

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/135/2018

In the matter between:

MATHAPELO HLOELE

PLAINTIFF

AND

**LESOTHO NATIONAL GENERAL
INSURANCE COMPANY LIMITED**

DEFENDANT

Neutral Citation: `Mathapelo Hloele vs Lesotho National General Insurance Company Limited (CIV/T/135/2018) [2021] LSHC 24 (25th MARCH 2021)

JUDGMENT

CORAM:

MOKHESI J

DATE OF HEARING:

18TH FEBRUARY 2021

DATE OF JUDGMENT:

25TH MARCH 2021

SUMMARY

CIVIL PRACTICE: *Request for further particulars for purposes of pleading or tender of settlement, in terms of Rule 25 of the High Court Rules- Principles applicable thereto considered and applied.*

ANNOTATIONS:

Legislation:

Motor Vehicle Insurance Order, No. 26 of 1989

High Court Rules 1980

Cases:

Khunou and Others v Fihrer & Son 1982 (3) SA (WLD)

Tahan v Griffiths 1950 (3) SA 899

S. A. Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944 (w)

Purdon v Muller 1961 (2) SA 211 (AD)

Coop & Another v Motor Union Insurance Co. Ltd 1959 (4) SA 273

Cete v Standard & General Insurance Co. Ltd 1973 (4) SA 349

[1] The plaintiff has instituted an action against the defendant in terms of the provisions of the Motor Vehicle Insurance Order, No. 26 of 1989 as amended, claiming for the loss of support and funeral expenses occasioned to her and her minor child as a result of motor vehicle accident which allegedly occurred on the 18th January 2016 along Main North 1. This accident had led to the death of the plaintiff's breadwinner husband. The plaintiff's husband was allegedly knocked down by the vehicle bearing Registration letters and numbers ME 954.

[2] After filing their notice of Intention to oppose, the defendant filed a Request for further particulars to enable it to plead or to tender. In response, the plaintiff filed what she called a Reply, in terms of which she declined to comply with the request citing as the reason the fact that the defendant is in possession of the documentation sought as those were filed with the defendant when a claim for compensation was lodged earlier. In a nutshell the plaintiff refused to provide the particulars sought because she argues that they are all in the possession of the defendant. Request for further particulars had sought information regarding:

- (i) The plaintiff and her son's date of birth;
- (ii) Copy of the marriage certificate or document evincing marriage between the deceased and the plaintiff;
- (iii) Names and addresses of the driver of vehicle ME 954 and all the details contained in the LMPS 29 (sketch plan of the accident);
- (iv) Copy of the deceased's passport, and information regarding where and when he died;

- (v) Copy of the postmortem examination report, and whether the deceased had received any medical attention before he died;
- (vi) The name of the executor of the deceased's estate, and whether his estate is being administered in terms of either common-law or customary law, and reference number of it is administered in terms of common law;
- (vii) If the estate is being administered in terms of the customary law, the list of assets in the deceased estate and their value and names of the heirs, and the value of their inheritances;
- (viii) How an amount claimed for funeral expenses was made up and documentary proof thereof;
- (ix) How the amount claimed for loss of support was made up and calculated and where the deceased was employed at the time of death and in what capacity;
- (x) The amount of tax deducted from the deceased's salary per month.
- (xi) Whether any amounts of pension, gratuity, leave pay or Insurance were paid, and proof thereof;
- (xii) The deceased's contact of employment and his pay slips.

[3] In response to the plaintiff's refusal to furnish further particulars, the defendant filed an application on the 13th April 2018, in terms of Rule 30(5) for an order compelling the plaintiff provide the particulars requested, and for an order of costs and other consequential reliefs. In response to this application, the plaintiff lodged an application in terms of Rule 30 (1) for an order that the defendant's application in terms of Rule 30 (5) was an irregular step as it was not preceded by a notice provided for in the Rule. This matter was allocated to Peete J who has since gone on retirement and was only re-

allocated to me in 2020 after his departure. I turn to deal with the issues raised in this matter, and the schematic arrangement of the Rules implicated.

[4] **THE LAW**

Request for further particulars to enable a litigant to plead or to tender, is governed by Rule 25 (1). This sub-rule provides that for purposes of pleading or tendering an amount in settlement, a party may make request for further particulars. An answer to this request must be made within 14 days. And in terms of Rule 25 (6):

“(6) If a request for particulars is not complied with, the party requesting the same may subject to the provisions of subparagraph (5) of Rule 30 apply to court for an order or for the dismissal of the action or the striking out of the defence and on such an application the court may make such order which it seems fit to make.”

