IN THE HIGH COURT OF LESOTHO

CONST.CASE NO.02/2012

In the matter between:

SEKOATI GERT LIMO **APPLICANT**

And

LESOTHO NATIONAL GENERAL INS. CO. LTD **1ST RESPONDENT**

MINISTER OF FINANCE AND DEVELOPMENT PLANNING **2ND RESPONDENT**

MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

Coram : Honourable Justice A.M. Hlajoane
Honourable Justice N. Majara
Honourable Acting Justice E.F.M. Makara

Dates of Hearing	:	28 February, 2013
Date of Judgment	:	24 October, 2013
For Applicant	:	Mr. Mosotho
For Respondent	:	Webber Newdigate & Co.

Summary

A constitutional application for a declaration of ***sec 8 the Motor Vehicle Ins. Order No 26 of 1989*** *as being discriminatory and inconsistent*

with ***secs 18 and 19 of the constitution*** *–* ***The sec 10 (1) of the Motor Vehicle Insurance Order 1989*** *prescription of the right of victim of the road accident to claim compensation - Whether the court has jurisdiction to extent the prescription period - The consequent effect of prescription - Its interrelationship with the applicant's locus standi and rendering the application academic - The court finding that the right to claim had prescribed and, therefore, that the applicant had lost the credentials to have brought the application and that it has, ultimately, become a moot process - The applicant's alternative utilization of* ***sec 22 of the constitution*** *to establish an alternative ground for locus standi - The court's determination that the applicant has made a prima facie case that* ***sec 8*** *is discriminatory save that* ***sec 18 (4) (d) of the constitution*** *countenances that discrimination- The applicant's endeavor to establish locus standi under* ***sec 22*** *rejected for his failure to have demonstrated it in his founding affidavit that he was simultaneously suing on behalf of some specified victims – Recommendations made for a revisiting of* ***secs 8 and 10*** *and for a humanitarian rather than a legalistic approach by the insurer to the plight of the applicant who is incidentally a young man in his early 20's – The application ultimately dismissed with costs.*

ANNOTATIONS

CITED CASES

'Mamokhethi Mokhethi V Lesotho National Insurance co. CIV/APN/ 57/ 86.

Mookho Masilo v Lesotho National Insurance Co. CIV/T/427/86, Malee Emsley Putsoa v The Attorney General C of A (CIV) No. 36 of 1994, Mahooane Peete v Lesotho National General Insurance Co. Ltd. CIV/T/141/2000.

Cabinet of the Transitional Government of SWA v EINS 1988 (3) SA 369,

Khuto v LNIC CIV/T/65/91, Moeti v LNGI and Ano CIV/T/618/93 S v

Zuma 1995 (4) BCLR 401 (SA) and Others

R v Big M Drug Mart Ltd 18CCC (3d) 385 at 395-6

Wessels CJ in Rooderport – Marraisburg Town Council v Eastern Properties (Prop) Ltd 133 AD 87 at 101

Dalrymple and Others v Colonial Treasurer 1910 TS 372 at 390

STATUTES & SUB-LEGISLATION

The Motor Vehicle Ins. Order No 26 of 1989
Motor Vehicle Insurance Order No 18 of 1972
The Constitution of Lesotho
The High Court Act 1978

MAKARA A.J.

[1] This is a constitutional case which has been brought in this court by the applicant who is seeking for an order in the following terms:

1. declaring **section 8 of the Motor Vehicle Insurance Order (as amended) 1989;** to be inconsistent with **sec 18 of the constitution of Lesotho, 1993** and invalid;

2. declaring **sec 8 of the Motor Vehicle Insurance Order 1989** to be inconsistent with **sec 19 of the constitution of Lesotho** and invalid;

3. such declarations of inconsistency shall not apply to and govern all claims instituted or to be instituted under **Motor Vehicle Insurance Order 1989**, which at the date of the finalization have not yet prescribed or finalized;
And incidentally

4. Costs of suit

5. Further and or alternative relief.

[2] The material facts which have precipitated the constitutionally premised issues for their determination by this court, originate from a motor vehicle accident which occurred on the 23rd January 2011 at Tiping Likalaneng along the mountain public road. The applicant happened to have been a fare paying passenger travelling in vehicle A6037 at the time it overturned on its own. He attributes the accident to the negligent driving of the driver of the vehicle, since according to him, he had been over speeding and as a result lost control of his vehicle. The applicant has in support of this statement annexed the police motor vehicle accident report to his founding affidavit. The report is marked annexure "SL1".

