IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 48/2014

In the matter between

GEORGE EDWARD GREEN	**APPELLANT**
And	
SWAZILAND ROYAL INSURANCE CORPORATION	**1ST RESPONDENT**
SWAZILAND RAILWAYS	**2ND RESPONDENT**

Neutral citation: *George Edward Green vs Swaziland Royal Insurance Corporation and Another (48/2014)* **SZSC 74 (3 December 2014)**

Coram: **DR TWUM JA, MCB MAPHALALA JA AND OTA JA**

Heard **17 NOVEMBER 2014**

Delivered: **3 DECEMBER 2014**

Summary: **Civil Procedure*: stipulatio alteri*; contracts entered into with a view to benefit third persons; acceptance and notification of acceptance prerequisites for invocation of the right of the third parties; guiding principles discussed; the 1st and 2nd Respondents contracting by way of an insurance policy with a view to benefit**

38 employees of the 2nd Respondent in the management or supervisory cadre, for injuries resulting in disability during the course of the employment amongst other factors; the Appellant who is employed by the 2nd Respondent in a managerial capacity sustained an injury allegedly resulting in his permanent disability during the normal cause of his employment; the Appellant lodged a claim with the 1st Respondent under the Insurance policy; 1st Respondent repudiated the claim; the Appellant instituted proceedings before the court *a quo* against the 1st and 2nd Respondents; the 1st Respondent took exception to the claim on the grounds that the Particulars of Claim disclosed no nexus between the Appellant and the 1st Respondent; 2nd Respondent applied for a striking out of paragraphs 5, 6 and 7 of the Particulars of Claim on the basis that they are vexatious and scandalous; the court *a quo* upheld both the exception and application to strike out; on appeal held: the Particulars of Claim unequivocally disclosed a *vinculum juris* between the Appellant and 1st Respondent; held: acceptance of a contract can be made expressly or impliedly by way of conduct; held further: the striking out was based on allegations not supported by the facts on record held: order of the court *a quo* set aside ; costs awarded; Plaintiff's claim referred back to the High Court to be determined by another Judge.

JUDGMENT

OTA. JA

[1] This is an appeal against the decision of the High Court per **QM Mabuza J,** rendered on 1 August 2014.

[2] **DRAMATIS PERSONAE**

The common cause facts of this case are that 1st Respondent (Swaziland Royal Insurance Corporation) and 2nd Respondent (Swaziland Railways) concluded a contract of Insurance, under Policy Number 0014816 described as Multimark 111 Policy (Insurance Policy), for the benefit of the 2nd Respondent's employees who are employed in managerial or supervisory positions.

[3] The Insurance Policy was to cover, *inter alia*, the risk of bodily injury, occupational diseases or death resulting therefrom, and arising out of and in the course of the employees' employment.

[4] The Insurance policy had been renewed on 1 April 2005 to terminate on 31 March 2006.

[5] In June 1997, the Appellant and 2nd Respondent entered into a contract of employment by virtue of which the Appellant was employed by the 2nd Respondent as a Mechanical Engineer, which is a managerial position and which is covered by the Insurance Policy.

[6] The contract was for an initial period of two (2) years, but was subsequently renewed with effect from 1 June 2003 to terminate on 31 May 2005.

[7] Clause 11 of the contract of employment stipulates that the 2nd Respondent carries personal insurance on behalf of the employees in addition to workmen's compensation and that the employees agree to accept any such benefits together with any other benefit payable in the contract of employment as full and exclusive compensation of any compensable bodily injury, occupational disease, or death resulting therefrom, arising out of and in the course of the employees' employment.

[8] On 8 May 2005, and in the normal course of his employment, the Appellant sustained an injury which he alleges resulting in his disability,

as attested to by several medical examinations carried out by qualified medical practitioners.

[9] The Appellant duly lodged a claim with the 1st Respondent for payment of his benefits under the Insurance Policy, which claim the 1st Respondent initially accepted and embarked upon processing, which process included sending the Appellant for further medical examinations, but subsequently repudiated on grounds that it did not meet the requirements of the Policy.

