CIV/APN/489/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

WOOL WAGON (Pty) Ltd. t/a M.K. CLOTHING PRODUCT	1ST APPLICANT
WOOL WAGON (Pty) Ltd	2ND APPLICANT
MRS 'MAMOTŠELISI KHIBA t/a HAIR AND BEAUTY SALON	3RD APPLICANT

and

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED	RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane
on 25th Day of April, 2002

I will start first by giving a brief synopsis of the relationship between the Applicants and the Respondent. The papers filed of record reveal that both parties had entered into written agreements of insurance in terms of which the Respondent undertook to insure first Applicant's machines and equipment, second Applicant's electronic equipment and third Applicant's stock in trade and all the contents against the risk mentioned in the Insurance contract; being amongst others fire, and malicious damage to property.

Applicants allege that on or about 16th May, 2001, a fire at their premises destroyed their property and that formulated claims were lodged between August and September respectively. Letters seeking the position of Respondent regarding the claims were thereafter written to the Respondent, showing that Respondent has unreasonably delayed in making a decision regarding Applicants' claim. Applicants feel that a decision by the Court on that issue will assist in the formulation and determination of three other claims arising from the fire.

It is further the Applicants case that after the burning of the premises and business Respondent conducted its own private investigations into the circumstances relating to the incidence, together with the question of liability. That the Respondent has known about the cause of the fire as early as June and July, 2001. It is further the Applicants feeling that they have complied with their obligations under and in terms of their policies but that Respondent has failed and/or refuses to either accept or deny liability in respect of the claims. As a result of Respondent's failure to decide on Applicants' claims, Applicants are unable to establish new businesses as they have been deprived of their main source of income and have had their lease agreement with the National University of Lesotho cancelled.

Applicants further contend that this Application relates to three separate Insurance policies with Respondent who cannot therefore rely on non-formulation of the stock claim in respect of Wool Wagon (Pty) Ltd as a ground for Respondent's failure to make a decision regarding Applicants claims. It is Applicants further contention that the policy documents in respect of which the present Applicants claim contain no clause that gives Respondent the right to combine any claim under them with any other claim under another policy.

The main prayer for this Application being;

(a) Directing the Respondent to make a decision regarding acceptance or denial of liability of Applicants' claims within fourteen (14) days of granting of the order.

(b) Directing Respondent to furnish the Applicants with the ground of denial of liability within fourteen 14 days of granting the order.

In opposing the Application Respondent shows that Applicants are in effect seeking for a mandatory interdict since the relief sought requires a final determination of the rights of the parties. Respondent is being asked to either accept or deny liability.

The policy wording of the relevant paragraph in the policy contract reads:

> **"In consideration of the payment of the premium by or on behalf of the insured, the company specified in the schedule agrees to indemnify or compensate the insured by payment or at the option of the company by replacement, reinstatement or repair in respect of the defined events occurring during the period of insurance and as otherwise provided under the within sections up to the sums insured, limits of liability, compensation and other amounts specified."**

The leading case on the subject of interdicts, **Setlogelo v Setlogelo 1914 AD 221** clearly spells out the requisites for an interdict:

- a clear right,
- injury actually committed or reasonably apprehended
- absence of similar protection by any other remedy.

The Respondent submits therefore that on the authority of the above case Applicants have not proved that they have a clear right to the relief sought, neither does such a right exist in the policy conditions. Respondent points out that, the Applicants are only relying upon the policy wording shown earlier, which has to be given its ordinary and popular meaning, **Fedgen Insurance Ltd v Leyds 1995(3) S.A 33 at 38.**

What the Policy wording provides is contractual right on the part of the

Applicants to insist upon payment from the Respondent in the event of the other conditions and terms of the policy being met. The question that has to be answered is whether or not the Applicants have a clear right to the relief being claimed.

On the facts of this case it has been clear that there is a contractual relationship between the parties, Applicants submitting a claim after the happening of an event and Respondent effecting payments on certain conditions being met by Applicants. There is a right to submit the claim under the contract by the Applicants and the right to be given a reply of whether to accept or deny liability by Respondent. To be said to be a clear right is a matter of evidence, **Welkom Bottling Co. (Pty) Ltd. v Belfast Mineral Waters (OFS) (Pty) Ltd. 1967(3) S.A. 45 at 56**. In order to establish that clear right the Applicant has to prove on a balance of probability the right which he seeks to protect. This is a task which is normally tackled by way of action since a final order will not be granted on motion where there is a dispute of fact. Applicant has only alleged that instituting an action will be premature and unsuitable without explaining further as to what he meant by that.

Injury Committed or Apprehended .

Applicants allege that the injury that has arisen is that they are unable to establish new business as their future is held to ransom by the Respondents and that their lease has been cancelled due to the conduct by the Respondent of not accepting or denying liability. But can it be said that the response is unreasonably withheld by the Respondent? Respondent is not just keeping quiet but making further private investigations to establish the possible cause of the fire so as to dispel any lingering doubts, (page 91 of the record) which is a letter to professional investigator. Respondent says he needed to investigate circumstances surrounding the fire damage. Applicants are saying that their prayers relate only to liability not quantum, and that proofs and information referred to by the Respondent would be an issue when the question of quantum is being addressed but not in this case. Applicants here have shown that according to them they have complied with their obligations in terms of the policy but that the Respondent has taken an unreasonable time before showing whether he accepts or denies liability. The Respondent on the other hand has shown that Applicants have not complied with their obligations in terms of the policy as they have not furnished proof required which they are obliged to furnish in terms of the said policy. Even here

there is clearly a dispute of fact which cannot be resolved on papers. Applicants are saying they have complied but the Respondent on the other hand claims that they have not complied. There is therefore a dispute of fact on whether or not enough information has been provided.