[3] The deponent has logically lamented in his founding affidavit that he has in consequence of the accident, sustained the following bodily injuries:

> 1) fracture of the right *humerus* (treated with open reduction and internal fixation with rush nail) ;
> 2) fracture of the right ulna and radius (Treated with open reduction with rush nail fixation) ;
> 3) fracture of the right tibia and fibula (Treated with open reduction with a nail fixation) ;
> 4) fracture of the left femur (treated with POP)

[4] The injuries have resulted in the permanent disabilities consisting of a stiff right elbow and stiff right ankle. The impression is seemingly to indicate to the court the seriousness of the injuries sustained and their future adverse effect on his life and perhaps

even on his means of livelihood. He has illustrated his psychological incapacitation and its effect by stating that he is unemployed, concentrating on his medical conditions, cannot proceed with his studies and that there are no prospects for him to get any meaningful employment.

[5] He had discovered the technical legal impediment against the compensation he is seeking for, after his attorneys had advised him that his claim for compensation against the 1st respondent is circumscribed under **Sec 8 (1) (a)** read in conjunction with **Sec 8 (1) (b) of the Motor Vehicle Insurance Order No26 of 1989.** The legal advice tendered by them appears from the context to have been that the compensation provided for under the section was unrealistic, unjustifiable, unfair and discriminatory to the extent that it is unconstitutional. The impugned provision provides:

> (1) The liability of an insurer in connection with any one occurrence to compensate a third party for any loss or damage contemplated in **sec 6** which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being in or on the registered motor vehicle concerned, shall be limited in total:
>
> (a) to the sum of M12, 000 in respect of any bodily injury to or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in the registered motor vehicle in question.
>
> (b) to the total sum of M60, 000 in connection with any one occurrence to pay compensation in terms of paragraph (a) to the third parties irrespective of the number of such persons whose bodily injuries or deaths were caused by or arose out of that occurrence.

[6] The applicant has highlighted the worst potential effect of **Sec 8 (1) (b).** It, in his analysis, allows the insurer to divide the M60 000 compensation amount amongst the passengers who may have individually sustained bodily injuries or died. The perception which he presents to the court is that ultimately, the compensation would be distributed among the victims on *pro-rata* or discretionary basis. This according to him, could leave an individual claimant with an amount less than the already humble M12 000.

[7] In the foregoing paragraphs, the applicant has in essence, charged that **Sec 8 (1) (a)** and **(b)** provide for unjustifiable and unrealistic quantum for compensation. On this basis, he introduces a constitutional question of its consistency with the constitutional right to equality before the law, equal protection of the law and freedom from discrimination.

[8] The constitutional attack against **Sec 8** proceeds from the premise that the section has unfairly and without any rational connection categorized the people who fall within its parameters from others who may in a like manner, be victims of a vehicle accident along public roads. The lack of fairness and rational connection are in this respect, attributed to the view that those who are contemplated in the section, are subjected to the M12 000 claim

or to share the total amount of the M60 000. The argument is that in contrast, the rest of the third party classes of similar vehicle accidents, remain at large to receive higher or commensurate amounts of compensation.

[9] The applicant has illustrated the unfair discriminatory effect of the section and its inconsistency with the constitutional right to equality before the law, equal protection of the law and freedom from discrimination; by specifically indicating that it is effectively designed to disadvantage the economically disadvantaged. He buttressed the concern by explaining that it is actually the ordinary class of people who become passengers in the public transport system such as buses and taxis as they lack alternative means of transportation.

[10] His last attack against the **Sec 8** is that it is against the spirit of the Order as a whole. He maintains that the intention behind the enactment is to provide the greatest possible protection to the victims of motor vehicle accidents. This notwithstanding, according to him, the section contrary to the said spirit, ensures better protection to the victims of a particular class whilst affording lesser coverage to another.

[11] In the midst of the key question on the consistency or otherwise of **Sec 8** and **Secs 18 and 19 of the constitution**, it becomes imperative that the provisions under these sections be quoted:

> **Sec 18** (1) subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority.
>
> (3) in this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
>
> (4) Subsection (1) shall not apply to any law to the extent that that law makes provision-
> (a).....
> (b).....
> (c).....
> (d) **for the appropriation of public revenues or other public funds** (emphasis added)
>
> (6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5).

[12] And, **Sec 19** provides:

> Every person shall be entitled to equality before the law and to the equal protection of the law.