[10] It is against the backdrop of the foregoing facts that the Appellant (as Plaintiff), instituted proceedings in the High Court against the Respondents (as 1st and 2nd Defendants), in a suit styled Civil Case No. 1451/2010, wherein he claimed for the following substantive reliefs:-

> **"1. Payment of the amount of E1,616,340.00**
> **2. Interest on the above amount calculated at 9% a tempere morae**
> **3. Costs of suit**
> **4. Further and / or alternative relief."**

[11] A recital of the relevant portions of the Particulars of Claim which is the bone of contention *in casu*, is imperative. They state as follows:-

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> **5.1 In or about the year 1997, in Mbabane, the 1st and 2nd Defendants entered into a written agreement by virtue of which the 2nd Defendant took out from the 1st Defendant an insurance policy or insurance cover under Policy Number MB MMA 0014816. The 1st Defendant was duly represented by its General Manager and the 2nd Defendant was duly represented by its Chief Executive Officer in concluding this agreement.**
>
> **5.2 The material terms of the agreement, whether express, implied or tacit were, *inter alia*, that:-**

5.2.1 the 1st Defendant undertakes to pay a calculable amount of money to an employee of the 2nd Defendant employed in a managerial position or supervisory position, in the event of the said employee's permanent total incapacity arising out of disability caused by accidental injury;

5.2.2 the calculable amount payable shall be an amount equivalent to five (5) times the annual earnings of the particular employee;

5.2.3 for purposes of calculating the amount payable thereof, annual earning shall mean the annual rate of wage, salary and cost of living allowance being paid or allowed by the 2nd Defendant to the employee at the time of accidental bodily injury, plus overtime, house rents, food allowances, commissions and other considerations of a character paid or allowed by the 2nd Defendant to the employee during the 12 months immediately preceding the date of accidental bodily injury;

5.2.4 the 1st Defendant undertakes to indemnify the said employee for medical expenses incurred as a result of the accident causing bodily injury in the total amount of E85,000.00 (Eighty Five Thousand Emalangeni);

5.2.5 the 2nd Defendant shall pay the premium of the insurance on due date annually;

5.2.6 the insurance policy would be renewable annually;

5.2.7 it is an express exception to the policy that the 1st Defendant would not be liable in respect of such person or employee if the injury is caused solely by an existing physical defect or other infirmity of such person or employee; and

5.2.8 by virtue of his / her employment with the 2nd Defendant, any employee in a managerial or supervisory position accepted the benefit flowing from the agreement aforesaid.

Annexed hereto and marked "G 1" are copies of the relevant provisions of the written agreement.

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In the year 2005 the insurance policy was renewed and was effective from the 1st April 2005 to 31st March 2006 and the premium was duly paid by the 2nd Defendant on due date.

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7.1 In June 1997, the Plaintiff and the 2nd Defendant entered into a Contract of Employment by virtue of which the Plaintiff was employed by the 2nd Defendant into the position of Mechanical Engineer; a managerial position;

7.2 In concluding the said Contract of Employment in Mbabane the Plaintiff contracted personally and the 2nd Defendant was represented by its Chief Executive Officer, Gideon Mahlalela;

7.3 The said Contract of Employment was for a period of two (2) years with an option of renewal;

7.4 At all material times hereto the Contract of Employment operational between the Plaintiff and 2nd Defendant had been renewed and on the 1st June 2003; it was renewed to be terminable on the 31st May 2005. A copy is annexed hereto and marked "G 2";

7.5 By virtue of the conclusion of the said contract of employment, the Plaintiff accepted the benefit contracted for the 1st and 2nd Defendants in terms of the contract of insurance or insurance policy.

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8.1 On the 8th May 2005, whilst inspecting a derailed carriage train and wagons, at Lubhuku in the Lubombo Region, and during the cause and scope of his employment duties, the Plaintiff sustained an injury when he slipped and fell on his bottom;

8.2 As a result of the accidental fall the Plaintiff was injured and subsequently received treatment including physiotherapy from various medical experts and therapists. The injury subsequently aggravated and persisted as he was later diagnosed with lumber osteoarthritis and coccygiti;

8.3 Ever since the accident, the Plaintiff underwent various medical assessments and / or examinations with various medical

practitioners who confirmed that the Plaintiff had become disabled as a result of the accident;

8.4 On the 27th September 2008 the Plaintiff underwent medical examination with Dr. M. Lukhele who issued his report and confirmed the Plaintiff's permanent disability and further confirmed that the Plaintiff had, as a result of the accidental injury, become permanently totally incapacitated from following his usual occupation or any other occupation for which the Plaintiff is fitted by knowledge or training. The said report is annexed hereto and marked "G 3";

8.5 The Plaintiff has lodged his claim with the 1st Defendant under the policy in question but the 1st Defendant has repudiated.

