CIV/APN/136/97

IN THE HIGH COURT OF LESOTHO

In the matter between:-

PIUS TEBOHO NTJA MASUPHA **APPLICANT**

vs

LESOTHO NATIONAL GENERAL INSURANCE CO. LTD. **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 21st August, 2000

In this application, the applicant prays for an order in the following terms:-

"1. Condoning failure of applicant to comply with Motor Vehicle Insurance Order 1989 (sic 1972) especially section 10 (1) thereof;

2. Granting applicant leave to sue the respondent for compensation as a result of a motor accident which resulted in the fatal death of applicant's wife.

3. Costs of suit only in the event of opposition.

4. Granting applicant further and/or alternative relief.

In his founding affidavit attached to the Notice of Motion, the applicant alleges that his wife was killed in a road accident that occurred on the **22nd April 1989** at Ha 'Masana between motor vehicles Y87761 and C1052. It is clear that the Motor Vehicle Insurance Order No.26 of 1989 only came into operation on the **1st January 1990** (section 1 thereof); when therefore the fatal accident occurred the Motor Vehicle Insurance Order No.18 of 1972 was still operative. The applicant therefore has relied and sought to comply with the provisions of a law that did not exist when the claim arose. Even though this incorrectness was raised by the respondent in his answering affidavit (paras 4 and 6), the applicant still persisted his replying affidavit to pursue application under the 1989 Order.

On this aspect **Mr Grundlingh** submits that the application be dismissed summarily as being bad in law. Section 19 (2) of the 1989 Order reads:-

> "(b) the provisions of the Motor Vehicle Insurance Order of 1972 shall continue to apply with reference to claims for compensation and to liability for compensation in respect of loss or damage which arose prior to the commencement of this Order."

The question is whether the founding affidavit and Notice of Motion are bad in law such that they do not disclose a cause of action. **Herbstein and van Winsen** - The Civil Practice of the Supreme Court of South Africa (4th Ed) 1997 p. 364 has this to say:

"This supporting affidavits must set out a cause of action. If they do not, the respondent is entitled to ask the court to dismiss the application on the grounds that it discloses no basis on which the relief can be granted"

Mr Grundlingh submits that if the applicant is replying upon the provisions of the 1972 Order, his Notice of Motion and supporting affidavits should have contained averments to make that clear - **Van der Merwe vs Suid Afrikaanse Nationale Trust en Assuransi Maatkappy Bpk** - 1947 (2) SA 440 at 446; **Gumede vs African Guarantee and Indemnity Company Ltd** 1952 (3) SA 457. The present application as it therefore stands on these papers does not plead the insurance obligation in terms of the 1972 Motor Vehicle Insurance Order which was still operating when the accident occurred. This incorrectness should have been rectified at least in the replying affidavit but this was not done. I would indeed feel inclined to dismiss the application on that ground alone; but I have chosen to deal with the main issue of whether this court has power under the 1972 Motor Vehicle Insurance Act to condone the late filing and service of summons in the circumstances of this case.

Assuming that the Motor Vehicle Insurance Order 1972 had been relied upon, it is pertinent to observe that this Order did not give the court power or discretion to condone the non-compliance with its prescriptive provisions, namely sections 13 (2) and 14 (1) and (2). These read -

"(a) The right to claim compensation under sub-section (1) from the registered company, shall become prescribed upon the expiration of two years from the date upon which the claim arose: provided that prescription shall be suspended

> during the period of sixty days referred to in sub-section (2) of section fourteen" (my underlining)

Section 14 (2) in turn reads:-

> "No such claim shall be enforceable by legal proceedings commenced by a summons served on the registered company before the expiration 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)" (my underlining)

The proper reading of section 10 (1) of the 1972 Order is that the right to claim compensation shall become prescribed upon expiry of a period of two years provided prescription is suspended for a period of sixty days after a claim MVI 13 has been lodged. In my view the right which has prescribed becomes extinguished and hence unenforceable. The prescription under the Motor Vehicle Insurance Order 1972 is best described as extinctive - **Neon and Cold Cathode Illuminations (Pty) Ltd vs Ephron** - 1978 (1) SA 463; **Mazibuko vs Singer** 1978 (1) SA 839.

Another question is: if a right has lapsed by operation of law, does the court possess power to revive or rescusitate such right under common law?

In the case of **Mokhethi vs Lesotho National Insurance Insurance Co.** - CIV/APN/57/86 (unreported) our **Chief Justice Kheola** (ACJ as he then was) had occasion to consider an application wherein the applicant sought an order condoning his late lodgment of an MVI 13 claim on the ground that the two years prescription period had expired due to no fault or negligence on her part. The application was opposed on the ground that under the Motor Vehicle Insurance Order No.18 of 1972

this Court had no power to condone the late lodging of the claim form with the registered insurers. In that case certain occurrences were alleged by the applicant as having induced her to fail to file her claim timeously within the two years period, for example a certain moon-lighting Mr Kosie who had posed as a lawyer had somehow disappeared along the way leaving incomplete forms in his trail. Holding that the words of the statute must always be interpreted in their ordinary and literal meaning, the learned Chief Justice stated that Sections 13 (2) (a) and 14 (2) make it abundantly clear that prescription begins to run from the date of the accident upon which the claim arises; and that if within two years from the date of the accident the third party sends or delivers the claim to the insurer, the prescription is suspended for a period of sixty days from the date the claim was sent or delivered. Where upon proper computation or calculation of the period, it is clearly shown that the right to claim compensation has prescribed either (a) because the MVI 13 was not served within two years after the accident and (b) because the summons have been served after the expiry of the prescriptive period (which should include 60 days), it was held that the court has no power to condone the late filing of the claim for compensation.

