C OF A (CIV) NO.24 2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

LESOTHO NATIONAL GENERAL INSURANCE COMPANY
APPELLANT

and

ALFA PLANT HIRE 1ST RESPONDENT
MASIA MAKARA 2ND RESPONDENT

Held at Maseru:

CORAM: **RAMODIBEDI, JA**
PLEWMAN, JA
GAUNTLETT, JA

SUMMARY

Exception taken after a plea filed – irregularity thereof – claim in terms of section 15 (2) (c) of Motor Vehicle Insurance Order of 1969 – section 17 of the Order.

JUDGMENT

PLEWMAN, JA

[1] This is an appeal against an order by **Maqutu J.** upholding an exception to a declaration on the ground that it did not disclose a cause of action. The appeal is not opposed. It is recorded in the judgment that "after the defendants had pleaded they excepted to plaintiff's claim". Rule 22 (1) of the High Court Rules provides that a defendant must (after a defined period following upon the service of a declaration) deliver a plea or an exception to the declaration. This is similar to the provisions in many other jurisdictions and in such jurisdictions it is trite law that once a party has pleaded it is no longer open to such party to except to a pleading. However in terms of Rule 22 (2) of the Rules in this country a party may, if he thinks fit, deliver an exception and "at the same time" deliver a plea stating that the plea should be considered "only in the event of the exception not succeeding". There is no averment to this effect in the plea in the present case and, in consequence, it would seem to me that the procedure adopted was irregular. But no objection on this ground seems to have been raised – either by the present appellant (the plaintiff) or the court *a quo*. It is unclear on the record on what basis the exception was argued and upheld. After it was upheld a notice of appeal was filed. There was again no mention of a procedural objection. In these circumstances it seems to me that the best course for this court to take is to make the assumption that an arrangement of some sort was made by the parties that the exception would be dealt

with as if it had been regularly filed and considered. I accordingly turn to the merits of the exception.

[2] It will be convenient to give at the outset the explanation that the appellant's claim in the declaration was based on the fact that a motor collision occurred on the 28 June 1999 between a vehicle insured by the Appellant in terms of the Motor Vehicle Insurance Order 26 of 1989 (the Order) and another vehicle. It is alleged in the declaration that appellant became obliged to and did pay compensation to certain persons. These persons were (so it is alleged) all occupants of the other vehicle. The claim is based on an allegation that the Order allows a right of recourse against the owner or driver of the insured vehicle on the ground that they failed to comply with their obligations in terms of the Order to furnish insurer with certain information relating to the occurrence.

[3] It is against this background that the exception must be considered. The exception is in the following terms:-

> "*That the Plaintiff's Declaration does not disclose a cause of action on the following reasons:-*
>
> (a) *Section 17 does not oblige Defendants to report about injury or death of people who are not occupants of their own cars. They are only obliged to report about persons within the car they are driving.*

(b) ***Alternatively to "A" above***

The Declaration does not disclose whether the Defendants knew about the said deaths and/or injury or not.

Section A provides for disclosure of names and addresses if known."

It is noted in the court a quo's judgment that "[The] parties in this matter should go to the statutory roots, they should not use the provisions of the statute for purposes for which they were not intended." The question in this appeal is however whether the court *a quo* itself did so.

[4] The argument which found favour in the court *a quo* was the contention that an insurer's right to be furnished with information concerning the occurrence giving rise to a claim is limited to cases where the dead or injured persons were occupants of the insured vehicle. It is necessary "to go to the statutory roots" to determine whether this is correct. The obligations of the owner and driver of an insured vehicle arise from section 17 of the Order. Section 17 is in the following terms:-

"17. *When, as the result of the driving of a registered motor vehicle, any person other than the driver of that motor vehicle has been killed or injured, the owner or the driver, if he is not the owner, of the registered motor vehicle shall (if reasonably possible), within fourteen days after the occurrence furnish the insurer on the prescribed form of the occurrence*

and of the place and time of the occurrence and shall furnish it with the name and address (if known) of any person who was killed or injured and of every person who was upon the vehicle in question at the time of the occurrence, with a description of any other vehicle involved in the occurrence with the name and address (if known) of the driver of every such other vehicle and of any other person who witnessed the occurrence and with any other reasonable information at his disposal in regard to the occurrence which the insurer may from time to time request him to furnish."

[5] It will be seen that the obligations of the owner or driver imposed by the section can for the purposes of this appeal be listed under four headings, namely that the insures be informed as to:-

(i) the occurrence;

(ii) the place and time of the occurrence;

(iii) Subject to this being known by the owner or driver, the name and address of any person who was killed or injured in the occurrence; and

(iv) Subject to the same qualification, the name and address of every person who was upon the vehicle in question (that is the insured vehicle) at the time of the occurrence with a description of "any vehicle involved in the occurrence with the name and address (if known) of the driver of every such vehicle and of any other person who witnessed the occurrence and of any

other reasonable information at their disposal in regard to the occurrence which the insurer may from time to time request him to furnish".

The obligations in paragraphs (iii) and (iv) above are qualified by the words "if known". But the obligations listed in paragraphs (i) and (ii) are mandatory. The wording of the section in so far as the obligation listed in paragraph (iii) above does not confine the obligation to persons who were occupants of the owner or driver's vehicle. It calls for information regarding "any person". That would include persons other than occupants of the insured vehicle if such persons were killed or injured.

It follows that to the extent to which the court *a quo's* conclusion was based on the defendant's contention that there was no obligation on the defendants to report the death or injury to persons not being occupants of the insured vehicle such conclusion was erroneous.

[6] It is necessary to refer briefly to the provision of sections 15 (1) and 15 (2) (c) and (3) of the Order. It is section 15 which confers on the insurer a right of recourse against the owner and driver of the insured vehicle. In both cases what gives rise to a right of recourse is a failure to furnish the information required in terms of the obligations listed in paragraphs (i) and (ii) above (not the information listed in paragraph (iii)). For this reason too the basis of the court *a quo*'s judgment upholding the exception is incorrect.

[7] The concern of this judgment is limited to a consideration of whether the court's upholding of the specific exception raised was correct or not. For this reason I do not discuss any other issue or consideration. This judgment cannot therefore be read as an endorsement of the terms of the declaration in relation to any other complaint which may yet be raised. It is however to be noted that the structure of the Order is such that once the owner or driver's default has been pleaded in the terms of section 15 (2) (c) any answer or reply to that allegation is manifestly a matter of fact which a defendant would have to raise by way of a plea. Furthermore an exception on the ground that a declaration or plea does not disclose a cause of action or defence will only be upheld where the pleading, taking everything it contains as established, fails to make out a case in law. This in my view cannot be said of the declaration in the present case. The form which the declaration takes is that averments are made concerning the occurrence and regarding the persons whom the appellant was obliged to and did compensate. It is also alleged that the negligence of the driver was the cause. There is then a reference to section 17 (the full terms of which are cited) and section 15 (2) (c) (which is made applicable to a driver by section 15 (3)). In my view the parties should have been ordered to proceed with the trial on the pleadings which have been filed.

[8] In these circumstances the appeal must be allowed. The order of the court *a quo* is set aside and there is substituted therefor an order that the exception is dismissed with costs.

_____
PLEWMAN, JA

I agree: _____
RAMODIBEDI, JA

I agree _____
GAUNTLETT, JA

For Appellant : **Mr Grundligh**
For Respondents : **Mr Matooane**