IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 2630/07

In the matter between:

SABELO MABUZA **APPLICANT**

and

THE MOTOR VEHICLE ACCIDENTS **RESPONDENT**

CORAM : Q.M. MABUZA –J
FOR THE APPLICANT: MR. B. SIGWANE OF
FOR THE RESPONDENT : MS. M. VAN DER WALT
INSTRUCTED BY MR. MASUKU
OF MAPHANGA HOWE
MASUKU NSIBANDE

JUDGMENT 28/3/08

---

[1] The application before Court came on a certificate of urgency. I must set out the orders sought as the meaning thereto would be lost if I abbreviated same. The orders sought are as follows:

1. **Dispensing with the usual time limits, procedures and manner of service provided for in the Rules of the above**

Honourable Court and hearing this matter as one of urgency.

2. **Condoning the non-compliance with the said Rules.**

3. **Declaring that Section 10 of the Motor Vehicle Accidents Act, 1991 entitles the Applicant to claim compensation from Respondent for any loss or damages for bodily injury to himself, which he otherwise would have been entitled to claim at common law as against the driver who caused his injury.**

4. **Declaring that the loss or damage envisaged in Section 10(1) of the said Act means (general or special) damages as generally understood at common law and as governed by the Law of damages.**

5. **Declaring that Section 10 of the Motor Vehicle Act, 1991 does not prescribe for the payment of any compensation due to a Claimant by way of instalment or annuity and that imposition of such payment mode upon the Respondent is immoral, irregular, unlawful and unconstitutional in as much as it is ultra vires the said Act.**

6. **Declaring that compensation or damages payable by the Respondent under Section 10 of the said Act are subject to payment in a lump sum in the form of a capital amount.**

7. **Declaring that the said compensation or damages is subject to the operation of the once and for all rule.**

8. **Compelling the Respondent to finalize settlement of the**

Applicant's claim and pay the accepted lump amount constituting the total sum payable as stated in the Respondent's offer dated 12th June, 2007, directly to the Applicant's Attorneys.

9. **Granting costs of suit against Respondent at the punitive scale.**

10. Further and/or alternative relief.

[2] In support of the application the deponent has filed an affidavit which inter alia gives a brief background hereto. During March 2006 the Applicant instructed his present attorneys to lodge a claim for compensation or damages in terms of Section 10 of the Motor Vehicle Accidents Act following his involvement in a motor vehicle accident at Manzini wherein he was severely injured and suffered physical disablement. According to him, his attorneys lodged the claim which remains un-repudiated by the Respondent.

[3] After lodgement of the claim and following the exchange of relevant proofs, correspondence and actuarial reports, the Respondent made the Applicant an offer of settlement in terms of Section 4 of the Motor Vehicle Accidents Act 1991.

[4] Although the amount of the offer is acceptable to the Applicant he does not accept the Motor Vehicle Accidents Fund's (MVA Fund) proposed mode of payment of the amounts in respect of "future medicals" and "future loss of earning" in instalments and directly to service providers.

[5] The offer is set out in a letter from the MVA Fund dated 12/6/07 addressed to "Sigwane and Partners". It is headed **"without prejudice"**. In the body thereof it states "**without in anyway admitting liability"** the Fund is pleased to make the following offer in full and final settlement. The offer is then set out and is incorporated in Annexure "SM 1" of the founding affidavit. The offer also states that **"Please note that this offer is indivisible and may not be accepted in part only".**

[6] The Respondent has countered the submissions advanced by the Applicant by attacking the application on three fronts namely:

(a) By moving an application to strike out;
(b) By raising points ***in limine***; and
(c) On the merits.

[7] The application to strike out based on Rule 6 (28) is two fold; **firstly** being aimed at the Motor Vehicle Act Funds "without prejudice" offer of settlement (Annexure "SM1") and all reference thereto in the founding papers and Annexures or the basis of irrelevance and **secondly** at scandalous and vexatious matter contained in the confirmatory affidavit deposed to by Bob Sigwane.

[8] The Respondents have submitted that the offer is based on a **"without prejudice"** offer of settlement and was made **"without in anyway admitting liability",** in **"full and final settlement"**, **and is indivisible and may not be accepted in part only".**

[9] The Respondents contend that the Applicant did not accept the offer in full and final settlement but wanted the Fund to agree to different terms of settlement. I have set out these terms in paragraph (4) above. The Respondent was not agreeable to this and made it clear to the Applicant that the offer had been made in the context of an out of court settlement. I agree with the Respondent.

