IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.18/2016

In the matter between:-

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED **APPELLANT**

and

TSEKISO POULO **RESPONDENT**

CORAM: FARLAM, A.P.
DR MUSONDA, A.J.A.
GRIESEL, A.J.A.

HEARD : 12TH OCTOBER 2016

DELIVERED: 28TH OCTOBER 2016

SUMMARY

Claim for damages against insurer resulting from Motor Vehicle accident – defendant raising special plea of non-compliance with provisions of Motor Vehicle Insurance Order, 1989 – provision

requiring filing of affidavit by claimant– Section 9(d)(iv) enjoins the claimant to furnish particulars to the insurer – failure to do so – effect of.

JUDGMENT

DR MUSONDA, AJA

[1] This is an appeal against a judgment of the High Court (per Majara J) which dismissed a special plea raised by the defendant (now the appellant).

[2] The plaintiff (now the respondent) instituted a claim against the defendant for payment of a sum of M2,803,486.00 as compensation for bodily injuries arising out of and/or caused by the negligent driving of a motor vehicle that occurred on or about 28th August 2006. In addition, he claimed interest at 18.5% per annum from the date of judgment; costs of suit; and further and/or alternative relief.

[3] In his Declaration, the plaintiff asserted that he had complied with the relevant provisions of the Motor Vehicle Insurance Order of 1989.

[4] After receipt of the summons, the defendant requested copious further particulars, including details as to the the time of collision, directions in which the respective vehicles were travelling, where the accident occurred, the names and

addresses of the owner of the vehicles, whether the plaintiff had a licence and to furnish a copy of that licence, and where and when plaintiff complied with the provisions of the Motor Vehicle Insurance Order.

[5] The plaintiff responded by furnishing some of the particulars requested, but he declined to furnish most of the particulars sought relating to the collision on the grounds that they were not necessary to enable the defendant to plead.

[6] The defendant thereupon filed a plea without compelling compliance with its request for further particulars. The defendant raised various defences by way of special pleas, only one of which is relevant to the present appeal. It reads:

> *'1.2.2 In terms of s 9(d)(iv) of the Motor Vehicle Insurance Order, No 26 of 1989, as amended, the defendant shall not be obliged to compensate any person for any loss or damage where such person refuses or fails to submit to the defendant, together with his claim form, or within a reasonable period there after, 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.'*

[7] Sec 9(d)(iv) provides as follows:

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

> *(d) suffered as a result of bodily injury to any person who;*
>
> *. . .*
>
> *(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.'*

[8] It was common cause in the court a quo that no affidavit as contemplated by s 9(d)(iv) had in fact been submitted to the defendant. Counsel for the defendant referred in this regard to the South African Supreme Court of Appeal decision in *Road Accident Fund v Makwetlane*,[1] in which the court considered a provision requiring that an affidavit had to be submitted by a claimant in a "hit and run" case. The holding of the court therein was that no justifiable claim against the Fund came into existence unless the same requirement has been complied.

[9] It was the plaintiff's contention that the plaintiff did not 'fail' to furnish an affidavit because there had never been any request from the defendant to this effect. Counsel further submitted that should the court find that the plaintiff had not filed an affidavit, it should find that such failure was not unreasonable.

[1] 2005 (4) SA 51 (SCA).

[10] This argument found favour with learned Judge in the court a quo, who held as follows when dealing with this issue:

> *"In my opinion, the wording of the provision as emphasised above presupposes that although the claimant is obliged to furnish as much particularity to the defendant as is possible (in this case, an affidavit) to enable the latter to settle or repudiate the claim before incurring costs of litigation and/or plead, the defendant is expected to first make a request for same. It is also my view that to find otherwise would create absurdity and an injustice to the ordinary claimant because the section contains the words refuses or fails. As I have already stated the word refuse presupposes that the request or order will have first been issued."* [2]

[11] The court a quo on that basis distinguished the present case from that of *Moskowitz v Commercial Union Insurance Company of SA Ltd,*[3] where the affidavit contained false information. The South African s 7(2)(a) of the 1996 Act is basically worded in similar terms as our s 9(d)(iv).

[12] Similarly in the case of *Road Accident Fund v Makwetlane (supra*), the Supreme Court of Appeal of South Africa had to determine, inter alia, whether a justifiable claim came into existence against the Road Accident Fund in terms of reg 2(1)(c) promulgated by the Minister of Transport under the Act, unless and until the regulations had been complied with.

[2] Judgment para 24.
[3] 1992 (4) SA 192 (W).

[13] The learned Judge drew a distinction between Road Accident Act 6 of 1996 of South Africa and Section 9: in the former, there was no requirement to make a request, while in the latter there was such a provision and accordingly she dismissed the special plea.

[14] On appeal to this court, counsel for the defendant submitted that the court below erred in finding that the appellant first had to request an affidavit from the plaintiff before it could deny liability in terms of s 9(d)(iv) of the Order. It was valiantly argued that para (iv), which is the subject-matter of this appeal, does not contains the words "at its request". It only provides that the insurer shall not be liable where the claimant unreasonably refuses or fails to submit together with his claim form an affidavit in which particulars of the accident are fully set out.