[13] It is against the backdrop of the stated undisputed facts which constitute the basis of this case that the applicant interfaces them with **sec 8 of the Order** and then challenges its constitutionality against **sec 18** and **19 of the constitution**. The former constitutional proviso inscribes a foundational principle that no law shall make any provision that is discriminatory either in itself or in its effect. This cardinal position, however, has inbuilt constitutional limitations imposed under **subsections (4)** and **(5)** respectively. He on the same strength, appears to have been conscientiously alive to the fact that **sec 19** reinforces **sec 18** and that the two reciprocate accordingly. In the circumstances, the court is immediately presented with a logical challenge to address in a nutshell, the constitutional jurisprudence on the equality clause and, therefore, on the right of freedom against discrimination. This would be explored with reference to the right to equal protection under the law.

[14] It must be primarily appreciated that *discrimination* amongst the people represents an antithesis of *equality* amongst them. Thus, *discrimination* as a social concept should be perceived with reference to *equality* also as a social ideal. This dictates that the two terms should be correspondingly explored since they are contradictory terms which, nonetheless, could assist in the comprehension of each other. It would be logical to first interrogate the meaning of equality. The *equality* of people as a right has been

introduced by **sec 19 of the constitution (supra)**. It has basically reiterated the Common Law definition. De waal and others[1] have defined the Common Law perception of the concept in these terms:

> Equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the idea of equality is a moral idea that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should not be treated alike[2]. For example, it is generally thought wrong to deny women the vote. This is because when it comes to voting men and women are in the same position; they are equally capable of exercising political choices. So, if men and women are alike they should be treated alike.

"Discrimination" as a constitutional term has been laboriously defined under **sec 18 (3) of the constitution (supra).** The legislature has, in pursuit of the democratic constitutional values enhanced the Common Law jurisprudence by grafting into the constitutional definition the specific grounds upon which different categories of people may be subjected to discrimination[3]. The definition seeks to provide the basis upon which individual persons or classes of person may not be discriminated against. The specified grounds are, however, not exhaustively provided. This is attributable to the fact that it contemplates rather endless categories of people who might be discriminated against. It has to be over emphasized for the

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[1] De waal J and others, The Bill of Rights Handbook, 2nd edition, Kenwyn Juta & Co, Ltd 1999, p188

[2] The definition has its genesis in the most famous expression by Aristotle (384-322BC): equality in mortals means this: those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.

[3] The specified grounds upon which discrimination may not be made are in terms of sec 18 (3) are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of any such description are subjected to disabilities or restrictions to which person of other such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

sake of certainty, that in principle, the sub-section endevours to present basis upon which people may not be discriminated against. This should, nevertheless, be comprehended in full recognition of the constitutionally provided limitations under **subsections (4) and (5)**.

[15] On the strength of the meanings ascribed to the terms *"equality"* and "*discrimination"* respectively, the court recognizes without necessarily traversing the merits,[4] that the applicant's analysis is that **sec 8 (1) (a) and (b)** introduces a class of fare paying victims of public road vehicle accidents. It then categorizes this class into two. The first is that of a victim who at the time of the accident was being conveyed for a reward in a motor vehicle which solely caused the accident. Such a victim would in accordance with the provision, be qualified for a maximum compensation of M12 000 for bodily injury or death. The second category consists of several fare paying third party victims who sustained injuries or died while travelling along a public road. Those victims are scheduled to share compensation in the amount of M60.000. This suggests that each could, depending on their numbers, receive a compensation amount lesser than M12 000. The centrality of the applicant's protestation against the **sec 8** classification is that it lacks a rational connection and justification in that its provided two levels of compensation are inconsiderate of the severity of his bodily injuries and any *sequelae*.

[4] The underlying idea in this paragraph and in its immediate subsequent one, is simply to project the court's appreciation of the applicant's case without delving into the merits since the judgment is based on the points *in limine* and not on the merits.

The view could, perhaps, be correspondingly considered against his earlier argument that the section is inconsistent with the preamble of the Order itself.