In support of their proposition that they are entitled to be appraised of a decision by the Respondent within a reasonable time of formulation of their claims, the Applicants on the authorities of **Reg v Liver pool Ex parte Liverpool Taxi Fleet Operators Association [1972]2 All ER 589 at 594** quoted Lord Denning where he showed that, a person or public body entrusted with powers for public purposes cannot divest themselves of those powers e.g. by contract. He pointed out that ;

> " That principle does not mean that a public corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it."

Applicants went further and stated that the abovementioned case was quoted with approval in the case of **Attorney-General and Others v Makesi & 85**

Others 1999-2000 LLR & LB 302 where the Court of Appeal issued a mandamus.

As can be seen from the facts of this case, it is distinguishable from the Makesi case as in Makesi there were no conditions precedent before effecting changes, the revised salaries for Court Presidents. The Government there had made an undertaking. You only have to be a Court President to qualify for such upgrading, no other requirements like qualifications, service or age. Unlike in Life Policies, which are valued policies. In Life Policy you only report death and you get paid. But in our present case liability is not automatic on the happening of the events, but there are other conditions that have to be satisfied first before accepting or denying liability. Applicant have first to furnish proof. That means loss has still to be proved in this case.

Claims

Section 6 (a)(iii) ..... after the event submit to the company full details in writing of any claim.

(iv) Give the company such proofs, information and sworn declaration as the company may require ....."

No Other Remedy

The Court will not generally grant final interdict where Applicant can obtain adequate redress in some other form of ordinary relief as a final interdict is a drastic remedy and in the Court's discretion. But in circumstances where the Court feels that despite existence of other remedies the interdict may in fact be less drastic than some other remedy available to the Applicant, the Court may grand a final interdict. *See* **Peri-Urban Area Health Board vs Sandhust Gardens (Pty) Ltd 1965 (1) S.A. 683 at 684**.

In this case the Respondent says that the Applicants still have other suitable remedy like instituting an action, but the Applicants on the other hand show that that move would be unsuitable and premature in the absence of any knowledge of grounds of repudiation. Applicants put their reliance on Section 6(c) of the policy which reads;

> **"In the event of a claim being rejected and legal action not being commenced within 6 months after such rejection all benefit afforded under this policy in respect of any such claim shall be forfeited"**

Applicants are reading the section to mean that there can be no action instituted in the absence of anything from the insurer by way of accepting or repudiating liability, at the same time are saying that Respondent has taken an

unreasonable delay in showing their position. According to them the behaviour of the Respondent is tantamount to rejection of liability on its part. The best way therefore would be to institute an action against the company.

An example being where a letter of demand has been given and the response to it being that you first have to do certain things before you get an answer. If you allege that what is needed from you has been complied with already you cannot insist on demanding but the best route would be to institute an action. In **Reserve Bank of Rhodesia vs Rhodesia Railways 1966(3) S.A. 656,** where it was held that the granting of an interdict was neither necessary nor competent as they had another remedy open to them. The Court went on to say that if in an Application for an interdict it appears that there is an existing remedy with the same result, the interdict should be refused. **Commander LDF and Another vs Matela 1999 - 2000 LLR & LB 13**

On Urgency

Respondent contents that the matter is not urgent as no grounds for urgency have been shown. Applicants on the other hand allege that the matter in fact is urgent as may have been deprived of their main source of income and are unable to settle outstanding debts. Again Applicants show that in fact the matter had not

been treated as one of urgency as Respondent was allowed to file opposing papers and no temporary interdict was sought against Respondent. Respondent suffered no prejudice as the Application was on notice, **Attorney General vs Makesi Supra .**

Admissibility of Answering Affidavit

Mr Martin Wright, Chief Executive of the Respondent deposed to an affidavit deriving an authority so to act from a resolution that was made at a Board meeting of the Respondent and copy of such resolution attached.

Applicants are arguing that the answering affidavit of Mr Wright is not admissible as he has not alleged that he deposes to facts that are within his personal knowledge or that have been gleaned from records of Respondents. In **Central Bank of Lesotho vs Phoofolo LAC (1985 - 1989) 259,** where the Governor had deposed to the answering affidavit on behalf of the Bank, and did not say that the fact to which he had deposed were within his personal knowledge. As rightly conceded by the Applicants the affidavit, dealt with legal issues and not factual issues. The Court held that since the material facts to which the Governor deposed to were clearly within his knowledge and were indeed common cause, the objection had to be dismissed. In that case my brother Molai J was taken to

have correctly dismissed that objection as the Court went further to state that, "There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts." Mr Wright is the Chief Executive of Respondent and is duly authorized. For the reasons given Mr Wrights affidavit is considered to be admissible.

It has already been shown that this Application is for a mandatory interdict and as such the requisites for an interdict have to be established. As rightly pointed out by the Respondent there is no provision in the policies contract entitling the Applicants to be told whether liability is being accepted or denied, the relationship is purely of a contractual nature. In the contracts, the Respondent has agreed to compensate or indemnify the Applicant by payment or replacement, reinstatement or repair in respect of the defined events occurring during the period of Insurance, in consideration of the payment of the premiums but on certain conditions.

There can therefore be no injury committed or reasonably apprehended as Applicants have not been able to establish or show a clear right under the contracts. Applicants still have a remedy open to them by instituting an action for

their claims under the contract.

I therefore dismiss the Application with costs.

A.M. HLAJOANE
ACTING JUDGE

For Applicant: Mr Malebanye

For Respondent: Mr Molyneaux