CIV\T\298\94

IN THE HIGH COURT OF LESOTHO

In the matter of :

'MASELLOANE TAUHALI **Plaintiff**

Vs

LESOTHO NATIONAL INSURANCE COMPANY **Defendant**

JUDGMENT

Filed by the Hon. Mr Justice M L Lehohla on the 27th day of August, 1997

On 15th May, 1997 a special plea sought by the defendant was upheld with costs on grounds of the fact that the plaintiff's claim had prescribed.

The plaintiff sued the defendant for M169 129-50 being compensation for the death of her husband as a result of an alleged negligent driving of a motor vehicle bearing Registration letter and numbers E-2373.

The plaintiff further claimed interest on the above sum at the rate of 18.5%

from the date of the summons plus costs of suit and further or alternative relief.

The circumstances of the alleged negligent driving are set out and amplified in the plaintiff's Declaration. I however choose to highlight the breakdown of her claim as appears in paragraph 7 of the Declaration as follows :

".. ...damages amounting to M163 129-50 made up as follows:

(a) Funeral expenses : M5929-50

(b) Estimated future loss of earnings : M163 200-00"

The accident and consequent or instant death of the plaintiff's husband occurred on 9th May, 1992 at Ha Sekoati along the Mafeteng-Wepener road in the Mafeteng District in Lesotho.

The defendant's special plea is based on the following aspects :

1 That the cause of action upon which the plaintiff's claim is based arose on or about 9th May, 1992, being the date of accident and death

2. That the claim in the prescribed form which the plaintiff was required to deliver to the defendant in terms of Section 12 of the Motor Vehicle Insurance Order 26 if 1989(as amended) was delivered to the Defendant on 6th May, 1994.

3. That the summons was served on the defendant on 12th July, 1994.

In order to determine the propriety of the basis on which the Special Plea is founded it would be beneficial to have reference to the provisions of Section 10 of the Motor Vehicle Insurance Order 26 of 1989.

This section reads :

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.

(2) No other law relating to prescription shall apply to this Order".

Because section 10(1) makes reference to section 12 it will be fruitful to refer to the relevant section of section 12 namely subsection 2 thereof reading :-

> "No claim in terms of this Order shall be enforceable by legal proceedings commenced by a summons served on the insurer before expiry of a period of sixty 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".

The Common Law position seems on proper reading and interpretation to suggest that prescription continues to run until a Summons is served on the

defendant. The logical extension of this notion would truly be understood to mean that only service of summons interrupts prescription.

In keeping with this notion I take solace with the view expressed by our Court of Appeal in C. Of A (CIV) No.1 of 1987 ***Putsoa vs The Attorney General*** (unreported) at page 2 that :

> "Firstly, there is the contention that the delivery of a letter of demand interrupted prescription. There is nothing in the Act to this effect. It is not necessary for purposes of the present case to decide whether the time-barring provisions contained in section 6 of the Act are subjected to any provisions of the Prescription Act of 1861, except for those sections specifically referred to in section 6, because in any event there is no provision in the Prescription Act that the delivery of a demand interrupts prescription. Counsel for the appellant was therefore forced to rely on the common law, but even then, he was unable to refer us to any source, whether in the writings of the jurists or in the decided cases, which set out a rule such as that on which he sought to rely. We know of no such rule, and our research has not uncovered one. On the contrary, reference may be made to **Wessels, Law of Contract in South Africa, (second Ed.)** Paras 2804 and 2818, where the following is said :
>
> > '2804. By our common law the running of prescription is interrupted by an acknowledgement of the debt..... or by judicial interpellation .....
> >
> > 2818. When we say that our common law prescription is interpreted by judicial interpellation, we mean that there must be a claim instituted before a court of competent jurisdiction. It is not sufficient for the creditor to send a lawyer's letter or a letter of demand; he must actually institute action by a valid summons ....."

It was against the above strong exposition of the law and the binding force of the Court of Appeal decision that *Mr Mahlakeng* for the plaintiff sought to persuade me. Needless to say such an endeavour was doomed to failure.

Reference to ***Union Government vs Willemse***, 1922 OPD 14 at 17 indicates that :

> "Demand cannot be considered to be made until it is communicated to the person who is required to comply with it. Nor can any Summons have any effect as a Summons until it is served on the party who is called upon to obey it"

Thus upon a proper construction of the clear language of section 10(1) above it is beyond question that the simple issue of Summons is not a judicial interpellation. Section 12(2) specifically provides for the commencement of legal proceedings by service of summons.

In ***Kleynhans vs Yorkshire Insurance Co. Ltd*** 1953(3) AD 544 at 545 by Schreiner ACJ it was held that

> ".....the mere issue of a summons, without service, did not end the running of prescription".

In CIV\APN\57\86 ***Mokhethi vs Lesotho National Insurance***

Company(Pty)Ltd (unreported) it is stated that

> "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 the claim was sent or delivered. In other words, the right to claim compensation from the registered company becomes prescribed upon expiration of two years. However, if a claimant lodges the claim form with the registered company within the two years from the date of the accident, prescription shall be suspended for sixty (60) days".

In C. Of A. (CIV) No. 36 of 1994 ***Lesotho National Insurance Company (Pty) Ltd vs Sekhesa*** a vital proposition was confirmed that a claim in terms of the Motor Vehicle Insurance Order, 1989 prescribes if Summons is not served within the two year prescriptive period (as suspended by the sixty day period after delivery of the claim form).

Given that the cause of action arose on 9th May 1992, and the summons was only served on 12th July, 1994 it is clear to me that the claim had prescribed because the two year period had expired on 8th May, 1994. Plaintiff lodged the claim form on 6th May, 1994; meaning she was left with two days. A further sixty day period gained by interruption of lodgment expired on 5th July, 1994. So service of summons on 12th July. 1994 was outside the period within which good and effective service could have been made. Even if as contended by *Mr Mahlakeng* the

mere issuing of summons suffices to interrupt prescription, the fact that this summons was only issued on 8th July 1994 would not be of any help to the plaintiff because the period expired on 7th July 1994.

In the light of the authorities cited to the effect that it is service not mere issuing of summons that interrupts prescription I am disinclined to view with favour submissions that the moment plaintiff files summons with the Registrar serves to act as a form of prescription because actual serving of such summons is a matter outside plaintiff's hands.

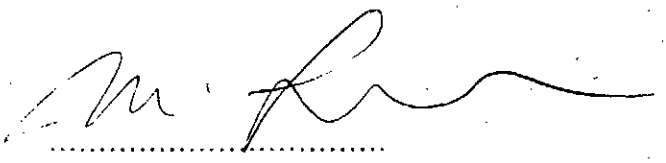
The law has taken a deliberate stand by laying emphasis on the point that mere issuing of summons cannot avail.

In keeping with the sound principle on which the present matter turns ***Putsoa*** above at page 3 would by a parallel approach disabuse litigants of grave misconceptions by stating :

> "The second misconception is as to the effect of the 30-day period provided for in s.4 of the Act. That does not mean that a demand may be delivered at any time during the 2-year prescriptive period, and that it is then in order to issue the summons within 30 days thereafter even if this is outside the 2-year period. ..... the correct reading is that summons may validly be issued only up to the end of the 24th month after the cause of action arose, and that it must be delivered or left at

the office .. . . by not later than the 23rd month after the cause of action arose". (For 30-day or 30 days in the above quotation read 60-day or 60 days)

Consequently the special plea was upheld with costs.



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JUDGE

27th August, 1997

For Plaintiff Mr Mahlakeng
For Defendant : Mr Grundlingh