9

The 1st Defendant's repudiation of Plaintiff's claim is wrongful and without justifiable cause.

10

Prior to his employment with the 2nd Defendant, the Plaintiff had undergone medical examination as a requirement of his employment and was given a clean bill of heath.

11

Further, prior to and immediately before the accident causing the injury on duty on the 8th May 2005, the Plaintiff had not been involved in any accident nor had he been injured in anyway. He further had not been diagnosed with any disease or any medical condition which may have led to his incapacity

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The 1st Defendant is therefore liable to pay the Plaintiff in respect of his claim as calculated in terms of the provisions of the policy as stated in paragraph 5.2.2 hereto.

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The Plaintiff's monthly earnings at the time of the accidental bodily injury amounted to E26 939 (Twenty Six Thousand Nine Hundred and Thirty Nine Emalangeni) calculated and made up as follows:-

13.1	**Basic Salary**	**E14,123.00**
13.2	**Vehicle Allowance**	**E 8326.00**
13.3	**Housing Allowance**	**E 2580.00**
13.4	**Medical Aid**	**E 500.00**

13.5	**Telephone**	**E 50.00**
13.6	**Coal (4 bags, market valued thereof)**	**E 360.00**
13.7	**Water and Electricity**	**E 1000.00**
	TOTAL	**E26,939.00**

14

The Plaintiff's annual remuneration therefore, was at the time of the accident the amount of E323, 268.00 (Three hundred and Twenty Three Thousand, Two Hundred and Sixty Eight Emalangeni).

15

In the premises the 1st Defendant is indebted to the Plaintiff and is liable to pay the Plaintiff in terms of the Insurance Policy the amount of E1, 616 340 (One Million Six Hundred and Sixteen Thousand Three Hundred and Forty Emalangeni) which amount is now due and payable but despite demand the 1st Defendant refused to Pay".

[12] It is pertinent that I interpolate and observe at this juncture, that prior to institution of the proceedings at the High Court, and on 30 March 2010, the Appellant (as Applicant), sought and obtained an ex parte Anton Pillar Order against the 1st Respondent, per **Agyemang J**. The order authorized the Deputy Sheriff for the Hhohho Region accompanied by the Appellant's attorneys to enter into the offices of the 1st Respondent situated along Somhlolo Road in Mbabane and to search for, attach and seize the original Insurance Policy and its schedules; to make a true photocopy of the Insurance Policy; to hand back the original to the 1st Respondent, and the Deputy Sheriff to keep the said copy in safe custody pending trial in the action to be instituted by the Appellant against the 1st Respondent. This order was promptly executed.

[13] It is on record that the ex parte Anton Pillar Order was subsequently set aside by **MCB Maphalala J**, in a judgment dated 28 March 2012, which was rendered after Civil Case No. 1451/2010 was instituted.

[14] Suffice it to say that the 1st Respondent noted a defence to Civil Case No 1451/2010 by way of notice of exception, contending that the Particulars of Claim do not disclose a cause of action against the 1st Respondent.

[15] For its part the 2nd Respondent launched an application to strike out paragraphs 5, 6 and 7 of the Particulars of Claim, on the basis that they are vexatious and scandalous. This is in terms of Rule 23 (2) of the Rules of the High Court.

[16] On 1 August 2014, the High Court per **Mabuza J,** granted both the exception and application to strike out and awarded costs.

