out the particulars of the occurrence or the statements of any eye-witnesses which she might have had.

1.4 She refused or failed to furnish within a reasonable period, further particulars of the occurrence as required by the First Defendant.

1st Defendant has said for failure to supply particulars required the said 1st Defendant is excused from liability in terms of provisions of the Act adverted to above. The court asked counsel for the 1st defendant several questions to elucidate the intractability of the problem. One of the questions was whether it was directory or peremptory that an affidavit should be supplied as requested and following on this and especially if the directions are peremptory whether failure to supply an affidavit closed the plaintiff's doors by reason of a foreclosure clause, prescription or other factors shutting the plaintiff out altogether.

Defence counsel's reply was that the provisions were peremptory and closed the plaintiff's door altogether and the court could not, because of the alleged failure or inability to supply the affidavit order that it be supplied for rectification can only

be done within the period of prescription and now that the prescriptive period had lapsed there could be no rectification and if the special plea succeeded that would be the end of the matter and there could be no resuscitation. According to counsel for the 1st defendant, it was not even necessary for the plaintiff to submit the affidavit for it could be submitted by anybody acquainted with the accident. He says it is binding that the M.V.A. form be accompanied by an affidavit and if for some reason claimants have been paid without such an affidavit, what's not law cannot put what's law out of office.

Mr. Grundlingh has handed in a letter from plaintiff's attorneys declining to furnish the affidavit. He says the latter does not amount to a failure but refusal to comply with the provisions of the Order. Several cases were quoted in support including Moscovitz v. Commercial Union Assurance Company. 1992 (4) SA 192 at 198 and 199 - a case also quoted by counsel for the plaintiff claiming to support the plaintiff in all material respects.

Counsel for the Plaintiff has also quoted from Union and South-West Africa Ins. Co. V. Fantiso, 1981 (3) SA 293 (A.D.) and disagrees saying the provision of the Order are directory if the court finds there was no unreasonable failure. Counsel says it is wrong to say plaintiff failed for in fact according to her letter she was 'not able' to furnish the affidavit. She says barring mala fides non-compliance with the rules is allowed. She further submits that plaintiff's case is distinguishable from Moscovitz's case for it is not refusal but inability to comply with the requirements; - she says this reduced to its lowest terms means it was impossible for the plaintiff to supply the affidavit. She hands in a letter of 6 January, 1993 from 1st defendant's

claims department showing that the matter had not ended as negotiations were still in progress and as the letter was not countermanded plaintiff was left in an air of expectancy.

Ms Kotelo further says it is totally wrong to say there can be no rectification for the claim has prescribed as this is not in accordance with the content and spirit of the Commercial Union's case above - she says there is no time limit for the statute is restrictively interpreted and whatever is claimed as covered by the statute must be reflected in the statute. She says the law and precedent affords 3rd party claims the widest possible protection and a claim may not be dismissed on what is perceived to be a technicality for laws affecting the claims are also to be restrictively interpreted. She concludes by saying nowhere does the statute penalise or foreclose for the non-supply of an affidavit.

In reply Mr. Gruntlingh for the defendant says in any event ordinarily the plaintiff would be expected to explain, as a matter of courtesy, why she was not able to supply the affidavit as is in law required for one's behaviour has to be explained. He says the claim as it stands is incomplete and therefore invalid and there can be no payment on an inchoate contract. He says plaintiff's inability to furnish the affidavit is to be interpreted as a failure, refusal, in the absence of a reason to have said what the failure was due to. The plaintiff should have taken the court into her confidence and the special plea cannot be regarded as a technicality. He says the section was brought in to protect insurance companies in similar situations arising - for the proposition he has quoted Sekhonde v. Lesotho National Insurance Company (Pty) Limited - C. of A. (CIV) 3/1981.

The court having heard the application on 26 February, 1998 reserved judgment to 12 March, 1998 and the following is the court's judgment made on 17 March, 1998 though, owing to a continuing criminal trial on the 12 March, 1998 the judgment was postponed to 17 March, 1998.

In this application it appears crucial questions to be answered by the court are:

(1) whether our own statute prescribes the furnishing of an affidavit in 3rd Party claims;

(2) whether the requirement under the statute is peremptory or directory;

(3) whether plaintiff or her legal representative in saying:

'we are unable to supply the affidavit you require'

this amounted to a refusal or failure to furnish the affidavit.

(4) whether because of the failure or refusal to supply the affidavit the court has no choice but to close all doors and avenues on the plaintiff.

