IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.11/2016

In the matter between:

'MATUMELO MARAMANE **APPELLANT**

And

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED **RESPONDENT**

CORAM: FARLAM AP
DR. MUSONDA AJA
SAKOANE JA (ex officio)

HEARD: 13 OCTOBER, 2016

DELIVERED: 28 OCTOBER, 2016

SUMMARY

Prescription – computation of period under an Act – common law method versus statutory method of computation – High Court upholding special plea on the basis of use of common law method – special plea set aside on ground that the statutory method is applicable and the suspensive period was ignored by the court a quo in computing the remainder of the prescription period.

JUDGMENT

SAKOANE JA

I. INTRODUCTION

[1] The appellant's husband died in a truck accident on 15 July 2011. She brought an action in the High Court on 13 September 2013 claiming damages for herself against the respondent as the registered insurer of the truck in terms of the **Motor Vehicle Insurance Order No.26 of 1989** as amended per the **Motor Vehicle Insurance (Amendment) Order No.26 of 1991** (hereinafter referred to as "the Order").

The claim

[2] The appellant's declaration alleged that the respondent was the registered insurer of the truck registration number F 1022 which caused her husband's death "as a result of the sole negligence of the driver". She articulated her claim for damages as follows:

> "
> 7.
> As a result of the accident, the plaintiff has suffered damages in the amount of M885,891,88 ….
>
> 8.

The Defendant is liable to compensate the Plaintiff the damages suffered in terms of the **Motor Vehicle Insurance Order No.26 of 1989** as amended.

9.

Defendant has been served with the Statutory Notice of demand by the Plaintiff, but notwithstanding same, refuses and or neglects to pay Plaintiff the sum of M885,891.88 for estimated future loss of support and funeral expenses."

Special plea

[3] The respondent filed a special plea and also pleaded over on the merits. The matter is on appeal because of the upholding, without costs, of the special plea in the court *a quo* by Hlajoane J.

[4] The respondent's special plea is as follows:

"

1.

SPECIAL PLEA

The defendant pleads specially as follows:

1.1 The claim upon which the plaintiff's action is based arose on the 15th July 2011, being the date of the accident and death.

1.2 The claim in the prescribed form which the plaintiff was required to deliver to defendant in terms of Section 12 of the Motor Vehicle Insurance Order, No.26 of 1989, as amended, was delivered on the defendant on 26th June, 2013.

1.3 Summons was served on the defendant on the 13th September, 2013.

2.

2.1 The defendant pleads that the plaintiff's claim in her personal capacity has become prescribed as the summons was not served within the period of two years as from the date upon which the claim arose and as required by Section 12, read with Section 10,

of the Motor Vehicle Insurance Order, No.26 of 1989, as amended. The summons should have been served on or before the 12th September, 2013.

2.2 **WHEREFORE** the defendant prays that the plaintiff's claim in her personal capacity be dismissed, with costs."

Reasons for upholding the special plea

[5] In upholding the special plea and dismissing the appellant's claim, the learned Judge below reasoned as follows in her judgment:

> "[16] By the same analogy, since *in casu*, the accident occurred on the 15th July 2011 the two year period expired on the 14th July 2013 whereas the summons was issued and served on the 13th September, 2013 which was well beyond the two year prescription period.
>
> [17] Based on what has been shown above the special plea of prescription succeeds in relation to plaintiff's personal claim as when plaintiff issued and served the summons on 13th September, 2013 the two year prescription period had already expired on 14th July, 2013."

Grounds of appeal

[6] The appeal is brought on the following three grounds:

> "
> 1.
> The Court erred in deciding that when the Summons were served the claim had long prescribed on the 14th July 2013, thus excluding the suspension period of sixty days.
>
> 2.
> The Court erred in finding that the Plaintiff excluded weekends and holidays in the computation of time, hence reached a wrong conclusion that the claim prescribed on 14th July 2016.
>
> 3.

> The Court erred in disregarding the fact that in computation of time in terms of the Interpretation Act, time is counted excluding the day of the event but including the last day."

II. ANALYSIS

The law

[7] This appeal raises an important issue of computation of time in an Act of Parliament when a plea of prescription is raised. Three methods of computation of time are provided for under the common law and one under the **Interpretation Act No.19 of 1977**.

[8] The common law methods are stated by **Corbett J.** in **Holmes v. North Western Motors (Upington) (Pty) Ltd** 1968 (4) SA 198 (C) at p. 202 F-H as follows:

> "It would seem from the decisions in these cases that when a period of time running from the occurrence of an event has to be reckoned there are three possible modes of computation. These are:
>
> (i) the *computatio naturalis*, which took into account fractions of a day and whereby the period was calculated *de momento ad momentum*, i.e. from the exact moment of the day when the event occurred to the corresponding moment on the final day of the period; (ii) the ordinary civilian method of computation (*computatio civilis*), which treated the calendar day as the unit and in determining the period included the first day, i.e. the day upon which the event occurred, and excluded the last; and (iii) the extraordinary civilian method which also took no account of broken days but included both the first and the last days."

