IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.10/2016

In the matter between:-

MOSA MOSHAO APPELLANT

AND

LESOTHO GENERAL NATIONAL INSURANCE CO. RESPONDENT

CORAM : **LOUW, AJ.A**
CLEAVER, A.J.A
DR MUSONDA, A.J.A

HEARD : 11TH OCTOBER, 2016
DELIVERED: 28TH OCTOBER, 2016

Claim for compensation under the Motor Vehicle Insurance Order No.26 of 1989 – section (d) (iv) of the Order requires a claim form to

be accompanied with an affidavit setting out particulars of the accident – claim form attached to the police report – Special Plea – who bears the onus to prove – what is the rational interpretation of section 9 (d) – failure of Judge to hold enquiry as to the veracity of the Special Plea – Judge dismissing the claim prematurely without hearing evidence – effect of

JUDGMENT

Dr Musonda, A.J.A

[1] This is an appeal against a judgment of the High Court which dismissed he appellant's claim to compensation under the Motor Vehicle Insurance Order No.26 od 1989 on the ground that the claim filed by the appellant in support of his claim did not comply with section 9 (d) (iv) of the said Order.

[2] The appellant's appeal to this court against the judgment of the High Court concerns in main the interpretation of the Section 9 (d) (iv).

[3] Application for condonation for late filing of the appeal, which is opposed since an element of the condonation's application concern the merits of the appeal, the merits of the appeal will be dealt with.

[4] The appellant's reasons for late instructions to her attorney to file the appeal was that she became aware of the judgment on 13th January 2016. She gave instructions to the attorneys to note the appeal 6 weeks ago. She had lost her mobile phone and her attorneys could not contact her. Advocate Joanna Jonas filed an affidavit in support of the appellant. She stated that there were prospects of the appeal succeeding.

[5] The appellant averred that she had filed the necessary documents with the Respondent namely an affidavit in Sesotho, a claim form MV13 commissioned at the police station before the Commissioner of Oaths.

[6] There were two "*Special pleas*" based on the same facts:

(a) was there was no affidavit?

(b) because after two years that no affidavit was filed, the claim had prescribed.

[7] The learned trial judge rejected the plaintiff's argument that the claim form and the police report constituted an affidavit. There being no affidavit in which the particulars of the accident that gave rise to the claim was ever submitted or lodged before the defendant was sued, the plaintiffs claim must fail.

[8] The court a quo did not consider the suspension of prescription period, as there had been no compliance with the provisions of Section 9 (d) (iv). She held that it was more than three years after the claim arose in April 2012. There can be no claim lodged after this, as the claim has prescribed.

[9] The onus is on the defendant to prove "*Special Pleas"*.

[10] Five grounds of appeal were filed which are hereby compressed in one paragraph for convenience. In ground one it was argued that the learned Judge erred by making a ruling on the Special Plea without calling evidence to prove compliance. Ground two, a finding should have been made that there was substantial compliance. The third ground was that. It was a misdirection to hold that no valid claim was filed. The fourth ground, was that the learned Judge disregarded for the intention of the legislature in Section 12. In ground five which was the last ground, it was canvassed that the Judge erred in making a finding that as a result of non-compliance plaintiff's claim had become prescribed. The view I take is that these grounds should be dealt with together.

[11] The appellant augmented the filed grounds of appeal by oral arguments. It was submitted that the Judge did not deal with the affidavit in Sesotho.

[12] Special pleas are dealt with by way of evidence as it demands an inquiry as to whether the insured was in the position to file. The court a quo did not allow an

opportunity to lead evidence. The appellant should have been given an opportunity to lead evidence that she had an affidavit.

[13] The appellant relied on this court's judgment in *Sekhonde vs Lesotho National Insurance Corporation.*[1] In that case this court dealt with the requirements of sections 14, where claimant had used a medical report other than the statutory medical report, since the insurer could intelligently make necessary investigations and assess the claim from the information supplied by the claimant. It was the court's view that the claimant was compliant

[14] The essence of the respondent's submission's was the decision in *Moskowiz v Commercial Union Assurance of SA Ltd*[2]*,* where it was stated that the concept of an affidavit was explained to the effect that it was solemn document that ensures that its contents have a degree of accuracy and can be relied upon. The court added that the degree of accuracy was to enable the appointed agent to enquire into the claim. On this

[1] (1980-1984) LAC 184
[2] (1992) (4) SA 192 (w)

basis, the court found, that the legislature had required that an affidavit be furnished with good reason.

