IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/149/2019**

In the matter between:

TANKI PULE **PLAINTIFF**

AND

`MATUMELO LETLALA **DEFENDANT**

Neutral Citation: Tanki Pule v `Matumelo Letlala (CIV/T/149/2019) [2021] LSHC 16 (25th MARCH 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **16TH FEBRUARY 2021**

DATE OF JUDGMENT: **25TH MARCH 2021**

SUMMARY

CIVIL PRACTICE: *The plaintiff excepting to the defendant's claim in reconvention where the defendant had claimed compensation from the supposed wrongdoer instead of the insurance company- Exception upheld.*

ANNOTATIONS:

Cases:

Voget v Kleynhans 2003 (2) SA 148 (c)

Colonial Industries Ltd v Provincial Insurance Co. Ltd 1920 CPD

Amalgamated Footwear and Leather Industries v Jordan & Co. Ltd 1948 (2) SA 891 (c)

Mckenzie v Farmers' Co-operative Meat Industries Ltd. 1922 AD

Road vir Kuratore vir Warmbad Plase v Bester 1954 (3) SA 71 (T.P.D)

Evins v Shield Insurance Co. Ltd 1980 (2) SA 814 (A)

Road Accident Fund v Abrahams (276/2017) [2018] ZASCA 49 (29th March 2018)

Legislation:

High Court Rules 1980

Motor Vehicle Insurance Order, 1989

Journals:

Ailola D.A. "The Law of third-party motor vehicle insurance in Lesotho: a comment on the new Order" ***Comparative and International Law Journal of Southern Africa Index 1991 Vol. 24***

[1] The plaintiff had instituted an action claiming an amount of M136,484.74 for fair, necessary and reasonable repair costs occasioned by the collision between his vehicle and that of the defendant. The collision occurred on the 17th January 2018 along the Mpilo Boulevard Road at or near Lesotho Funeral Services.

[2] The defendant filed a counterclaim or claim in reconvention against the plaintiff's claim above. In her counterclaim the defendant claimed payment of an amount of M500,000.00 for future medical expenses, M4,000,000.00 (four million Maloti) as damages for emotional shock and psychiatric injuries arising from the same collision plus 15.5% per annum.

[3] To this claim in reconvention the plaintiff raised an exception on the ground that the defendant's claim in reconvention lacks averments necessary to sustain a cause of action.

[4] **THE LAW**

In terms of **Rule 29 (1) (a) of the High Court Rules 1980** a party is entitled to except to his or her adversary's pleadings where it can be shown that they lack averments which are necessary to sustain an action. When dealing with an exception, the court must assume the correctness of the averments made in the impugned pleadings for purposes of deciding the exception unless those averments are palpably untrue or improbable that they can safely be rejected (**Voget v Kleynhans 2003 (2) SA 148 (c) at 151).** The approach to exceptions was stated in **Colonial Industries Ltd v Provincial Insurance Co. Ltd 1920 CPD 627 at 630** thus:

> *"Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. Under the name of "Demurrer" it grew under the old English practice into a most pernicious evil: the courts of law abnegating their functions as Courts of Justice directly countenanced and encouraged the ingenuity of counsel in drafting fine demurrers which ignored the rights on which they were called to adjudicate. I think the possibility of such abuse of legal proceedings should be jealously watched and that save in the instance where and exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed."*

[5] In order to succeed, the excipient must show that upon any reasonable construction or interpretation which can be placed on the pleadings, they do not disclose a cause of action (**Amalgamated Footwear and Leather Industries v Jordan & Co. Ltd 1948 (2) SA 891 (c) and 893:**

> *"It seems to me that insofar as there can be an onus on either party on a pure question of law, it rests not upon the plaintiff but upon the excipient. It is the excipient who is alleging that the summons does not disclose a cause of action and he must establish that in all its possible meanings no cause of action is disclosed."*

In **Mckenzie v Farmers' Co-operative Meat Industries Ltd. 1922 AD 16 at 23**, the court held that in order to disclose a cause of action the pleadings must set out:

> *"[E]very fact (material fact) which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which it is necessary to be proved."*

[6] Importantly, for present purposes, in **Road vir Kuratore vir Warmbad Plase v Bester 1954 (3) SA 71 (T.P.D) at 74B – C,** the court said:

> *"A claim which by reason of the provisions of a statute is unenforceable does not disclose a cause of action and can be excepted to because the courts take judicial cognizance of statutes and the validity of a statute cannot ordinarily be challenged, whereas a claim which may possibly not be enforceable by reason of the provisions of a regulation cannot be excepted to as not disclosing a cause of action since not only do the courts not take judicial cognizance of regulations but in addition the regulation may itself not be valid, and until it has been proved the question of its validity does not arise."*