[15] Secondly, it was pointed out that the marginal note to s 9 in the 1989 Order (protection of Insurer) has been amended by the Motor Vehicle (Amendment) Order No 26 of 1991 to read "Exclusion of liability". In *Simo Mamooe v Lesotho National Insurance Company (Pty) Ltd*,[4] Monapathi J. commenting on the amendment said:

> *"The legislature could not have been ignorant and without certain intention in using the language used in the amended marginal note. The amendment gives rise to*

[4] CIV/T/576/92

> *a conclusion that the legislature abandoned its original intent, and that the amended marginal note was to exclude the insurer's liability on certain conditions. The said amendment is an aspect of history which can legitimately be taken account of in interpreting the legislature's intent"*

[16] The court a quo did not consider or refer to the effect of the said amendment, and in the premises, so it was argued, the amended marginal note to s 9 is further indication that a "request" for an affidavit is not a condition for the exclusion of liability.

Discussion

[17] It is trite that the onus of establishing its special plea rested on the appellant.[5] It was therefore incumbent on the defendant to allege and prove that the plaintiff had (a) unreasonably (b) refused or failed to submit the necessary affidavit to the insurer and (c) that he was in a position to do so.

[18] The defendant did not adduce any evidence in order to discharge this onus, nor did it plead that the plaintiff's failure to submit an affidavit was 'unreasonable'. This in itself is fatal to the defendant's special plea.

[5] See eg *Lesotho National General Insurance Co. Ltd v Ever Unison Garments (Lesotho) (Pty) Ltd* LAC (2009-2010) 540 para 8.

[19] Furthermore, the interpretation of provisions similar to our s 9(d)(iv) has been authoritatively settled by a trilogy of judgments by the South African Appellate Division.

[20] In *Union and South-West Insurance Co v Fantiso*,[6] Rumpff CJ quoted with approval from the judgment of the court a quo in that case, where the following was said:

> *"In my view the word 'fails' within the context of Section 23(c)(ii) connotes wilful and blameworthy conduct on the part of an injured plaintiff, and the words 'fail to furnish' do not fall to be interpreted as 'does not furnish'. The word 'fails' therefore does not embrace a simple omission to furnish due to mere inadvertence or other conduct which cannot be considered blameworthy".*

The Chief Justice thereupon proceeded:

> *"The word 'refuses' implies a specific verbal or written refusal. Having regard to the context of the Act and of s 23 itself, the word 'fails' in (c)(ii) implies more than the mere omission to furnish copies of reports. To hold otherwise would create injustice which the legislature could not have intended. In view of the severity of the penalty, a final loss of claim, one has to consider the failure to furnish copies of reports in a restrictive manner, restrictive in the sense that a court will not deprive the plaintiff of his right to 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 plaintiff's claim will only be allowed, in my view, if*

[6] 1981 (3) SA 293 (A) at 300F-G.

the information is wilfully withheld after a request is made or if the request is deliberately ignored." [7]

[21] In *Touyz v Greater Johannesburg Transitional Metropolitan Council*,[8] van Heerden JA adopted Rumpff CJ's words in *Fantiso* and proceeded to state that

". . . in the absence of a request there could not have been a refusal or failure within the ambit of s 23(c)(ii). . . . It is indeed clearly implicit in the reasoning of the Chief Justice that since the word ['fails'] was of uncertain meaning it had to be interpreted in favour of third parties."

[22] In *Multilateral Motor Vehicle Accidents Fund v Clayton NO*,[9] Kumbleben JA referred to the two cases mentioned above and concluded with regard to the interpretation of the words "refuses or fails" in art 48(f)(ii):

"In sum, there must be a deliberate and blameworthy withholding of the statement or document in question for the subarticle to have been contravened." [10]

[23] The interpretation of the South African legislation which is similar to ours, as it appears from the above cases, actually accords with s 15 of our Interpretation Act 19 of 1977, which

[7] At 301B-E.
[8] 1996 (1) SA 950 (A) at 958E-F.
[9] 1997 (1) SA 451
[10] At 456B.

enacts *pro libertate* interpretation and is couched in these terms:

> *"Every enactment shall be deemed remedial, and given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".*

[24] For Judges who are "princes of reason" and "guardians" of fundamental rights and freedoms, it would be inappropriate to interpret s 9(d)(iv) as meaning any inadvertence by the claimant will render the claim void. If Judges have to err, they should err on the side of sustaining rights not on the side of their deprivation.

[25] It was therefore incumbent on the appellant to satisfy the court that there had been a "deliberate and blameworthy withholding" of the affidavit on the part of the respondent, which onus it has failed to discharge.

[26] The appeal is DISMISSED with costs.

DR P MUSONDA

Acting Justice of Appeal

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I.G. FARLAM

Acting President

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B.M. GRIESEL

Acting Justice of Appeal

For the appellants	:	Adv. P.J. Loubser
For the Respondents	:	Adv. M. Posholi
		Adv. L.M. Lephatse