With regard to (1) above, *Section 9 of the Motor Vehicle Insurance Order, 1989 reads:-*

> The insurer shall not be obliged to compensate any person in terms of this Order for any loss or damage.
>
> (d) suffered as a result of bodily injury to any person who:

(iv) unreasonably refuses or fails to submit to the insurer together with his claim form as prescribed by regulation, or within a reasonable period thereafter and he is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out;

Mr. Gruntlingh has said the context in which the word 'shall' has been used in the statute means strict compliance with the statute. Ms. Kotelo has also said provisions of the statute are to be restrictively interpreted. According to the Oxford Illustrated Dictionary - 2nd Ed., the word 'shall' forms __ moods expressing in first person: simple future action so that if I say I 'shall' do this and that, I am merely expressing simple future action like 'I shall be seeing you _' which, to me, sounds like a future wish; it is said in other persons it expressed a command and in all other persons an obligation, intention, necessity and so on and so forth. The question is whether in the context in which it is used in the order it implies a command or an obligation. As the statute says 'the insurer shall not be obliged ------' the view of this court is that 'an employer' is 'other persons' and accordingly that the context in which 'shall' is used by the legislation denotes a 'command'.

To Austin (The Province of Jurisprudence Determined (ed. Hart) and his Idea of Law), the law is a command and commands were seen by him as expressions of desire given by a superior to an inferior (in this case Parliament to those affected by its laws).

The English Pocket Thesaurus by Collins or what is colloquially referred to as the 'word finder' equates commands to, amongst others, as: compulsion, injunction, demand, edict, charge, ultimatum, while the English Dictionary referred to above refers to a command inter alia, as: order, mastery, to be supreme.

It is to be recalled as Ms Kotelo has correctly submitted that statute law differs from the common law in that statutory implications are to be restrictively construed. Moreover, considerations of equity and reasonableness do not form part of the statute law unless they have been incorporated or enshrined into the statute book; therefore, unless these commands are obeyed, there is sanction for their disobedience may be visited by punishment.

Consequent to the reasoning above, it follows that the requirement to furnish an affidavit is, under the statute, peremptory.

Considerations of (3) and (4) above were dealt with in several leading cases to be reviewed by the court infra.

In Moskovitz v. Commercial Union Assurance Co. *of SA Ltd, 1992 SA 192 (W.L.D.) section 7 (2) (b) (i)* similar in all respects to our section *9 (d) (iv)* above was at stake. The plaintiff had been unable to furnish an affidavit from his personal knowledge, that is personal recollection of the collision. Although the court had found the requirement under *7 (2) (b) (i)* to furnish an affidavit was directory, it was held as it was not required of the plaintiff to furnish information from his personal knowledge in that parties acquainted with the accident could also provide such an

affidavit, that plaintiff's claim of inability to furnish the affidavit for non-recollection of the collision was without foundation and accordingly the action was dismissed for non-compliance with regulation *7 (2) (b) (i).*

Just to impress upon the necessity for furnishing an affidavit, in the same Moscovitz case above, it was said the affidavit was, like a medical report, directory though an affidavit was to be distinguished from a medical report in that it is a statement on oath promulgated in terms of the Justice and Peace and Commission of Oath Act. It was also said the law as to providing an affidavit which is a statement in writing on oath was enacted mainly for the benefit of the M.V.A. fund and appointed agents and as Burman, A.J. said at pp.198 - 9:

> '___ The purpose of the section is to ensure that before being sued an appointed agent will be informed of sufficient particulars about the claim and will be able to settle or compromise it before costs of litigation are incurred (*see Nkisimane and others v. Santam Insurance Co. Ltd., 1978 (2) SA 430 (A) at 434 F - G - 435* H *and the Guardian National Insurance Co. Ltd v. Van der Westhuizen 1990 (2) SA 20* © ___ *1990 (2) SA 204 (C).* It was said the purpose was also to enable the appointed agent to inquire into the claim and to invite, guide and facilitate such investigation.' *(see also Constantia Insurance Co. Ltd v. Nohamba, 1986 (3) SA 27 (A.) At 39G).'*

In the course of the judgment it was also said an affidavit is a solemn document and ensures that its contents have a decree of accuracy and can be relied upon. According to the learned judge the Legislature intended that these objects and

purposes be given a dimension of certainty. From the Moscovitz judgment is appears the affidavit is treated as the direct and certain evidence of the plaintiff without which, I may venture to add, the insurance company would not be enabled to meet its commitment to pay.