[16] The thesis of the applicant's analysis is that people who fall in the **sec 8** class would normally be those in the economically disadvantaged position, since it would normally be this class of people who would most likely experience public road accidents while being fare paying passengers in public transport vehicles. This is due to the fact that usually the economically advantaged use private travelling means and would most likely fall in the class outside the purview of the section. The resultant understanding is that the applicant is relying upon a characteristically analogous ground [5] against discrimination. His charge against the unconstitutionality of the section in consideration, **could be** *in tandem* with the **sec 18 (3) of the constitution** which envisages people of other status who on comparative basis are related to lesser advantages or compromised privileges than others who are characteristically in a similar situation. The latter would obviously be the third party victims who are being conveyed without a reward and the implication is that in their case, the *quantum* for compensation would be based upon the degree of the injuries and the attendant material results thereof. This in a nutshell captures

[5] The ground would constitute the bases for discrimination against particular groups of people which are not listed under sec 18(3) of the constitution. It is the characteristics and the circumstances surrounding such groups which would be a determining factor that they represent a common interest.

the applicant's *prima facie* sound standpoint that **sec 8** is demonstratively unfairly discriminatory and inconsistent with **secs 18 and 19 of the constitution.**

[17] It should for the purpose of brevity, be indicated that at the commencement of the hearing of the application, Adv. Dazfuss SC, motivated the 1st respondent's points *in limine* which were that:

> 1. The applicant's claim has prescribed in that he had not filed it within a two years period and that it has consequently, by operation of **sec 10(1) of the Motor Vehicle Insurance Order No 26 of 1989** and, therefore, that the application has been rendered moot.
>
> 2. The applicant does not have a *locus standi* in the matter on account of the fact that he is litigating over a matter which has prescribed.
>
> 3. The applicant has not in clear terms stated the factual or legal basis upon which prayer 3 is based; in that he seems to be asking the court to declare that the inconsistency of **sec 8** with **secs 18 and 19 of the constitution,** should apply to and govern all claims instituted or to be instituted under the Order which at the date of the finalization of this matter have not yet prescribed or finalized.

[18] Adv. Mosotho responded to the raised points *in limine*, by advancing a counter argument that the 1st respondent's counsel was suddenly ambushing him in that he had not previously notified him that he was going to raise those points in order for him to adequately prepare himself for that challenge. He then expressed a view that the 1st respondent's counsel was simply employing delaying tactics and yet the matter had been pending before court

for a year. The latter replied by drawing it to the attention of the court that the 1st respondent has already foreshadowed the legal points in consideration under paragraph 42 and 43 of his answering affidavit. He explained that this was in reaction to paragraphs 18 and 19 respectively of the applicant's founding affidavit. The counsel highlighted it that the applicant has in these two paragraphs made an averment on prescription and thereby making it a subject for reply.

[19] The applicant's counsel had concluded his arguments against the points raised *in limine* by the 1st respondent's counsel, by seeking to persuade the court to allow both counsel to address the points and to simultaneously also traverse the merits of the application. He submitted that the approach would facilitate for an expedient dispensation of justice in the matter.

[20] Adv Dazfuss in reply maintained that it would be logically imperative to have the points interrogated first. He, in support of that reasoned that the nature of the points *per se* had a high propensity to render it unnecessary for the merits to be prosecuted. On the same strength, he cautioned that the proceedings would turn to the merits if the court would dismiss them. The emphasis of his argument was that it would, in the circumstances, be logical and strategic for the court to preliminarily consider the points *in*

limine and then make its determination thereon. A foundation of his proposed approach was simply that at the end of the hearing of the points, the court may make a ruling which could dispense with any necessity for the counsel to respectively address the merits.

[21] The court directed that the hearing would be adjourned for a short while for it to specifically consider its ruling on the conflicting approaches tendered by the counsel. When the sitting resumed, *the court delivered a ruling in which it stated that the issue of prescription was not surfacing for the first time during the commencement of the proceedings. It in upholding the 1st respondent's position, pointed out that the question of prescription had already been introduced in the answering affidavit and dismissed the applicant's counsel's argument that the point was being raised for the first time and, therefore, that he was being denied time to prepare for his counter-response. In conclusion, it determined that the points could present a decisive picture as to whether or not it would be academic to venture into the merits. There was also a recognition in the ruling that if the claim would be found to have prescribed, the applicant could on the basis of* ***sec 10****, be rendered to lack locus standi in the matter. Thus, the ultimate word was that the points be preliminarily addressed by the counsel for the stated purpose.*

[22] In consequence of the ruling which had effectively dismissed the objections raised by the applicant's counsel on the approach to be followed; Adv Dazfuss re pursued his points *in limine.* He at that time addressed their content with reference to the relevant facts, the antecedent statutory provisions and case law.