[7] In terms of **s.6 (1) of the Motor Vehicle Insurance Order, 1989** (the Act) the insurer is obliged to pay compensation to any person for any loss or damage which that third party has suffered as a result of any bodily injury to himself or herself or death arising out of the driving of a motor vehicle registered in Lesotho. The said section provides:

> *"The insurer shall be obliged to compensate any person for any loss or damage which the third party has suffered as a result of –*
>
> *(a) Any bodily injury to himself*
>
> *(b) The death of or bodily injury to any person;*
>
> *In either case caused by or arising out of the driving of a registered motor vehicle by any person in Lesotho, if the injury or death is due to the negligence or other unlawful act of the person who drove the registered motor vehicle or of the owner or his servant in the execution of his duty."*

[8] And crucially, under s.14, the Act provides that:

> *"14.* ***When a person is entitled under this Order to claim from the insurer any compensation in respect of any loss or damage result[ing] from any bodily injury to or the death of any person***

> ***caused by or arising out of the driving of a registered motor vehicle under this Order by the owner thereof or by any other person with the consent of the owner, the first mentioned person shall not be entitled to claim compensation in respect of that loss or damage from the owner thereof or by any other person with the consent of the owner, the first mentioned person shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the driver who drove the vehicle as aforesaid*** *or if that person drove the vehicle as a servant in the execution of his duty from his employer, unless the insurer is unable to pay the compensation or its liability has been terminated under Section 7."(emphasis added)*

[9] This case raises a very important question, and it is whether the Act obliges claimants against the owners of the vehicles which occasioned injuries to them to proceed against the insurers. In order to answer this question, the rationale for having the legislation as the Motor Vehicle Insurance Order 1989, must be understood. This legislation is a form of social insurance law. I cannot do better than quote what the learned author **Ailola D.A.** "The Law of third-party motor vehicle insurance in Lesotho: a comment on the new Order" ***Comparative and International Law Journal of Southern Africa Index 1991 Vol. 24 at 365,*** when explaining the rationale for the Act:

> *"As is the case with similar statutes elsewhere in the Commonwealth, and although Order 18 was a post-independence Statute, its introduction was really a part of the ongoing process of extending British law into the Colonies and ex-Colonies. In the specific case of motor vehicle insurance, this legislation was primarily inspired by the feeling that ordinary road users and working people needed some kind of relief or compensation for losses and damages arising from motor vehicles, which like other industrial inventions had come to be accepted as desirable hazards. Accordingly, it came to be accepted that the most effective methods of taking care of this problem would be for the various participants in the creation of the risk, namely motor vehicle owners or drivers, to pool their resources by contributing to an insurance fund from which victims of car accidents who satisfied certain requirements would be compensated. Hence the creation and regulation of the business of third-party motor insurance…"*

[10] Based on this rationale, if by pouring fuel into the tank of the motor vehicle, the driver or owner is deemed by law to have taken out an insurance to protect himself or herself against claims for compensation for bodily injuries to third parties, a claimant is obliged to claim against the insurer not the owner of the vehicle. The reengineering of the law of delict brought about by the Act in terms of s.14 was to abolish the common law right of the injured party to claim against the owner, and in the owner's stead the Act places the insurance company. Dealing with the ss. 21, 23 and 27 of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (s. 21 of which is closely similar to our s.14), Corbett JA in **Evins v Shield Insurance Co. Ltd 1980 (2) SA 814 (A) at 841 E – G** said:

> *"To a great extent the Act represents an embodiment of the common-law actions to damages for bodily injury and loss of support where the bodily injury or death is caused by or arises out of the driving of a motor vehicle insured under the Act and is due to the negligence of the driver of the vehicle or its owner or his servant. Then in place of, and to the exclusion of, the common law liability of such persons is substituted the statutory liability of the authorized insurer…."*

[11] Dealing with s.14 equivalent of the South African Road Accident Fund Act 56 of 1996, Makgoka AJA in **Road Accident Fund v Abrahams (276/2017) [2018] ZASCA 49 (29th March 2018)** at para. 13 said:

> *"[13] A useful starting point is to consider the effect of S.17, read with S.21 (1). As stated already, the latter abolishes the right of an injured claimant to sue the wrongdoer at common law. S.17 (1) [S.6 of our Act], in turn substitutes the appellant [insurer] for the wrongdoer. It does not establish the substantive basis for liability. The liability is founded in common-law (delictual liability). Differently put, the claim against the appellant is simply a common-law claim for damages arising from the driving of a motor vehicle, resulting in injury. Needless to say, the liability only arises if the*

injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle…."

[12] With this legal background the defendant's claim in reconvention is ill-conceived and ought to be dismissed for failing to disclose a cause of action.

[13] In the result:

(a) The exception to the defendant's claim in reconvention upheld with costs, which costs shall be costs in the cause.

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MOKHESI J

For the Plaintiff: **Ms. Taka**
From Webber Newdigate Attorneys

For the Defendant: **No Appearance**