It is also worth emphasising that in Moscovitz case above it was also emphasised 'total failure' to comply can never amount or be considered to be substantial compliance.

In *Union and South-West Africa Insurance Co. Ltd v. Fantiso, 1981 (3) SA 293 (A) at 301F* it was said there must be a consideration of elasticity and reasonableness in the application of *S. 23 © (ii) and (iii)* where at 301B it was said:

> 'The word 'refuses' implies a specific verbal or written refusal. Having regard to the context of the Act and of S.23 itself, the word 'fails' in © (ii) implies more than the mere omission to furnish copies of reports. To hold otherwise would create an injustice which the Legislative could not have intended. In view of the severity of the penalty, a final loss of claim, one has to consider the failure to furnish copies of report in a restrictive manner, restrictive in the sense that a court will not deprive plaintiff of his right to claim compensation unless he can be said to have obstructed the insurer from getting the information which he is entitled to. As the object of the section is to allow the insurer to get information, forfeiture of plaintiff's claim will only be allowed, in my view, if the information is wilfully withheld

after a request is made or if the request is deliberately ignored.'

As I have already shown above, it was said the plaintiff had wilfully withheld an affidavit, or has at least deliberately ignored the requirement to furnish one and he has obstructed the insurer from getting the information he was entitled to. Or at least his attorney who acted as his authorised agent (-----) had done so for, as the affidavit did not have to be made by the plaintiff in that the particulars may not be to the knowledge of the plaintiff or claimant, the contention that plaintiff's inability to furnish an affidavit from his personal knowledge of how the collision arose excused him from furnishing them was without foundation.

I may add that the protection of the insurer refers, according to the above judgments, to a case where a plaintiff or claimant has misrepresented facts as to the cause of accident making it look like he was the innocent party when, in fact, he was the guilty party. It is cases like these where the insurer is protected and Ms. Kotelo has submitted that in the present inquiry the plaintiff had not cheated but was merely a casualty of an accident of not her making and it was accordingly unheard of to punish her simply because she had not submitted or furnished the required affidavit. I may add that from a reading of the cases it appears it is failure to furnish the affidavit that is punishable for in the event the insurer is obstructed from deciding on his option to pay or not to pay and as Mr. Gruntlingh submitted, the transaction being incomplete, there is no way the insurer can pay.

A related question is whether the plaintiff or claimant can eat his cake and have it or, in other words, have another bite at the cherry. Before this poser is

answered, perhaps it is time to deal with implication of *Sekhonde v. Lesotho National Insurance Corporation, LAC 1980-84 p.184.* The case concerned damages arising from an accident in which a passenger was injured when motor vehicles collided. The question was whether the submission of a medical certificate instead of properly completed medical report as prescribed was in compliance with *sec.4 of the Motor Vehicle Insurance Order, 1972.* The trial judge Mofokeng, J (as he then was) had held there was no compliance and on appeal per Maisels, P. it had been held there was compliance.

According to Maisels, J.P. the reason to consider whether there has been substantial compliance is based on a number of principles as was said in Nkisimane's case, supra at 434F - G and the authorities therein cited, namely;

> 'to ensure that, before being sued for compensation, an authorised insurer will be informed of 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.'

And as pointed out in Mutual Insurance Association Ltd. v. Gcanqa, 1980 (1) SA 858 (A) at 865:

> 'obviously in order to consider the claim properly the insurer may also have to investigate it. MV 1 13 is also designed to invite, guide and facilitate such investigation.'

On p.187 of Sekhonde's case Maisels, J.P. has also pointed out that in

Gcanqa's case at 865E, 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 death of others resulting from the negligent or unlawful driving of motor vehicles.

The logic in either Nkisimane's or Gcanqa's case can equally be applied to the furnishing of an affidavit though in this court's view by reason of an affidavit having to be on oath its furnishing appears to be on a higher scale than the furnishing of a medical report or for that matter the M.V.I 13 itself.

Taking into consideration the courts remarks above, note has to be taken of Schutz, J.A.'s remarks at p. 191 A - J above in Sekhonde's case that:-

> And I think that the correct approach for a Court is to seek to place itself in the position of a bona-fide insurer who seeks to make intelligent and constructive use of the information supplied, bearing in mind also the difficulties which the claimant may have in giving full information in a particular case. If this is to be the approach, it follows, in my view, that there are limits to saying that the insurer should make his own investigations, based upon such information as the claimant may have provided. Investigations often have to be made by the bona fide insurer, whether there is an exact compliance with the prescribed forms or not. (I have underlined and underscored the word 'forms.').