[23] The counsel had in his re motivation of the points, started by strengthening up the basic facts. He did so by in essence conceding to all the background facts relating to the incidence. He specifically agreed that the accident resulted from the negligent driving by the driver of the vehicle which is under the 3rd party insurance coverage of the 1st respondent. This notwithstanding, he drew it to the special attention of the court that the public road accident in which the applicant sustained the injuries in relation to which the claim against the 1st respondent is based; had happened on the 28th January 2011. He then hastily pointed out that his argument that the claim has prescribed, is premised precisely upon the fact that the applicant hadn't accordingly filed his claim within 2 years in accordance with **Sec 10 (1) of the Order**. The section provides that the right to claim compensation under the order from the insurer shall become prescribed upon the expiring of a period of two years as from the date upon which the claim arose; provided that the prescription shall be suspended during the period of sixty (60) days referred to in **Sec 12.**

[24] It is, for the purpose of this case, found necessary to selectively extract **Sec 12 (2)** from the rest of the provisions under the section. It directs in mandatory terms that no claim in terms of the Order shall be enforceable by legal proceedings commenced by summons served on the insurer before the expiry of a period of 60 days as from the date on which the claim was send or delivered by hand as the case may be, to the insurer as provided for in **Sec 10**.

[25] It appears to be common cause that the right for the applicant to lodge his claim in terms of **Sec 10** had prescribed on the 27th January 2013 since the accident which constituted its basis had occurred on the 28th January 2011. A further inferential conclusion from the applicant's founding affidavit and consequently from prayer 3 of his notice of motion, is that he had never even up to the time of the hearing of the application, filed the claim. He has under this prayer asked the court to suspend the operation of the prescription clause under **Sec 10.** This stands to be a truthful acknowledgement of the fact that he hadn't filed the claim with the insurer. This was so despite the applicant's lawyer's equivocation before the court when he was confronted with a precise question as to whether or not the applicant has lodged his claim for compensation. He had answered in the affirmative and promised to provide the court with documentary proof of that, but never did. In the meanwhile, his answer remained contradicted by paragraph 18

of his founding affidavit and by the order which the applicant is asking the court to make under prayer 3 of his notice of motion.

[26] Adv Dazfuss developed his point on prescription with reference to **Sec 10,** by attacking the applicant's *locus standi* in the matter. The understanding which he created was that prescription and *locus standi* were, within the context of this case, directly interrelated. He maintained that the prescription of the right to claim deprived the applicant of the primary credential to have the right to have brought the application. In simple terms, he portrayed a view that the applicant would have acquired the qualification to embark on this litigation process if he had lodged the claim and was seeking to enforce it in accordance with **Sec 12 (2)** which has already been captured in *verbatim* terms in the preceding part of the judgment.

[27] The counsel in support of his proposition that the applicant's claim has prescribed since he hadn't filed within the statutorily provided period, lacked the *locus standi* to have brought this application and that he was as a result seeking for an academic relief; by advancing a plethora of judicial precedence on the subject. The court having read and considered the cases to which it had been referred by the respondent's counsel, came to a determination that the jurisprudence on almost all of the issues raised in the

points *in limine,* appears to have originated from **'Mamokhethi Mokhethi V Lesotho National Insurance co. CIV/APN/ 57/ 86**.

[28] The other cases upon which Adv. Dazfuss for the 1st respondent supported his raised points are **Mookho Masilo v Lesotho National Insurance Co. CIV/T/427/86, Malee Emsley Putsoa v The Attorney General C of A (CIV) No. 36 of 1994 and Mahooane Peete and Lesotho National General Insurance Co. Ltd. CIV/T/41/2000.** The common denomination in these cases is that they centered on prescription and its effect.

[29] The point that the applicant's case is moot is a logical result of the primary argument that the claim has by operation of **sec 10(1)** prescribed. The prescription based attack has been extended to challenge the applicant's *locus standi* in the matter. Simply speaking, the 1st respondent's counsel has presented a perception that the prescription of the claim automatically deprived the applicant of the right to have launched the notice of motion before the court and to, consequently, in those proceedings pray for an order for the motor vehicle accident compensation. He had in the circumstances maintained that the case has become academic especially when the applicant himself would not be qualified for the relief sought.

[30] The 1st respondent's last point is that the applicant hasn't despite prayer 3 in his notice of motion, laid down a foundation for it in his founding affidavit to demonstrate that he is also litigating on behalf of the other victims of public road vehicle accidents in relation against whom **sec 10** may adversely impact in comparison to others in a similar situation.

[31] Prayer 3 was, according to the counsel, simply intended to circumvent the prescription clause seemingly under the pretext that the application has also been brought on behalf of the other victims. This he said, is attested to by the prayer in which the applicant is asking the court to extend the claim period without reference to any provision in the Order which empowers it to make such an order. He brought it to the attention of the court that the claim in consideration is exclusively governed by the Order. This is by the dictates of **sec 10 (2)** of the enactment.