Rule 30(5) on the other hand provides that:

“(5) Where a party fails to comply timeously with a request made or notice given pursuant to these Rules, the party making the request or giving the notice may notify the defaulting party that he intends after the lapse of seven days, to apply for an order that such request or notice be complied with, or that the claim or defence be struck out. Failing compliance within the seven days, application may be made to court and the court may make such order thereon as it deems fit.”

- [5] The procedure for setting aside of an irregular proceeding is provided for in Rule 30(1), thus:

“(1) where a party to any cause taken an irregular or improper proceedings or improper step any other party to such cause may within fourteen days of the taking of such step of proceeding apply to court to have it set aside”

And Rule 30(3) provides that:

“(3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part either as against all the parties or as against some of them, and grant leave to amend or make any such order at it seems, including any order as to costs.”

- [6] **Whether the defendant’s Rule 30(5) notice irregular.**

The issue for determination is whether or not the defendant’s Notice in terms of Rule 30(5) constitutes an irregular step. It is the defendant’s contention that Rule 30(5) applies in circumstances where there has not been any response to the request for further particulars within the stipulated time frames, and that, such a warning was not a prerequisite in the present matter.

- [7] On the one hand, the plaintiff argued that Rule 30(5) notice/warning must precede any application to compel, and in support of the argument, Mr

Letompa cited the case of **Khunou and Others v Fihrer & Son 1982 (3) SA (W.L.D) 354 at 360**. I agree that the present case calls for the warning to be issued before an application to compel the furnishing of further particulars is lodged. This Rule 30(5) covers the present circumstances where the plaintiff refuses to comply with request for further particulars. As already said, the plaintiff relies on the **Khunou case** (ibid) for the proposition that notice of the intended approach to court to have the defaulting party compelled to furnish particulars is mandatory and that non-compliance with it is fatal. In fact, this case does not support such a proposition, but the contrary view. At p. 360 G – H, SIomowitz J said referring the analogous South African Rule:

“He submitted that the effect of this Rule is to preclude an application of the present kind unless and until a notice in terms of Rule [30(5)] has been given. In support of this proposition, he referred me to [citation omitted]. I do not however read that authority or any of the other cases to which it refers as supporting his submission. Neither it nor the other authorities in question express the view that the Rule is peremptory and that no order can be made on an application compelling compliance with the Rules (in a case where there is no specific sanction for non-compliance) unless a notice has first been given in terms of Rule 30 (5). I have no doubt that a court can condone a non-compliance with Rule 30(5). This demonstrates that it is not peremptory. I agree that the Rule is one which ought in general to be complied with, and I do not question that a failure to comply with it will in the ordinary course affect the matter of costs and probably result in the application itself being dismissed...”

[8] Undoubtedly, the defendant has not complied with Rule 30(5) as the application to compel was not preceded by the requisite seven days' notice, and as such it was an irregular step. However, given that an order dismissing this application will not disentitle the defendant to restart the process in compliance with the Rules, a course which would necessitate a further delay to the main case being heard and finalized. It is clear that the plaintiff is adamant that she will not comply with the request because as she says, the defendant is in possession of the information being requested. Therefore, in the exercise of my discretion in terms of Rule 59 I condone non-compliance with Rule 30(5).

[9] **Whether application to compel furnishing of further particulars merited.**

What is left to determine is whether the defendant application to compel as any merit, but before I do not that it is apposite at this point to deal with plaintiff's reason for not complying with the request for further particulars: her reason is that the defendant is in possession of the information requested. It has to be stated categorically that the plaintiff is misguided in preferring this reason as the basis for resisting furnishing further particulars. This position was dealt with in **Tahan v Griffiths 1950 (3) SA 899 at 905 D – F:h**

“In support of his submission on this point, Mr. Van Rhyen referred to Beck on Pleadings (at p.144), which reads as follows:

‘Thus, where matters are peculiarly within a party’s knowledge, or quite as much within his knowledge as within that of his opponent, he cannot be heard to object that there is insufficient particularity.’

The authorities referred to for this statement are **Sugar v Bennett** (4 H.C.G 337) and **Reid v Haliburton** (1894 (1), O. R. 23). The cases -referred to were not cases in which the defendant's alleged knowledge of the particulars sought by him has been held to be a defence to the application for such particulars.

In the English practice it is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary will try to make out against him, which may be something very different from the true facts of the case.

.....
In addition, the opposite party is entitled to have the details recorded as part of the pleadings so as to bind the pleader and limit him at the trial to the details so recorded, thereby circumscribing and defining the issues of fact triable.”

