

CIV/T/673/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MATŠEPANG MOSOLA

PLAINTIFF

and

**LESOTHO NATIONAL INSURANCE COMPANY
(PTY) LTD**

DEFENDANT

J U D G M E N T

To be delivered by the Honourable Mr. Justice G.N. Mofolo
on the 30th March, 1998.

From the correspondence (though there is no form in the file) it appears the plaintiff lodged her 3rd Party claim with the defendant. Rather unpleasant if unsavoury correspondence appears to have been exchanged between offices of the plaintiff's attorneys and defendant's attorneys.

I am in particular referring to Annexure TK² in which defendant's junior staff members were enjoined from communicating with the plaintiff directly and defendant was asked whether or not he accepted liability and if so in what amount.

At this stage it is worth emphasising that it is not so much to avoid liability that insurers engage in long drawn-out discussions until sometimes the prescriptive period runs, it is to elicit and solicit as much information as is possible before accepting or rejecting liability. The process is long and cannot be done on the drop of a hat having regard to the fact that the insurer is also entitled to protect his interests from unscrupulous claimants. It is certainly not as if for every injury sustained compensation follows.

Following on the correspondence and most probably feeling that the matter might prescribe plaintiff had issued summons claiming:-

- (a) An order that it pay the amount assessed by defendant as adequate compensation for plaintiff's loss on the basis of the completed claim form with defendant or
- (b) The sum of R52,000-00;
- © Costs of suit.

The matter had been defended and at the same time defendant had applied that paragraphs 6, 7, 8, 9, 10 and 11 of the plaintiff's Declaration be struck out as scandalous and/or vexations and/or superfluous and/or argumentative and/or irrelevant. The paragraphs complained of are

Paragraph 6:

‘within the times allowed by the law plaintiff was assisted by persons of goodwill to put in a claim for compensation with defendant which registered such claims as MVA 93/14317 Third Party claim in its records.’

Paragraph 8:

‘plaintiff eventually instructed legal practitioners to process her claim and communicate with defendant on her behalf after she received a rather insolent and officious letter from one TUPELO KEPA in the defendant’s claims department dated 11th September, 1995.’

Paragraph 9:

‘The legal practitioners aforesaid wrote to defendant’s managing director on two occasions in an effort to get defendant to do two things relevant to the third party claim, that is:

- (a) Does defendant admit or deny liability to pay compensation?
- (b) If liability is admitted, how much does defendant consider on the basis of the completed claim form or otherwise to be adequate compensation for the loss of life of plaintiff’s husband.

Paragraph 10:

‘The letters were as follows:

- (a) A hand delivered letter dated 29th September, 1995 and

- (b) A registered letter dated 10th November, 1995 actually posted on 15th November, 1995.'

Paragraph 11:

'Defendant as to date ignored both letters from plaintiff's lawyers, which defendant has no excuse in law to do.'

Another exception was taken excerpting to Plaintiff's summons and Declaration on the grounds that the Summons and Declaration lack necessary averments to sustain an action against the defendant because:

Plaintiff had failed to disclose a cause of action for her claim against the Defendant in that:

- 1.1 There is no basis in law alleged why the Defendant is allegedly liable to the plaintiff.
- 1.2 Plaintiff has not set out the basis upon which the claim for loss of support rests, that is, whether there was a legal duty upon the deceased to support the plaintiff and his dependants, that the plaintiff is indigent and/or required such support, that the deceased actually maintained the plaintiff and that the deceased in future would have had a legal duty to continue with the maintenance of the plaintiff.
- 1.3 The summons does not allege that the loss or damage has been suffered as the result of either bodily injury or death of any person as required by the Motor Vehicle Insurance 26 of 1989.
- 1.4 There is no allegation that the driver of vehicle E2086

was negligent and that such negligence was 'in driving' of vehicle E2086.

- 1.6 There is no allegation that the plaintiff has complied with the provisions of the Motor Vehicle Insurance Order 26 of 1989.

Concerning the application to strike out, instead of acceding to the application and rectifying paragraphs under attack by the defendant, the plaintiff appears to have contended himself with opposing the application by denying that the paragraphs complained of are argumentative, unnecessary and trivial for, according to the plaintiff in his heads of argument the paragraphs are relevant in that they comply with *sec. 14* of the Order. According to the plaintiff, defendant's exception was to be seen as a thinly veiled excuse not to pay compensation under the Order and the exception was a time - wasting effort and prevarication to come clean on whether defendant was prepared to pay and if so as to how much.

With respect, this court was much taken aback by plaintiff's counsel's argument. Courts of law have particular procedures and standards which must be observed. It is not as if we are in tribunals where there is neither procedure or the quest to maintain civilized, acceptable legal standards. Plaintiff's declaration was in many ways a long, rambling, desultory and periphrastic protestation; a disquisition displaying disquietude and disapprobation of the tardiness and incompetence with which the defendant handled plaintiff's claim. The declaration did not address itself to potent and relevant issues justifying the claim. In fact the account was so peripheral one is left wondering whether it was an attempt to expose defendant's vices than to justify plaintiff's claim.