[10] At common law statements, made expressly or

impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute, cannot be disclosed in evidence without the consent of both parties. The words “without prejudice” mean without prejudice to the rights of the person making the offer if it should be refused (see Hoffman and Zeffert South African law of Evidence (3rd Ed) at 170 cited with approval in **Sibeko and Another v Minister of Police and Others 1985 (1) SA 151** (w) at 164, **Naidoo v Marine and Trade Insurance Co. Ltd 1978 (3) SA 666 (A)** at 677 B-D.

[11] ***In casu***, the Funds offer which was indivisible, was refused by the Applicant, and the Fund did not consent to disclosure of its offer. Any matter pertaining to the offer is therefore inadmissible and irrelevant, operates to the prejudice of the Fund and stands to be struck out.

[12] The application to strike out scandalous and vexatious matter which is found in the confirmation affidavit by Mr. Bob Sigwane. The words complained of are “condescending” and “unprofessionally” found at paragraph 3 of the said affidavit and “shocking” and “illegal” at paragraph 3. The phrase “should the

Respondent succeed in their ploy to make the matter drag at a slow pace through the judicial systems" at paragraph 5.

[13] Scandalous matter consists of allegations which may not be relevant but are so worded as to be abusive or defamatory. Vexatious matter consists of allegations which may or may not be relevant but are so worded as to convey an intention to harass or to annoy see **Vaatz v Law Society of Namibia 1991 (3) SA Nm** at 566 C-E.

[14] The words and sentence complained of are in my view prejudicial to the Respondent in that they give the impression that the Respondent is callous, not professional and spiteful and vengeful. These words and phrase have no place in the papers before me and I agree that they should be struck out.

[15] The Respondent raised points ***in limine*** namely:

(a) urgency

causes of action: no prima facie case.

[16] The issue of urgency dealt with at the hearing was that the Applicant's attorney conceded that it was the

period of prescription that they were concerned about but as this had been extended by the Respondent the urgency had fallen away.

[17] In respect of the causes of action the Respondent raised two issues:

(a) Declaratory orders and

(b) the mandatory interdict compelling the Fund to make payment.

[18] In respect of declaratory orders the principles applicable thereto include that there must be a right or declaration which becomes the object of the enquiry. It may be existing, future or contingent.

[19] The Applicant has not properly set out a cause of action upon which he relies, which would establish the Respondents liability to him. This should be properly set out in a summons. Instead the Applicant bases his cause of action on an offer which is without prejudice and inadmissible. Furthermore the Respondent did not admit liability.

[20] The only prayer expressly seeking a declaration as to a right is prayer 3, which relates to a right to claim in terms of section 10 of the Act. This right only arises when bodily injury or death was due to the negligence

or other unlawful act of a vehicle driver.

[21] There is no allegation in the founding affidavit that the Applicant sustained injuries or that such injuries were due to any act by a driver of a vehicle and as such the Applicant has not established a right to claim from the Fund. There is therefore no right be it existing, future or contingent which can be the object of an enquiry.

[22] I agree with the Respondent that the Applicant's prayers 4 to 7 relate to academic questions with reference to the nature of damages claimable and modes of payment thereof. A party is not entitled to approach the Court for what amounts to a legal opinion upon abstract or academic matter. These cannot be resolved or addressed by way of declaratory orders.

[23] In respect of the mandatory interdict compelling the Fund to make payments (prayer 8): the party seeking a final interdict must allege and prove a clear right to the relief sought; harm or injury; and no other satisfactory remedy. The Applicant has not addressed any of these requirements.

[24] For the aforegoing reasons the application must fail. There is no need for me to get into the merits thereof. I

order as follows:

(a) The application to strike out by the Respondent is granted.

(b) The points ***in limine*** raised by the Respondent are upheld;

(c) The Applicant's application is dismissed with costs. The Applicant is ordered to pay the certified costs of Counsel in terms of Rule 68 (2).

[23] The period of prescription is hereby extended for a period of 14 days from today in order to enable the Applicant to issue summons against the Respondent.

Q.M. MABUZA -J