

IN THE HIGH COURT OF LESOTHO

In the matter between:-

KHOKHOBELA NTHONYANA

PLAINTIFF

and

LESOTHO NATIONAL GENERAL INSURANCE

DEFENDANT

JUDGMENT

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane
on the 29th day of August 2002

The plaintiff in this case has sued the Defendant for damages in the total amount of M35,000.00 arising from the death of plaintiff's son as a result of the negligent driving of vehicle BRF 564 FS. This vehicle was at the time of the accident driven within Lesotho along the Main South 1 road at or near Motsekuoa junction. The motor vehicle was insured by the Defendant.

The amount claimed is made out as follows:-

1. Payment of M225.00 hospital expenses.
2. Payment of M4 500 for funeral and transport expenses.
3. Payment of M20,000 for raising the deceased's head.
4. Payment of M10,200.00 for contumelia.
5. Costs of suit.

This claim is made in terms of **Motor Vehicle Insurance Order No.26 of 1989**.

The Defendant filed a Special plea couched in the following terms:-

1. The claim upon which the plaintiff's action is based arose on the 27th April, 1998 being the date of accident and death.
2. The claim in the prescribed form which Plaintiff was required to deliver to Defendant in terms of section 12 of the **Motor Vehicle Insurance Order 26 of 1989** as amended, was delivered on the 21st March 2000.
3. Summons was served upon the Defendant on the 8th May, 2000.
4. The Defendant pleads that the period of sixty days allowed in terms of section 12 (2) of the **Motor Vehicle Insurance Order 26 of 1989**, as amended, had not expired when summons in this action was served on the Defendant.

5. In the premises, the plaintiff's claim against the Defendant is unenforceable and as the summons was not re-served upon the Defendant outside the 60 days suspension period and within the two year prescriptive period, the Plaintiff's claim has prescribed.

WHEREFORE DEFENDANT prays that Plaintiff's claim against it be dismissed with costs.

In order to appreciate the basis on which the special plea is founded I will make reference to the sections of the Act which the Defendant submits plaintiff ought to have complied with;

Section 10 (1) of the Act:

"The right to claim compensation under this Order from the insurer shall become prescribed upon the expiry of a period of two years as from the date upon which that claim arose:

Provided that prescription shall be suspended during the period of sixty days referred to in section 12 hereof.

(2) *No other law relating to prescription shall apply to this order.*

I will only extract the relevant subsection under section 12.

Section 12 (2)

“No claim in terms of this order shall be enforceable by legal proceedings commenced by a summons served on the insurer before the expiry of a period of 60 days as from the date on which the claim was sent or delivered by hand, as the case may be to the insurer as provided for in section 10.”

The facts which are common cause are that the cause of action arose on the 27th April 1998, which is the date of the accident and death. Also that the claim form was received by the Defendant on the 21st March 2000, and summons served upon the defendant on the 8th May 2000. I must also mention that it is not disputed that the summons was served within the 60 days period. In short, all the facts on which the special plea is based are indeed a common cause.

Plaintiff's argument is that, the Insurance Order was made to afford compensation to those who have suffered or who are victims of road accidents due to negligence. He goes further to say, that the purpose of the prescriptive period is to afford the Defendant some time within which to consider his position, but not to render the Defendant immune from litigation.

I would not agree any less with the plaintiff's line of argument, but would advance it further and say that as there are rules in every game, the legislature in its wisdom has allowed some fixed periods of time in the lodging of insurance claims. There is allowance for lodging the claim with the insurer, for serving summons and re-serving the summons.

It was also the Plaintiff's contention that the Courts are there to develop the law, otherwise there would be amendments made day in and day out. On that, I would say the Courts are there to interpret the law, and in interpreting the law the primary rule is to give the words of a statute their ordinary literal meaning with the aim of giving effect to the intention of the legislature. The Court will depart from interpreting in the ordinary, literal meaning where there is some absurdity, **Mokhethe v LNIC CIV/APN/57/86**.

The question of violating the spirit of the Constitution by taking away the Court's discretion doesn't arise, as the rule of interpretation still leaves room for the Court in the event of absurdity. But the language used in the **Insurance Order** is very clear and not ambiguous, leaving no room for other interpretation.

As was the case with **Khuto v LNIC and another** 1997-98 LLR 90, on the facts of this case, the delivery of plaintiff's claim form to the Defendant on the 21st March 2000, had the effect of suspending the prescription for a period of 60 days from the date of such delivery. So that the claim could not be enforceable by legal proceedings commenced by a summons served on the Defendant before the expiration of a period of 60 days. This is precisely what the plaintiff in this case has done by serving the summons before the expiration of 60 period. If my calculations be correct from 21/03/00 to 8/05/00 is only 49 days not sixty days.

It is without doubt therefore that the summons in this case was served prematurely, as a result rendering the action unenforceable in terms of section 12 (2) of the Motor Vehicle Insurance Order 26 of 1989, **Lesotho National Insurance Company v**

Tšepo Sekhesa C of A (civ) No.36 of 1994 as cited in **Khuto v LNIC** supra. But as was eloquently shown by my brother Ramodibedi J in the same case, that a summons which is served prematurely is in effect not a nullity as may be re-served. Since we have not been told that such was the position, the special plea by the Defendant is upheld with costs.



A.M. HLAJOANE
ACTING JUDGE

For Plaintiff : Mr Mohau
For Defendant : Mr Grundlingh