[32] The counsel had in support of the dimensional points *in limine, viz* that the applicant lacks *locus standi,* the application is academic and that he has not made a case showing that he has the credentials to litigate on behalf of other victims; referred the court to **Cabinet of the Transitional Government of SWA V EINS 1988 (3) SA 369, Mokhethi V Lesotho National Insurance Company Ltd CIV/APN/57/86, Khuto V LNIC CIV/T/65/91, Moeti V LNGI and Ano CIV/T/618/93** and **Peete V LNGI CIV/T/141/2000**.

[33] Now turning to the counter responses mounted by Adv. Mosotho for the applicant, it emerges from their content and emphasis thereon that the gist of his argument is for the court to attach less significance to the legal points *in limine* and their technical effect; but rather, to be inclined towards a substantive based approach which will culminate into a merit oriented judgment. The counsel had throughout over emphasized on the importance of having the merits of the case addressed since the focus in this matter was on the violation of the applicant's constitutional right to equality and to the equal protection under the law. He adamantly maintained that the centrality of the case before the court is the question of the constitutionality of **sec 8** hence his prayer for the court to dismiss the points *in limine* for their diversion of the attention of the court from the determination of the real issue before it.

[34] The applicant's counsel reacted to the point on prescription by initially somehow indicating that the claim has been lodged with the 1st respondent and that there is a documentary evidence to that effect. He even undertook before court to later exhibit that proof. It would seem that despite that presumably genuine promise, the counsel inadvertently forgot to ever fulfill that. He also sought to persuade the court to adopt a view that the claim prescribes after two (2) years *plus* an extra sixty (60) days from the day it arose. On

the same note, he contended that even if the claim has prescribed, the applicant would, nonetheless, still have recourse to **sec 22 of the constitution** which gives a *locus standi* to everyone to sue where there is a likelihood of a constitutional provision being violated. This line of argument appears to be in harmony with his consistent and foundational position that the applicant has come before the court to seek for its declaratory order concerning the violation of his constitutional rights in consideration.

[35] In the foregoing scenario, the court realized that the content of the argument advanced by the applicant's counsel in reaction to the points raised in *limine* was, in essence and effectively a resonation of his challenge against the constitutionality of **sec 8 of the Order.** His position has throughout been that the court should be mindful that it is sitting in its constitutional jurisdiction and presiding over a constitutional case and in that perspective, it should be inclined towards a merit based judgment rather than to a technical one. The advocacy for the court to adopt that approach appears to have been inspired by the jurisprudence articulated in **S v Zuma 1995 (4) BCLR 401 (SA) and Others** where *the dictum* of Dickson J in **R v Big M Drug Mart Ltd 18CCC (3d) 385 at 395-6** was cited with approval. There the learned judge had *inter alia* (for the purpose of this case) postulated that:

> The interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the charter's protection.

[36] The counsel was seeking to persuade the court to interpret **sec 8** *contextually* in such a way that its ordinary grammatical meaning is interfaced with **secs 18 and 19 of the constitution.** He maintained that the court should not assign a *textua*l meaning to the section since that approach would derail its wisdom from discovering that it is not in rhythm with the constitutional provisions against which it is being tested.

[37] The conflicting representations advanced by both counsel have led the court into a realization that the legal points under consideration have, for over a decade been progressively addressed by this court and by the Court of Appeal. This has culminated into a clear system of precedence on the subject. Here the meaning and the parameters of **sec 10 and 12 of the Order** and the question of the court's authority to extend the prescription period have been ascertained.

[38] The prescription of the claim as provided for under **sec 10 of the Order,** has been presented as the primary basis of all the points raised in *limine*. This is indicated by the dependency of the rest of the points upon it. It would therefore, be appropriate for the judgment based on the points in *limine* to decide upon it first. The court takes a view that the prescription under **sec 10** is written in a simple and clear language such that it deserves to be comprehended through the instrumentality of the literal interpretation of a statutory provision. In this regard, the court

understands prescription, to be the logical consequence of the victim's failure to file a claim within 2 years. The right to claim is provided for under **sec 6**. The operational effect of *prescription* is that the right of the victim of the public road accident to lodge the claim with the insurer for compensation prescribes after two years. This would run from the date of the accident which would also be the date on which the right to claim arose.