Again at p.191J:

> One of the purposes of sec.14 is to place the insurers in a position to do just that. But it would be quite wrong, in my view, to condone the omission by the complainant of such information as in a particular case

> is reasonably needed by the insurer to make an intelligent start to his assessment and investigation. If the approach were otherwise it might in some cases amount to treating sec.14 and the supporting subordinate legislation as pro non scripto.

Noticeably, sec. 14 of the Order was treated as directory like in Moscovitz's case above where an affidavit like a medical report were treated as directory.

As I have said above, speaking for myself, I would have thought by using the term 'shall' in the context in which it was used it was intended that the provision should be imperative than directory? And yet in Nkisimane's case supra at 433H - 434B it was stated as follows:-

> 'Preliminary I should say that statutory requirements are often categorised as 'peremptory' or 'directory.' They are well-known concise, and convenient labels to use for the purpose of differentiating between the two categories. But the clear cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seem to have become somewhat blurred. Care must therefore be exercised not to infer merely from the case of such labels what degrees of compliance is necessary and what the consequences are on non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision a question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the

> enactment as a whole and the requirement in particular (see the remarks of van der Heever, J. in *Lion Match Co. Ltd. v. Wessels, 1946 O.P.D. 376 at 380).*

This court has contrasted and compared the rights of the insurer and those of the claimant bearing in mind difficulties the claimant may have in giving full information and that investigations have to be made by a bona fide insurer whether or not there is compliance with the prescribed forms; and more particularly the protection the section gives to claimants for bodily injury or death, bearing in mind that omission by the claimant to provide necessary information may not be condoned plus what was said in Moscovitz's case supra that total failure to comply can never amount or be considered to be substantial compliance'; the court having found that the furnishing of an affidavit is 'peremptory', the only question this court has to ask itself is whether there is substantial compliance with the rules or no compliance. This apart, it appears that the attorney who dealt with the plaintiff's matter was probably influenced by ignorance of what was at stake and required of the plaintiff. This court hates punishing clients for the faults of their attorneys. Be this as it may, the question remaining to be answered is whether the plaintiff can be allowed to file an affidavit in default of the affidavit she should in the first place have filed. Rule 8 sub-rule (11) of the Rules of court says:

> Within seven days of the service upon him of the answering affidavit aforesaid the applicant may deliver a replying affidavit.

Sub-rule 12

> No further affidavit may be filed by any party unless the court in its discretion permits further affidavits to be filed.

This court is of the view that if the plaintiff suffered a handicap by non-compliance with the rules pertaining to the furnishing of an affidavit, and the plaintiff was desirous of filing such an affidavit in retrospect, the plaintiff should have asked this court for leave to file such an affidavit. There being no leave to file such an affidavit, one might say it does not behove this court to make such an order on its own motion.

But this case has to be distinguished from cases where a plaintiff in a motor collision was a driver and he defaulted on furnishing an affidavit for fear of grave repercussions; or having filed such an affidavit lied or misrepresented facts. It does not seem that the plaintiff who was an ordinary commutor had any axe to grind in the accident except that there was an omission which the court can hardly label mala fides.

Mr. Gruntlingh has argued that there is no way this court can allow plaintiff to file an affidavit because the action has prescribed. I do not think so for in this court's view prescription applies to what was not done before it comes into operation. Where prescription comes into effect when a fact has been realised and forms part of the proceedings it cannot be said that the fact has prescribed. An affidavit was sought before the prescriptive period ran and though not furnished formed part and parcel of pleadings that had not prescribed.

Notwithstanding the fact that the claim is based on and flows from statutory provisions, I do not think that rules of natural justice and fair play admit of a situation faced by the plaintiff who, although she has complied in other respects,

there has been no compliance in others. As I have said, necessary as the furnishing of an affidavit is, because its non-furnishing is not motivated by malice and it cannot be said that the 1st defendant is prejudiced by its non-furnishing having regard to other information supplied the 1st defendant, and the fact that it cannot be said the information was wilfully witheld or deliberately ignored, viewing the case as a whole, this court finds there was substantial compliance with the rules.

Accordingly the 'special plea' is not granted and it is dismissed. It is, however, ordered that costs be costs in the action.

G.N. MOFOLO
JUDGE
16th March, 1998.

For the Plaintiff: Ms. Kotelo
For the Defendants: Mr. Gruntlingh