This court has no intention of wasting time on the application to strike out and grants the application as prayed and equally the plaintiff is allowed leave to make necessary deletions and substitutions to his declaration within fourteen (14) days from the date of this judgment. Costs are to be costs in the action.

Concerning the exception relating to the summons, for the sake of comparison, here is a declaration under the 1989 Motor Vehicle Insurance Order, 1989 prepared by one of the most experienced attorneys who, where an exception was taken to his summons and declaration, was humble enough to amend the summons.

Paragraph 1:

Plaintiff is NTHATISI MAPHELENA LEPHOLE a female adult of Thabaneng, Matelile Ha Seeiso in the district of Mafeteng.

Paragraph 2:

2.1 First Defendant is Lesotho National Insurance Company (Pty) Ltd, a company with limited liabilities, incorporated according to the Laws of Lesotho and whose headquarters is at Lesotho National Insurance House, Kingsway, Maseru.

Paragraph 3:

3.1 On or about the 22nd November, 1990 second defendant was driving a motor vehicle registration number A 6910, collided with a motor vehicle A 2203 driven by Third Defendant.

- 3.2 (a) The said collision was due to the sole negligence of the said Third Defendant.
- (b) ALTERNATIVELY, the said collision was due to the sole negligence of the Second Defendant.
- © ALTERNATIVELY the said collision was due to the sole negligence of the second and third defendants collectively.
- 3.3 Plaintiff is uncertain whether second or third defendant is the sole cause of the collision or both defendants are the cause of the collision.

Paragraph 4

At the time of the collision aforesaid the said vehicles A 6910 and A 2203 were insured in terms of the Motor Vehicle Insurance Order No.18 of 1972 with the First Defendant. By reason of the facts set out above, First defendant is liable and plaintiff has complied with the provisions of Order No.18 of 1972.

Amler's Precedents of Pleading - 4th Ed. gives a precedent related to the claim thus:-

1. Plaintiff (name) an adult male machine operator who resides at (address), who was born (date).
2. Defendant is (name) Insurance Company Limited a company duly incorporated with limited liability according to the company laws of the Republic of South Africa which has its principal place of business within the

area of jurisdiction of this honourable court at (address).

3. At all times material hereto and more particularly on (date), defendant was an appointed agent within the meaning of the schedule to the *Multilateral Motor Vehicle Accidents Act 93 of 1989*.
4. On (date) at (place), vehicle X, which was being driven by (name), collided with plaintiff who was a pedestrian (or a passenger as the case may be).
5. The aforesaid collision was caused exclusively by the negligence of the driver of the vehicle who was negligent in one or more of the following respects (detail).
6. As a result of the collision, plaintiff sustained the following bodily injuries:- (detail).

Mr. Gruntlingh has also said that action under the *Order, 1989* is based on *lex aquilia* and consequently that delict has to be proved. On the contrary, Mr. Seotsanyana has said the action is purely statutory having nothing to do with *lex aquilia* nor is it necessary to prove delict.

Harms in his *Amler's Precedents* quoted above says at p.220 that 'claims for payment of compensation for damages as a result of bodily injuries or death caused by motor vehicle accidents are regulated by statute.' The court interposes that in Lesotho the claims are equally regulated by statute. On p.222 *Harms* says liability under the Acts is Aquilian making it necessary to make allegations relating to wrongfulness, negligence and causation; further that it is necessary to allege and prove that the loss or damage suffered was caused or arose out of the driving of the motor vehicle.

Plaintiff's summons or declaration is not a shadow of the precedents I have referred to above much as these precedents are to be largely regarded as guidelines.

Legal practitioners are trained lawyers who cannot do without acquainting themselves with and updating their own current knowledge. The knowledge consists in the first place of precept followed by practice. It's no matter whether particular legal practitioners are unorthodox for it is the unorthodoxy that will make them unconventional and static. A modern lawyer prides himself in arming himself with prevailing legal forms and precedents so as not to be left behind or lost in the struggle for intellectual ascendancy and supremacy. Indeed much like a lunatic, a legal practitioner is expected to behave or act like a trained practitioner.

Mr. Gruntlingh in answer to the court's perception of a proper order where a summons is attacked by way of an exception had earlier said if the court grants the exception the summons would have to be thrown out. He has, on reflection, agreed that the right move in the event of an exception being approved is amendment of the summons.

Accordingly, while the exception relating to the summons and declaration succeeds, the plaintiff is also given leave to amend the summons and declaration within fourteen (14) days from the date of delivering this judgment. Costs will be costs in the action. Plaintiff also might, appropriately, consider applying for a joinder.

~~G.N. MOFOLO~~
JUDGE
25th March, 1998.

For the Plaintiff: Mr. Seotsanyana
For the Defendant: Mr. Gruntlingh