- [10] A party seeking an order compelling the furnishing of further particulars for purposes of pleading, must meet the test articulated in **S. A. Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944 (w) at 947 F- G:**

“4. A defendant seeking an order for further particulars to be supplied must satisfy the court that without such particulars he will be embarrassed in pleading; he must show that the plaintiff has failed to deliver particulars “sufficiently” in terms of what is required, i.e. that particulars are lacking which are strictly necessary to enable him to plead or to tender. This he can do by relying upon the terms of the plaintiff's pleadings as such, but it is also open to him to adduce evidence on affidavit of matters extraneous

to the pleadings in order to explain the cause of his embarrassment; outside evidence, however, may be used only for the purpose of satisfying the court that particulars are required within the ambit of the general principles applicable, and not for the purpose of extending the scope of the particulars required in terms of those principles.”

[11] The function of further particulars has been stated to be:

- a) To limit the generality of allegations in the pleadings;
- b) To define the issues with greater precision; and
- c) To prevent the party asking for particulars from being taken by surprise at the trial (**Tahan v Griffiths supra**)

[12] It is important to note, as it was made plain in **S. A. Railways and Harbours v Deal Enterprises (PTY) Ltd (supra) at 947 H – 948 A** that the defendant is not entitled to know the plaintiff’s evidence but:

“...the outline of the case which is being brought against him. He is not entitled to information simply because it would be useful to him. In particular, he is not entitled to be supplied with information which forms no part of the plaintiff’s cause of action as formulated, or which relates to matters extraneous to the facta probanda put forward by the plaintiff himself for the purpose of enabling him to ascertain whether he has a defence to the claim, or to formulate such defence...”

[13] The courts’ lamentations about the abuse of Rule 25 procedure are legendary and must be reproduced to remind counsel that the courts are alive to the fact

that this procedure is more often than not deployed not to achieve the purposes stated above. In **Purdon v Muller 1961 (2) SA 211 (AD) at pp 214 – 215 A** the court said:

“A distinction must also be drawn between particulars required for purposes of pleading and particulars required for trial (citations omitted). I am however, not now concerned to examine either of those matters, but rather to refer to the tendency, which has increasingly revealed itself over the last decade, on the part of practitioners to abuse the further particulars procedure by making unnecessary, and unduly lengthy, requests for information before pleading. This inevitably leads to much delay; and the court, instead of being furnished with a reasonably concise and self-contained statement of the respective cases of the parties, is confronted with a formidable array of papers from which the real issues between the parties can only be ascertained by a laborious process of reference and cross-reference to a whole series of separate documents. Indeed, it is by no means rare for the further particulars to obscure, rather than to clarify, the real issues between the parties.”

- [14] This is an action for loss of support by the dependents of the deceased who was killed after being knocked down by the insured motor vehicle in circumstances where the driver is alleged to have been negligent in ways articulated in the Declaration. In the Declaration, the plaintiff avers that her husband was knocked down by the insured vehicle driven by one Lerato Tsunyane on the 18th January 2016 along Main North 1 at Ngoana-oa-Illa (vehicle Reg. ME 954); that the deceased died the same day and was declared as such upon arrival at hospital; that the deceased earned a living as a driver earning M1800.00 per month; that the deceased was 27 years old at the time; that funeral expenses were incurred as a result; that the plaintiff and her minor

child suffered loss of support. These are standard pleadings in this type of proceedings.

[15] With the above averments in mind, the defendant drew a raft of particulars which it said were required to enable it to plead or tender settlement. One cannot help but see a tendency which was decried in **Purdon v Muller (ibid)**: It is not clear for what purpose the plaintiff and her son's birth certificates would serve at this stage. The defendant could not possibly require these documents in order to plead; the same considerations apply to the marriage certificate or proof of customary marriage; the LMPS Accident Report (LMPS29) detailing out the time of collision, the direction of the deceased and the vehicle ME 954, the point of impact, the address of the driver, the plaintiff's copy of passport; copy of postmortem report; the deceased's copy of death certificate; copy of the deceased's contract of employment. (See: **S. A. Railways and Harbours v Deal Enterprises (PTY) Ltd (supra) pp 951-952**). All these documents are not necessarily required before the defendant can plead. They are essentially, documents which can be discovered in terms of Rule 34 or the particulars which can be disclosed in terms of Rule 37 to enable the defendant to prepare for trial and to avoid being ambushed in respect thereto.

[16] In the litany of the so-called particulars sought were the executor's addresses, and in terms of which system the estate of the deceased was administered copy of liquidation and distribution account lodged with the Master of High Court in respect thereof; list of all the assets in the deceased's estate and their value; heirs and their addresses and the value of their inheritances; where the deceased was employed, in what capacity (this clearly appears in the

Declaration); the amount of tax deducted from the deceased's salary per month; amounts paid out consequent to his death; the deceased's pay slips. All these documents relate to issues of assessment of damage and compensation and, therefore are not required to enable the defendant to plead or to tender. These matters may be dealt with under Rule 37 where request for particulars is meant to enable the defendant to prepare for trial.

