C OF A (CIV) NO.10/ 2003

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

LESOTHO NATIONAL GENERAL INSURANCE CO. LTD. APPELLANT

and

SALEMANE PHAFANE RESPONDENT

13 and 20 APRIL 2005

CORAM: GROSSKOPF JA
SMALBERGER JA
GAUNTLETT JA

SUMMARY

Insurance policy – clause 14 providing for a 12-month time bar to institute action – clause 12 requiring insured to commence action within 6 months after the insurer has disclaimed liability – clause 14 provides in clear and unambiguous terms that "in no case whatever" shall the insurer be liable after the expiration of the 12-month period – no express or implied term providing for the interruption or suspension of the running of the 12-month period once the insurer has disclaimed liability.

JUDGMENT

GROSSKOPF JA

[1] This appeal was postponed *sine die* on 2 October 2003 pending the resolution of the following applications:-

1. An application to set aside as an irregular proceeding the notice of set down which led to a judgment by default being granted in the main action.

2. An application for the rescission of the judgment by default referred to in 1 above.

3. An application to stay execution on the said judgment.

[2] This Court ordered on 2 October 2003 that the appeal could not be re-instated until an affidavit by the appellant's attorney was filed stating that the above applications had been resolved in the High Court. Such an affidavit has now been filed in which it was further mentioned that judgment was handed down on 26 August 2004 in the High Court in terms whereof the notice of set down was set aside, the judgment by default rescinded and execution stayed.

[3] This Court further ordered on 2 October 2003:-

(a) that no order be made on the notice of motion of the respondent dated 21 August 2003 in which the respondent applied to have the appellant's appeal struck off the roll;

(b) that the costs of the respondent's said application and the costs of the hearing on 2 October 2003 be dealt with by this Court when the appeal is finally heard.

[4] The respondent claimed M105 600,00 from the appellant as insurer in the High Court in terms of a motor vehicle insurance policy. The claim was for the respondent's insured vehicle which had been stolen. The appellant filed a special plea of prescription together with its plea on the merits. The parties thereafter agreed upon a written statement of facts in terms of rule 32 (1) of the High Court Rules for the adjudication of the special plea. By agreement between the parties only the special plea was argued before the Court *a quo* while the merits of the claim stood over for later adjudication. The Court *a quo* dismissed the special plea with costs on 1 April 2003. The appellant appeals against this order.

[5] The respondent had previously brought an application in this Court to strike the appellant's appeal from the roll on the grounds that the order of the Court *a quo* dismissing the special appeal was an interlocutory order which required leave to appeal. The respondent did not proceed with this application before us and it will accordingly be dismissed with costs.

[6] The following relevant facts were admitted by the parties in their written statement for purposes of the special plea:

(a) The respondent's insured motor vehicle was stolen on 12 March 2000.

(b) Liability in respect of the respondent's claim was repudiated on 23 January 2001.

(c) Action was instituted by the respondent on 30 May 2001,

more than 14 months after the happening of the event, i.e. the theft of the vehicle.

(d) The respondent's claim was neither the subject of pending action or arbitration on 11 March 2001, nor is it a claim under section 11 of the policy.

[7] The appellant in its special plea denied liability under the policy in view of the provisions of clause 14 of the general conditions of the policy which reads as follows:-

> *"In no case whatever shall the Company be liable under this Policy after the expiration of twelve months from the happening of the event unless the claim is the subject of pending action or arbitration or is a claim under Section 11."*

[8] The respondent on the other hand submitted that a proper interpretation of clause 12 of the general conditions shows that he had 6 months after the appellant's disclaimer to institute his action, irrespective of whether the 12 month period of clause 14 had by then elapsed or not. Clause 12 provides as follows:-

> "*In the event of the Company disclaiming liability in respect of any claim and an action or suit be not commenced within six months after such disclaimer all benefit under this policy in respect of such claim shall be forfeited."*

The court *a quo* agreed with the respondent's interpretation.

[9] On the respondent's construction the insured who has lodged his claim within the 12-month period will always have an additional 6 months after the insurer's disclaimer to institute his action, even if the insurer disclaims liability on the last day of the 12-month period. Such an interpretation in my view disregards the clear wording of clause 14 which is introduced by the words "In no case whatever …". Clause 14 should also be read together with clause 12.

[10] It was held in **Union National South British Insurance Co Ltd v Padayachee and Another** 1985 (1) SA 551 (A) at 559 H-I that a clause similar to the present clause 14:

> *"has no need of a special interpretative approach or an implied term to give it meaning or efficacy. It is clear and unambiguous; it entitles the insurer to refuse to pay any claim after the expiration of the 12-month period if no action is then pending. If, as the end of the 12-month period approaches, the insured finds it impossible within such period to furnish all the required information …due to the insurer's own untoward delay in requesting such information, there would to my mind be nothing to bar the insured from issuing summons within the 12 month period."*

[11] A similar approach was adopted in **Kgaka v Statsure Insurance Co Ltd and Another** 2001 (4) SA 245 (T) at 247 H-248A where the learned judge remarked as follows in relation to clauses in insurance policies barring action after expiry of a period of 12 months:

> *"They provide an independent defence to a claim under the policy. All that is necessary to make such a defence available to the insurer is the failure of the insured to institute action within 12 months of the happening … These provisions provide a contractual defence to the insured's claim. They have nothing to do with prescription and they are therefore not affected by the provisions of the Prescription Act 68 of 1969. The only question is therefore whether or not the claim was the subject of a pending legal action within 12 months of the happening."*

[12] On the respondent's interpretation the provisions of clause 12 serve to interrupt or suspend the running of the 12 month period in clause 14. There is however no clause in the insurance contract of the parties which expressly provides for any such interruption or suspension, and there is certainly no need to imply a tacit term to provide for such interruption or suspension. See the **Padayachee** case, *supra*, at 559C-560I, where the court rejected the insured's argument that a similar term should be implied in the contract of insurance.

[13] The respondent relied heavily on the case of **SZ Tooling Services CC v SA Eagle Insurance Co Ltd** 1993 (1) SA 274 (A). The policy in that case contained a 24-month time bar for legal action similar to our clause 14. That condition did not however play any role in the case. A further condition, similar to our clause 13, provided that in the event of a claim being rejected and legal action not being commenced within 3 months after such rejection all benefit under the policy shall

be forfeited. The question in that case was whether motion proceedings for declaratory relief instituted within the 3-month period constituted the required commencement of "legal action". The court held that it did. In my view the **SZ Tooling** case does not provide any support for the respondent's contentions.

[14] In my judgment clauses 12 and 14 should be read together. Reliance cannot be placed on clause 12 to the exclusion of clause 14 which in clear and unambiguous terms entitles the insurer to refuse to pay any claim after expiration of the 12-month period if no action is then pending. I am accordingly of the view that the special plea should have been upheld and that the appeal should be allowed with costs.

[15] The following order is made:

1. The appeal is upheld with costs, such costs to include the costs of the hearing on 2 October 2003.

2. The order of the court *a quo* dismissing the special plea is set aside and the following order is substituted therefor:

   "The special plea is upheld with costs".

3. The respondent's application to strike the appeal from the roll is dismissed with costs.

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F.H. GROSSKOPF

JUDGE OF APPEAL

I agree

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J.W. SMALBERGER

JUDGE OF APPEAL

I agree

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J.J. GAUNTLETT

JUDGE OF APPEAL

For the Appellant : **Mr P.J. Loubser**

For the Respondent: **Mr M. Ntlhoki**