[39] The legislature has under **sec 10(1)** qualified the two year prescription period, by providing that the prescription is suspended for sixty (60) days after the victim has filed his claim with the insurer. The suspension is, contextually, intended to provide the insurer with the time to process the claim and to decide upon it. It is for the facilitation of that consideration, that the claimant is empowered under **sec 12(2)** to enforce his right for compensation through a litigation process, after sixty (60) days from the day he filed the claim with the insurer. The prerequisite would, however, in the understanding of the court, be that its intervention could only be sought for by a claimant who would have lodged his claim strictly within the two (2) years. The 60 days should not in any manner, whatsoever, be comprehended as the extension of the prescription period. **Sec 10(1)** appears to address situations such as where a claimant files his claim towards the last day of the two year prescription period in that his right to claim will not prescribe on that last day but, instead, it will be suspended for 60 days more. Thus, for clarity sake, it is reiterated that the claimant could only

issue summons against the insurer for the enforcement of his right to compensation after 60 days from the date he lodged the claim with the insurer. This becomes clearer when **sec 10(1)** is read in conjunction with **sec 12(2).**

[40] It has ultimately emerged with certainty that the applicant hasn't ever since the 23rd January 2011 to date, lodged his claim for compensation with the 1st respondent. The significance of this date is that it is the day on which the vehicle accident in consideration had taken place and, therefore, the date on which his right to file the claim with the insurer of the vehicle had arisen.

[41] On the specific question concerning prescription, the court finds that the applicant's failure to have lodged his claim with the 1st respondent within the first two years, has by operation of **sec 10 (1)** rendered his right to the claim to have prescribed. It, correspondingly, holds that his prayer for the court to extend the time for him to file the claim with the insurer to be foundationless since there is no provision which empowers it with the jurisdiction to do so. Here, the court is particularly mindful *that* **sec 10(2) of the Order** is explicitly instructive that no other law relating to prescription shall apply to the Order. The decision on the subject should resultantly be primarily made with reference to that law.

[42] Kheola ACJ seems to have pioneered the jurisprudence around the prescription provision in '**Mamokhethi Mokhethi V Lesotho National**

Insurance co. (supra). The facts therein were *mutatis mutandis* materially similar to the ones in the instant case. The only difference of significance is that in that case there was no question on the constitutionality or otherwise of the similar provisions in the **Motor Vehicle Insurance Order No 18 of 1972[6] .** The applicant there was seeking for an order condoning her late filing of the motor vehicle insurance claim form on the ground that the claim had expired due to no fault or negligence on her part. The late Acting Chief Justice in dismissing the application had *inter alia* reasoned that there was no provision in **The Motor Vehicle Insurance Order 1972** giving the court the power to make the condonation order.

[43] The learned Acting Chief Justice had in ascertaining the meaning of prescription and its practical effect within the context of the Order, relied upon the ordinary literal interpretation of the word as used in the provision. He had found that this canon of interpretation was not occasioning any absurdity and thereby causing the court to explore the purposive mode of interpretation to circumvent that. In the same thinking, he adamantly rejected the proposition that the court could grant the condonation through its unlimited jurisdiction under **sec 2(1) (a) of The High Court Act 1978[7].** He reasoned that the section shouldn't be misinterpreted to mean

[6] The Motor Vehicle Insurance Order No 18 of 1972, has been repealed by the Motor Vehicle Insurance Order No 26 of 1989 which is presently the law in force. The dispensation sought for from the court was in that case based upon sec 13 (2) read in conjunction with sec 14 (2) of the repealed Order. The provisions are couched in pari materia terms with secs 10(1) and 12(2) now under consideration.

[7] The section provides that the High Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho.

that the court could make an order which is not in any manner whatsoever, provided for in the applicable enactment.

[44] It should be realized that **sec 13 and 14** of the repealed **Motor Vehicle Insurance Order 1972** which in the existing **Order No.26 of 1989**, have been replicated under **secs 10(1) and 12 (2)** represent the determinative provisions to the points raised *in limine* primarily on the prescription of the right to claim. Thus, the inquiry pivots around the sections subject to the legislation in operation at the material time. In the final analysis, the basic importation in the judgment was that, given the wording employed in both sections, the prescription period is limited to the two (2) years and resultantly the right of a person to lodge the claim under the Order expires immediately thereafter. The judgment was specifically on this subject, cited with approval by Ramolibeli J (as then was) in **Lefu Samuel Khuto V Lesotho National Insurance Company and Ano** (supra) and subsequently by Monaphathi J (as then was) in **Mahooana Peete V Lesotho General Insurance** *(supra).*

[45] To this end, the picture before the Court is that the applicant's claim for compensation had prescribed and that this disqualifies him from having a *locus standi* in the matter. The finding borrows its credence from *inter alia* the judgment by **Wessels CJ in Rooderport – Marraisburg Town Council v Eastern Properties (Prop) Ltd 133 AD 87 at 101** where he directed:

> ….by our law any person can bring an action to vindicate a right which he possesses (*interesse)* whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have. *Nemo enim privatorum populares persequitur actions quoad interesse piblicum. Pro suo autem interesse cuilibet sive per se sive per procuratorem agree licet*- Groenewegen de leg Abr ad D 47.23.