[17] Among the particulars sought are where and when the deceased died and whether he received any medical attention before he died. Although the plaintiff did not say where the deceased died, she made it plain in her Declaration that the deceased was knocked down by the insured driver and was declared dead on arrival at hospital. To ask the plaintiff whether the deceased received any treatment at hospital, in the light of this averment, is plainly mind-boggling. The plaintiff's pleaded case is that the deceased was declared died on arrival at hospital.

[18] My considered view is that while this raft of particulars requested is not necessarily required to enable the defendant to plead, there is a further serious problem regarding the defendant's request for further particulars: It has not been shown how the absence of the particulars being requested would embarrass the defendant when pleading to the case, i.e. what particulars are lacking to enable it to plead to the case. Neither has the defendant (in order to show the embarrassment) by reference to the plaintiff's pleadings sought to explain the source of embarrassment. In fact, as has been seen, the defendant demands information which will not aid it in pleading to the case, but rather which will be relevant for assessment of damage and compensation.

[19] Rule 21 (6) provides that:

“(6)(a) A plaintiff who sues for damages must set out particulars of his claim in such a manner as will enable the defendant reasonably to assess the quantity thereof.”

This rule must be read with Rule 25 which allows for the defendant to request further particulars which are “strictly necessary to plead, replicate, or to enable a tender to be made.” In compliance with Rule 21 (6) (a), the plaintiff is only required to make out a case in the founding papers with:

“...sufficient particularly to convey to the defendant the ground, or where they are more, the grounds upon which the claim is based so that he may be able to decide whether he has a good defence to the whole or a portion of the claim, and if not, whether he ought to make a tender. For the purpose of making a tender he is entitled to know the full nature of the claim against him.” (**Coop & Another v Motor Union Insurance Co. Ltd 1959 (4) SA 273 at 276 D – E**; see also **Cete v Standard & General Insurance Co. Ltd 1973 (4) SA 349**)

[20] Dealing with equivalent of Rule 21 (6) (a) the court in **Cete case (ibid)** made it plain that in order to place the defendant in a position where he can reasonably assess the quantity of a claim the defendant is not merely a passive requester of information but has a corresponding duty to undertake an enquiry to prepare for his case:

“what the Rules entitle him to is to information which will enable him to make his own assessment. In other words, he is not the passive party who

merely checks on what the plaintiff says. He has a duty himself to work out what is reasonable assessment of the damage sustained by the plaintiff.” (Cete ibid p.354 F – G).

[21] I have looked closely at the defendant’s request for further particulars, and I am convinced that the particulars to which the defendant is entitled to enable it to plead or to tender relate to the breakdown of funeral expenses and the amount claimed for loss of support. The other items regarding the amounts of taxes the deceased paid, any pension paid or gratuities, leave pays, insurance payments, and similar payments, employment contract, the system in terms of which the deceased’s estate is administered: The absence of these items may not enable the defendant to accurately tender an amount which the court may ultimately award as damages, but that is not to say that the particulars pertaining to those matters should be provided:

“But in my view the defendant has been put adequately into the picture of the basis of the two plaintiffs’ claims for damages for all proper purposes at the present stage, i.e so that it can plead or decide to tender and plead. It may not be able accurately to tender an amount which a court may ascertain to be the damages which should be awarded after all the evidence is heard. But, as I have indicated above, there is no present duty upon the plaintiffs to give, as it were, an advance abridged edition of their evidence to establish their damages at the trial....”(Coop and Another v Motor Union Insurance Co. Ltd case supra at pp.277H-278A)

[22] **Costs**

Given that a litany of particulars requested cannot be seriously be said to be required to enable the defendant to plead or to tender, my considered view is

that they are a manifestation of the pernicious and unfortunate practice of legal practitioners abusing Rule 25 procedure. And for this reason, I would not award costs to the defendant despite being successful in certain respects.

[23] In the result the following order is made:

(a) The plaintiff is ordered to provide the defendant with further particulars requested under paragraph 5.1, 5.2, 5.3 of the Defendant's Request for Further Particulars within 14 days of service of this order.

(b) That in the event the plaintiff failing to comply timeously with the terms of this order, the defendant is given leave to approach the court on the same papers, suitably supplemented, for an order striking out the plaintiff's claim with costs.

(c) Each party is to bear its own costs.

MOKHESI J

For the Applicant:

Ms. Taka

From Webber Newdigate Attorneys

For the Respondent:

Adv. Letompa

Instructed by Mosotho Attorneys