[9] The statutory method is legislated for under PART IX of the **Interpretation Act No.19 of 1977**. The sections relevant in this appeal are 49 and 50. They provide as follows:

> *"49. (1) In computing time for purposes of an Act –*
>
> *(a) a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*
>
> *(b) where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day is a Sunday or public holiday, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next following day, not being a Sunday or public holiday;*
>
> *(c) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, Sundays and public holidays shall not be reckoned in the computation of the time.*
>
> *(2) If the time limited by an Act for any proceeding or the doing of anything under its provisions expires or falls upon a Sunday or public holiday, the time so limited shall be extended to, and such thing may be done on, the day next following not being a Sunday or public holiday.*
>
> *50. Where a number of days not expressed to be "clear days" is prescribed the same shall be reckoned exclusively of the first day and inclusively of the last; where the days are expressed to be "clear days" or where the term "at least" is used both the first day and the last shall be excluded."*

[10] Section 49(1) (b) and (2) decree that if the time or day for doing anything or for any proceeding expires on or falls on a Sunday or public holiday, it shall be considered as done or taken in due time if it is done or taken on the day next following the Sunday or public holiday. The comment made (by Mr. Justice E. Cameron) in **LAWSA** Second Edition Vol.27 at para 287 in regard to the provision of a similarly worded section is that:

> *"Because the application of the statute is expressly confined to prescriptions involving a "number of days", it has no relevance to statutes referring to months or years. There the common-law rule is applied. The statute furthermore has no application in matters of private agreement, even though it would undoubtedly have been "more convenient to adopt the rule" contained in the statute in all cases where time periods are stipulated in days. The result is that the law applicable to the calculation of time periods expressed in days encompasses two distinct systems of computation – ordinary civilian and statutory – and to this extent is anomalous. But "it is an anomaly which the Legislature built into our law with unambivalent intent, and it must be accepted as such".*
>
> *Since the statutory method involves the exclusion of the first day and the inclusion of the last, it is "the converse of the [ordinary] civilian method of computation". It has also been suggested that the statute's provisions relating to the exclusion of Sundays and public holidays where the last day of a period expressed in days falls on a Sunday or a public holiday, being "at variance with the common law", must for that reason be restrictively interpreted. Whether this approach can be maintained in the face of the clear wording of the statute seems doubtful. None of the cases that have declined to apply statutory calculation relies on the presumption against statutory intrusion on the common law and the Supreme Court of Appeal has held that in the absence of repugnancy, the interests of legal certainty require that the statutory method be applied. Furthermore, such repugnancy must not be readily assumed."*

[11] The learned author's further comment at para 293 is that:

"The incidence of Saturdays, Sundays and public holidays may affect the duration of the period, depending on whether the statutory
or curial method applies. Where a specified number of days is required to elapse from the happening of a certain event before a legal competency arises, or where an event is required to occur not more than a specified number of days before another, the "clear days" method of counting may apply, though the Supreme Court of Appeal has held that in cases where statutory computation is applicable, a clear repugnancy (which is not to be readily assumed) must appear before the "clear days" method will displace the statutory method."

[12] The sections of the Order relevant to computation of prescription period and its suspension for sixty days are sections 10 (1) and 12 (2) and (3) which read thus:

"10 (1) 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.

11. …….

12 (1)……..

(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.

(3) Notwithstanding subsection (2) if the insurer repudiates liability in writing for the claim before the expiry of 60 days, the claimant may, immediately after such repudiation, serve summons of (sic) the insurer."

[13] In **Sekhonde v. Lesotho National Insurance Corporation** LAC (1980-84) 184 @ 189 E and 191 G-I, this Court held that one of the purposes of the sixty days period which suspends the running of the two years period is to give the insurer time to investigate and assess a claim with a view to possibly compromising it before legal costs are incurred. Therefore, the sixty days period serves to protect the claim from prescribing by suspending the running of the two years within which it should legally be enforced by the claimant as well as enabling investigation by the insurer with the view to honouring its obligations without any risk of judicial compulsion.