[46] It would logically follow that in sequel to the finding that the applicant's right to claim for the compensation has prescribed and that as a result, he has lost the credentials to establish the *locus standi*, the end result is that the application becomes an academic exercise. The reason behind is that he wouldn't himself qualify for the redress which he is asking the court to dispense.

[47] The undesirability of academic issues being brought before court was in **Dalrymple and Others v Colonial Treasurer 1910 TS 372 at 390** explained by Wessels CJ in these terms:

> Courts of law… are not constituted for the question of academic questions, and they require the litigant to have only not an interest, but also an interest that is not too remote.

[48] The court realizes that the applicant has tactically exploited **sec 22 of the constitution** as an alternative avenue to establish his *locus standi* from the constitutional perspective. He took the move in order to circumvent a possible finding by the court that his claim has by operation of **sec 10(1)** prescribed and, therefore, that he has lost the qualification to enforce it in court under **sec 12(2)**. It is clear

in terms of **sec 22** that the applicant could on his behalf or on behalf of others bring a constitutional case against the violation of the rights provided for under **secs 4 to 18 of the constitution** before court for a personal redress or for the sake of the others whose constitutional rights are being vertically or horizontally transgressed. The underlying philosophy is that the constitution is a sacred national covenant and a property which should be jealously protected by all the citizens.

[49] Notwithstanding **sec 22** and the acknowledgement that the applicant could exploit it to establish a *locus standi* to *inter alia* attack the constitutionality of a statutory provision and to accordingly seek for some declaratory pronouncement against it; the court must be cognizant of the constitutionally inbuilt limitations. The court realizes that the applicant has in his reaction **to the points raised *in limine*,** consistently maintained the position that he is empowered by the section to challenge the consistency of **sec 8 of the Order** against **sec 18 and 19 of the constitution.** In this background consideration, it emerges that **sec 18(1) of the constitution** which is the key equality clause against any legislative provision which is discriminative in itself or in its effect, is correspondingly, limited by *inter alia* **sec 18(4)(d) of the constitution. The section empowers parliament to enact a law which could be discriminatory for the appropriation of public revenue or other public funds.** The court identifies **sec 8 of the order** as a constitutionally

sanctioned discriminatory statutory provision which governs financial distributions. **Secs 18 and 19 of the Constitution** cannot, resultantly assist the applicant to obtain the declaration that **sec 8** is unconstitutional.

[50] It should suffice to state it in few words that the court is not convinced that the applicant had from the onset, brought the application on behalf of the other victims in his situation. This has not been satisfactorily foreshadowed in his founding affidavit.

[51] It is the hope and the wish of this court that the 1st respondent would, notwithstanding the final decision in this case, be conscious of its existence as a public institution and about its obligation to the citizens. In that perception, it would be inclined to provide what would be in the best interest of the poor victims of the vehicle accidents along the public roads without necessarily being over legalistic in considering the compensation. The formula for the compensation appears to be unrealistically humble. In some cases, it could be appropriate for the 1st respondent to discretionarily extend a Samaritan hand to the victim. The fact that the present victim was only 22 years old when he met the tragedy, presents a challenge for the management of the 1st respondent to adopt an approach which will demonstrate that whilst it is business minded, it is, nevertheless, inspired by the spirit of *botho* and not exclusively by the profit making imperatives.

[52] The court finds it rather obligatory to recommend that the prescription clause be revisited. There should be a re thinking about the accommodation of the jurisdiction of the court to extent the prescription period under justifiable circumstances and that the formula for compensation under **sec 8**, be urgently amended to be commensurate with the current economic challenges and to facilitate for some equitable distribution of the funds concerned.

[53] In the result, the points raised *in limine* are upheld and the application is dismissed with costs.

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E.F.M. Makara
Acting Judge

I concur:

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A.M. Hlajoane
Judge

I concur:

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N. Majara
Judge