[17] **LEAVE TO APPEAL**

The Appellant is desirous of wholistically appealing the decision of the court *a quo*. He has approached this court for its leave to appeal the order striking out paragraphs 5, 6 and 7 of his Particulars of Claim. This is in compliance with section 14 (1) (b) of the Court of Appeal Act which postulates that:-

> **"14 (1) An appeal shall lie to the court of Appeal –**
>
> **(a) from all final judgments of the High Court; and**
> **(b) by leave of the court of appeal from an interlocutory order, an order made ex parte and an order as to costs only."**
>
> (emphasis added)

[18] It follows from the above that an appeal against an interlocutory decision does not lie as of right but by leave of the Court of Appeal. The Appellant is thus correct to be knocking on our door for the requisite leave to

advance therein with an appeal against the said order of the court *a quo* striking out paragraphs 5, 6 and 7 of the Particulars of Claim. This order, it cannot be gainsaid, is interlocutory in character, by reason of the fact that it is not definitive. It did not finally decide the rights of the parties in the suit. It is not the final judgment of the court.

[19] It needs hardly be stressed, that this court is loath to grant leave to appeal such interlocutory or interim orders which have no final effect on the suit. What determines whether an appeal against an interlocutory or interim order should be entertained is what best serves the interest of justice or whether the Applicant has shown good cause for the leave sought. To this end, the court is duty bound to have regard to and weigh carefully all germane circumstances.

[20] What factors would justify the grant of such an order will depend on the peculiar facts and circumstances of each case. I however count it now judicially settled that such an application must establish two points namely:-

(a) That the appeal involves a matter of substantial importance to one or both of the parties concerned (seriousness of the issues on appeal). What is required under this head is to show irreparable damage or prejudice occasioned by the order sought to be appealed. Speaking about this test in **Globe and Phoenix Gold Mining Co. Ltd v Rhodesian Cooperation Ltd 1932 AD 146 at 155,** the court stated as follows:-

> **"We have not to look to any inconvenience or even expense which an interim order may cause to the person against whom such order operates. We look to its effect upon the issue or issues in the suit----**

> **In order to be appealable an interlocutory decision must be one which is irreparable, not in the sense that the effect which it produces cannot be repaired having regard to the resources at the command of the person against whom it is made, but in the sense that (if it remains unreversed) it irreparably anticipates or precludes some relief which would or might have been granted at the hearing."**

(b) The normal criterion of a reasonable prospect of success of the appeal.

See **Wildfire Investments (Pty) Limited and Others v Quayside Logistics (Pty) Limited and Another Civil Appeal Case No 17/2014, Haine v Podlashuc Nicolson 1933 AD 104; African Guarantee & Indemnoty Co Ltd v Van Schalkwyk & Others 1956 (1) SA 326 A at 328 in fire – 329A, R v Baloi 1949 (1) SA 523 (A).**

[21] Of course, there are other factors that should be weighed in the balance, such as, the delay in noting the appeal and the avoidance of piecemeal litigation. Although, judicial pronouncements are *ad idem* that once the importance of the issues and reasonable prospects of success are shown, they should operate to outweigh the other issues and elicit the grant of the leave sought.

[22] *In casu*, there is a notice of appeal urged which exhibits the following rather prolific grounds of appeal:-

> **"1. The Court *a quo* erred in law and in fact in holding that the Plaintiff had to allege and prove a *stipulatio alteri* in order to escape the exception. In particular the Court erred in holding that there is no averment in the Particulars of Claim, that 1st Defendant was notified that the Plaintiff accepted the benefits conferred.**

1.1 Whilst the Court *a quo* currently (sic) made a finding at page 7 (at paragrph 12 of the Judgment) when it relied on an extract from the Edition of Gordon and Getz on the South African Law of Insurance that recourse in this matter must be had to south African Law in general, it however made an error in then not relying and having recourse to the South African Law of Contract in respect of the different modes of notifying acceptance.

1.2 Had the Court *a quo* had recourse to the South African (as well as Swaziland's common Law of Contract), the Court would have found that sufficient notice of acceptance by the Plaintiff to the 1st Defendant of the benefit was made.

1.3 The Court *a quo* would also have been properly guided to find that, for purposes of determining an exception the requirement is not proof but allegation, hence would not have come to the conclusion that the Plaintiff ought to have alleged and proved the *stipulatio alteri*, but would have come to the right conclusion that once the *stipulatio alteri* was alleged, then the exception would fall because proof of it was for evidence at trial.