[14] Counsel for the respondent advances the proposition that we should give the words of the Order their ordinary, literal meaning as the learned Acting Chief Justice Kheola did in **Mokhethi v. Lesotho National Insurance Co** 1985-1990 LLR 476 (H.C) at 477-478 where he said:

> "The primary rule of interpretation is that the words of a statute must be interpreted in their ordinary, literal meaning. But where to give the words their ordinary meaning would lead to an absurdity so glaring that the legislature could not have contemplated it, or to a result contrary to the intention of the legislature as shown from the context or otherwise, the Court may so interpret the language of the statute as to remove the absurdity, and give effect to the intention of the legislature (**Venter v. R** 1907 T.S. 910).
>
> In the present case the words of the Motor Vehicle Insurance Order 1972 are very clear and unambiguous and the Court is bound to interpret them in their ordinary, literal meaning. It is quite clear that the applicant will suffer a great loss if this application is refused, however, that should not stop the Court from applying the proper rules of interpretation as

> long as they do not cause absurdity so glaring that it could never have been the intention of the legislature to do so.
>
> Section 13 (2) (a) and 14 (2) make it quite clear that prescription begins to run from the date of the accident upon which the claim arises. If within two years from the date of the accident the third party sends or delivers the claim form to the registered company (insurer), the prescription is suspended for a period of sixty (60) days from the date of claim was sent or delivered. In other words, the right to claim compensation from the registered company becomes prescribed upon the expiration of two years. However, if the claimant lodges the claim form with the registered company within two years from the date of the accident prescription shall be suspended for sixty days."

[15] The implication of adopting the ordinary, literal meaning of the words of the Order is that the prescription period is two years plus sixty days. It is inconsequential whether the last day falls on a Sunday or public holiday. The effect of this approach is to ignore the statutory method provided for in Sections 49 (1) (b) and (2) and Section 50 which clearly provide that the doing of any act or institution of proceedings is on time if done on the day following a prescribed day where the latter falls on either a Sunday or public holiday. I am persuaded that *in casu* the statutory method cannot be ignored. The *dicta* in **Mokhethi** *supra* are irrelevant where the expiry date falls on a Sunday or public holiday. In this regard it is important to note that both the civilian and the statutory methods apply: the civil method in respect of the two-year period of prescription and the statutory method in respect of the sixty day period of interruption.

Application of law to facts

[16] Since the civilian method applies to the two years prescription under the Order, the two years prescription period must be reckoned from the date of the accident (15th July 2011) but up to 14th July 2013. When the claim was lodged on 26 June 2013, thereby suspending the running of the two years by sixty days to be computed under the statutory method, nineteen (19) days remained for the two year period to run its course. When the sixty days suspension period ended on 25th August 2013, a further day, which is 26th August, had to be added to give the insurer the full sixty days to investigate the claim because 25th August 2013 was a Sunday. The remaining nineteen days started to run from 27th August until 14th September 2013.

[17] As the appellant's claim was lodged nineteen days before the expiry of two year prescription period, these are the days which are affected by the sixty days suspension period. Their suspension expired on Monday 26th August 2013 because of the addition of an extra day under section 49 (2) of the Interpretation Act, as I have explained above. It is only thereafter that the appellant's action became enforceable within a period of the remaining nineteen days. Before the 27th August, the appellant's summons to enforce payment of the claim, if it were to be served before the expiry of the investigation period, would not have been

enforceable: **Lesotho National Insurance Company v. Sekhesa** LAC (1995-1999) 26.

[18] From the aforegoing, when the appellant's summons were served on the respondent on 13th September 2013, the two years period within which to enforce her right to claim had not expired. I would, therefore, uphold the appellant's argument that the action for damages was instituted in time and reject the respondent's argument to the contrary.

[19] This appeal is the first in which the applicability of the two methods is crisply in issue and need to be decided by this Court. It is my considered opinion that in so deciding we should reiterate the principle that computation of period in Acts of Parliament is by the civilian method, except where the statutory method applies in respect of periods expressed in days.

[20] The other matter raised in the second ground of appeal is that the court *a quo* failed to even consider the sixty days suspensive effect on the prescription period. That this is patently so appears in para [17] of the judgment as shown in para [5] above.

III. DISPOSITION

[21] The result is that this appeal succeeds. The following order is made:

Order

1. The appeal is upheld.

2. The order of the court *a quo* is altered to read:

   "Special plea is dismissed."

3. The respondent is to pay the appellant's costs on appeal.

_____
S.P. SAKOANE
JUSTICE OF APPEAL (ex-officio)

I agree

_____
I.G. FARLAM
ACTING PRESIDENT

I agree

_____
DR. P. MUSONDA
ACTING JUSTICE OF APPEAL

For the Appellants: M. Tau-Thabane (with L.M.A. Lephatsa)

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For the Respondent: Adv. P.J. Loubser
Instructed by Webber Newdigate, Maseru