[15] In *Road Accident Fund v Makwetlane*[3]. The case dealt with a provisions where an affidavit to the police was required in so-called hit and run cases. The court held that:

> *"No justifiable claim against the Fund came into existence unless the said requirement had been complied with."*

[16] In case of *Simon Mamore v Lesotho National Insurance Company (Pty) Ltd*[4] it was held that:

> "*By the legislature amending the marginal note of section 9 by the Motor Vehicle (Amendment) Order No.26 of 1991 which amended the marginal note from" protection of insurer to the read "exclusion of liability", the legislature*

[3] 2005 (4) SA 51 AD
[4] CIV 7/576/92

made it clear that the respondent would not be liable unless an affidavit is filed together with the claim forms."

Finally it was the contention of the respondent, citing *Masuku v Mlalose*[5],that the appellant has not made out a case for the proposition that a formal affidavit is not required by the section in question

[17] The law:

This court held in *Lesotho National General Insurance Co. Ltd v Ever Union Garments (Lesotho) Ltd*[6], that:

"The onus of establishing a special plea rests on the defendants, not only in the evidential sense of requiring the defendant to first adduce evidence, which if it establishes a prima facie case, calls for rebuttal by the plaintiff, but also the primary and substantial duty of proving the plea". Per Smalberger JA

[5] (1998) (1) SA 1 SCA
[6] 2009-2010 LAC p.541

[18] The learned Judge a quo's judgment does not reflect or mirror any enquiry regarding the proof required to determine that the "Special Plea" had been proved. To "establish" as used in the judgment of this court means, "*Show to be true or certain by determining the facts"* see *Concise Oxford English Dictionary tenth Edition*. The court cannot rely on the tangential assertion or suggestion by the defendant. There must be a *prima facie* case to enable the plaintiff to rebut. This is the main complaint by the appellants in this appeal.

[19] It was imperative the pleader of the "Special plea" to lead evidence that establishes a *prime facie* case then the plaintiff is then called upon to rebut that evidence, that is the tenor of this court's judgment in *Lesotho National General Insurance Company v Ever Unison Garments (Lesotho) (Pty) Ltd (supra).*

[20] Before I delve into whether the court a quo should have dismissed the claim I will reproduce section 9 (d) in its entirety, because the appellants and respondents sharply focussed on Section 9 (d) (iv). The philosophy underlying the Motor Vehicle

Insurance Order No.26 of 1989 can be understood and appreciated if section 9 (d) is looked at as a whole.

"*9. The insurer shall not be obliged to compensate any person in terms of this Order for any loss or damage –*

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable if section 6, had not been included in this Order; or

(b) suffered as a result of bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death was being conveyed in circumstances other than those set out in section 8 of this Order;

(c) if the claimant is unable to identify either the motor vehicle or the driver thereof.

(d) suffered as a result of body injury to any person who;

(i) unreasonably refuses or fails to subject himself, at the request of the

insurer, to any medical examination or examinations by medical practitioner designated by the said insurer;

(ii) *refuses or fails to furnish the insurer at its request and cost, with copies of all medical reports in his possession that relate to the relevant claim for compensation;*

(iii) *refuses or fails to allow the insurer at its request to inspect all records relating to himself that are in the possession of any hospital or his medical practitioner;*

(iv) *unreasonably refuses or fails to submit to the insurer together with his claim form as prescribed by regulation, or within a reasonable period thereafter and if he is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out;*

(v) *refuses or fails to furnish the insurer with copies of all statements and documents relating to the accident*

that gave rise to the claim concerned, within a reasonable period after having come into possession thereof; or

(vi) refuses or fails to furnish in writing within a reasonable period such further particulars of the said accident as the insurer may require".