> "There is no provision in the Motor Vehicle Insurance Act 1972 giving the Court the power to do so," and ... "the function of the court is to interpret the law and not to legislate," the learned Chief Justice noted.

In my view this Court has no power either under the High Court Act of No.5 of 1978 or under common law to condone non-compliance with an Act of Parliament; it however has power to condone non-compliance with its own rules - see High Court Rule 59. It reads-

> "Notwithstanding anything contained in these Rules, the Court shall always have discretion, if it considers it to be in the interests of justice, to condone any proceedings in which the provisions of these rules are not followed." (My underlining)

The court, in other words, cannot resuscitate a right which **ex lege** has prescribed and been extinguished. In passing it may be mentioned that in South Africa until recently, section 24 (2) of the Motor Vehicle Insurance Act No.56 of 1972 as amended provided for a court relief of a prescribed claim if the applicant could satisfy the court that by reason of special circumstances he could not reasonably have been expected to comply with the prescriptive provisions of the Act. (See **Chiliza vs Commercial Union Assurance** 1976 (1) SA 917 at 918). In Lesotho we did not have a similar provision under our 1972 Order, and indeed we still do not have such even under the current 1989 Order.

Mr Maieane however strenuously argued that the court had the inherent power in view of the special, if not pitiable, circumstances of this present case, to condone the late filing and service of the summons to enforce the applicant's claim for compensation.

It is not in dispute that in the present case the claim was served upon the insurer timeously on the **9th June 1989** (the accident date being the **22nd April 1989**). My calculation of sixty day suspension period gives **9th August 1989**; and the summons therefore ought to have been served upon the defendant on any day between **10th August 1989** and **22nd June 1991** the latter date being the cut-off date and no

summons could not therefore be validly issued after the date (see my recent judgment in **Moeti vs LNIG** - CIV/T/618/93 (unreported). Of great interest is however the case of **Attorney General vs Mpalipali Lerotholi** 1995 - 96 LLR and Legal Bulletin 155 where the late **Mahomed P** (as he then was) held that it was clearly relevant for the court to take into account the culture of human rights when exercising discretion in terms of section 60 of the Police Order 1971 - e.g. ignorance on the part of the applicant concerning the prescriptive provisions in the law, and the effect of denying him relief as precluding his human right to ventilate his claim under law. Under the Police Order the Court has a discretion to extend the 6 months statutory period of prescription.

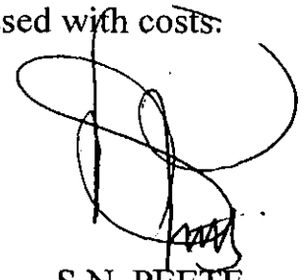
In the present case, **Mr Maieane** invoked what he called "special circumstances" of the case, for example the fact that immediately after his wife had been killed in the road accident of the 22nd April 1989, the applicant timeously lodged his MVI 13 claim on the **9th June 1989.** This he did on his own without assistances of an attorney. This choice is the one that begot him his later woes or troubles. On the **8th July 1989** the insurer wrote to him acknowledging receipt of his claim and informing him that the claim would henceforth be handled by Webber Newdigate as their attorneys and "you will no doubt be hearing from them in due course." Applicant apparently wrote to Webber Newdigate on 6th November 1991 and was replied by them on the 9th January 1992; there are also letters dated 28th October 1991, 26th September 1991, 19th July, 1989, and 18th January 1992.

Correspondence **per se** unless it repudiates liability does not interrupt the running of the 60 day suspension period; if the insurer however immediately or at any time during this suspension period repudiates liability, the claimant can issue and serve summons upon the insurer right away. In the present case the insurer only required certain information in order to enable it to determine the claim. It neither settled nor repudiated this claim during the sixty day period. In my view, the applicant, personally or through his attorney had a full right during the period **10th August 1989** to **22nd June 1991** to have issued summons without much further ado. He did not exercise his right as he was entitled to do; ignorance of the law is pleaded; but I should say ignorance of the law does not interrupt or suspend the running of the suspension nor is it a factor sufficient to entitle the court to condone his non-compliance with the provisions of the law.

Under the Motor Vehicle Insurance law in Lesotho as it presently stands the court has absolutely no discretion even to afford an equitable relief to a defaulting applicant; and I regret to say that he cannot even claim against the owner of the vehicle which might have negligently caused the death of his wife. Speaking for myself, I dare say, that our law on this aspect may be in need of reform so that the claimant be afforded a better protection against prescription. As I stated in **Moeti's** case (supra) lay claimants are not acquainted with the intricate provisions of the Insurance law whose provisions even mislead or are misinterpreted by some legal practitioners. I need not again indeed repeat my advice to practitioners who receive instructions, to lodge the insurance claims and issue summons timeously on behalf of their lay clients.

In the circumstances of this case, I hold that this court has no power or discretion under the Motor Vehicle Insurance Act of 1972 to condone non-compliance with the provisions of section 10 of the said Act.

The application is therefore dismissed with costs.



S.N. PEETE

JUDGE

For Applicant : Mr Maieane

For Respondent : Webber Newdigate