[21] In *Touyz v Greater Johannesburg Transitional Metropolitan Council*[7] Van Heerden JA quoting an earlier decision in *Union and South – West Africa Insurance Co. Ltd v Fantiso*[8], the court considered the meaning of the word 'fails' in Section 23 (c) (ii) of the compulsory Motor Vehicle Act 56 of 1972 and emphasised that the general object of the 1972 Act, was to the afford third parties the widest possible protection and since the word 'fails' was of uncertain meaning, it had to be interpreted in favour of third parties: it was for this reason that the Court equated the word with deliberate inaction i.e. failure to act in the appreciation that action was or might be required. The statutory provisions in Lesotho are similarly

[7] 1996 (1) SA AD 95
[8] (1981) 3 SA 293 (A) at 301 B-D.

worded with the South African statutory provision which these cases interpret.

[22] Accordingly, it followed that a mere omission could not constitute a failure within the meaning of Section 9 (d), and for the purpose of Section 9 (d) there had to be a deliberate withholding of a statement or a document before it could be said that the claimant had failed to furnish the same.

[23] In *Multilateral Motor Vehicle Accident Fund v Clayton No*[9], Kumbleben JA commended on Rumpff CJ's approval of the interpretation of the word 'fails' in *Fantiso (supra)* and had this to say about the word "refuses":

> "*The word "refuses" implies a specific verbal or written refusal. Having regard to the context of the Act and of Section 23 itself, the word 'fails' in (c) (ii) implies more than the mere omission to furnish copies of reports. To hold otherwise would create an injustice which the legislature could not have intended. In view of the severity of the penalty, a final loss of claim, one has to*

[9] 1991 (1) SA 55 D AD

consider the failure to furnish copies of reports in a restrictive manner, restrictive in the sense that a court will not deprive a plaintiff of his right to claim compensation unless he can be said to have obstructed the insurer from getting the information which he is entitled to. As the object of the section is to allow the insurer to get information, forfeiture of the plaintiffs claim will only be allowed, in my view, if the information is wilfully withheld after a request is made or if the request is deliberately ignored".

[24] The appellant who was a minor as she was 18 years at the time of the accident had timeously approached the police who commissioned an affidavit in Sesotho, commissioned a medical report which gave details of the accident, filed the claim which was acknowledged by the insurer, who never required further particulars as enacted in Section 9 (d) (iv). Claimants should not have their claims defeated just because they unconsciously failed to appreciate what is expected of them.

[25] The insurer will not succeed with Section 9 (d) 'special plea', when there has been no wilful or deliberate refusal. For instance,especially where the claimant

has been seriously injured and may have difficult to walk like in this case. How does he approach counsel. This is why section 9 (d) (iv) uses the words "and if he is in position to do so". It could be unreasonable to expect a severely injured person to be in the position to furnish particulars of an accident timely. This is the tenor of this court's judgment in *Sekhonde v Lesotho National Insurance Corporations (Supra)*; the decisions of the South African Appellant Division in *Touyz v Greater Johannesburg Transitions Metropolitan Council (supra), Union and South-West Africa Insurance Co. Ltd v Fantiso (supra), Multilateral Motor Vehicle Accidents Fund v Clayton No. supra.*

[26] The application of condonation will succeed where there are prospects of this appeal succeeding, which it has, and there were justifiable reasons for not noting an appeal in time.

[27] Conclusion:

The South African Supreme Court of Appeal been consistent that due to the severe penalty of the claimant foregoing the claim completely, unless the insurer can establish that there was unreasonable

refusal and deliberate failure by the claimant who has the capacity and the capability to do so a claim "should not be dismissed".

[28] I would make the following order

(i) Appeal succeeds with costs.

(ii) Order of the High Court set aside and replaced with the following order

"The "Special pleas" raised by defendant are dismissed with costs."

(iii) The matter is referred back to the High Court for continuation of the trial on the merits of the appellant's claim.

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DR MUSONDA, A.J.A

I agree _____

LOUW, A.J.A

I agree _____

CLEAVER, A.J.A

For the Appellant : **Adv. L.G. Tau-Thabana**
Adv L.M. Lephatse

For the Respondent : **Adv. P.J. Loubser**