1.4 The Court *a quo* ignored the averment in paragraph 7.5 of the Particulars of Claim that by virtue of the conclusion of the said contract of employment, the Plaintiff accepted the benefit contracted for the 1st and 2nd Defendants in terms of the contract of insurance policy. Furthermore, the Court erred in ignoring the allegation made in paragraph 8.5 of the Particulars of claim that the Plaintiff has lodged his claim with 1st Defendant under the policy in question but the 1st Defendant has repudiated Plaintiff's claim. The lodging of the claim amounted to Notice of acceptance of the benefit.

1.5 Had the Court considered the two paragraphs (7.5 and 8.5 of the Particulars of Claim) it would then have been properly guided and come to the right conclusion, based on the law of contract that:-

1.5.1 The mere allegation that the Plaintiff accepted the benefit, in law, did suffice to squash the exception; and

1.5.2 The mere allegation that the Plaintiff has lodged his claim with the Defendant, in law, does suffice as

notice of acceptance of the benefit, especially because the insurance contract itself does not have express provisions for the manner of acceptance of the benefit.

2. The Court *a quo* erred in law and in fact in holding that the policy document itself does not permit a claim by a third party (Plaintiff). In this regard the Court *a quo* relied on the wording contained in the Policy document itself (as shown in paragraph 17 of the Judgment at page 9 thereof) that "Under the heading "DEFINED EVENTS" the policy provides that First Defendant ------ will pay to the insured on behalf of such persons or his estates, the compensation stated in the schedule -----"

2.1 The Court *a quo* opted for a narrow and wrong interpretation of that phrase. The correct interpretation being that, the phrase was in no way limiting the right of claim by third parties under the contract but was only stipulating the mode of payment of the claims.

2.2 To further establish that the interpretation of the phrase under reference was wrong, the Policy Document itself does not have any express provisions on how claims of the nature of Plaintiff's claims would be lodged and who would lodged same and who would have the right of suit.

2.2.1 The 1st Defendant, being the drafter of the Insurance Policy (Policy Document) ought to have expressly stipulated therein that the third party beneficiaries would not have a right to claim directly to the Insurer (1st Defendant). The lack of specificity on this issue in the Policy document cannot in law be held to prejudice or disadvantage the Plaintiff (third Party Beneficiary).

2.3 The Court *a quo* wrongly relied on the Judgment in Sage Life Ltd v Van der Merwe 2001 (2) SA 166 (W). This Judgment is distinguishable from the case at hand on a number of points, including the following:-

2.3.1 The facts of both cases are strikingly dis-similar. In the Sage Life case the Plaintiff had not, at all, pleaded or made allegations of a *stipulatio alteri* in his Particulars of Claim yet *in casu* the Plaintiff has elaborately pleaded a *stipulatio alteri;*

2.3.2 **The policy document in the Sage Life case was elaborated and detailed in its terms regarding the right of claim by third parties, etc however, *in casu* the Policy Document does not even provide an indication of who has a right of claim under the policy, save for how claims will be paid.**

3. **The Court *a quo* erred in law and in fact in holding that for the Plaintiff to have successfully relied on the *stipulatio alteri* it would have been necessary for the stipulation to have been contained in the agreement between the contracting parties, that is to say, the insurance policy.**

3.1 **The Court *a quo* in this regard wrongly applied the decision of Schreiner JA in Crooks NO v Watson. If the Court *a quo* was correct in its finding, this would offend against many other decisions, of Superior Courts, on this issue. For instance this would presuppose that there can never be a *stipulatio alteri* where all three parties (the Insurer, Insured and the Beneficiary) can all at the same time be parties to the contract.**

3.2 **Further the finding of the Court *a quo* presupposes that in unwritten contracts (verbal contracts) for the benefit of a third party, the *stipulatio alteri* finds no application.**

4. **The Court *a quo* erred in law and in fact in holding that there is no *vinculum juris* between the Plaintiff and the First Defendant.**

4.1 **The Court *a quo* ignored the Judgment of MCB Maphalala J, delivered on the 28th March 2012 (between the same parties) under Civil Case Number 1451/2010, wherein it was unequivocally held, after considering evidence brought before Court by all parties on affidavits that it is apparent that the Applicant (Appellant) does have a cause of action against the Respondents on the basis of the contract of insurance concluded between the Respondents and that it would therefore be unreasonable for the Respondent (1st Respondent herein) to argue that the Applicant (Appellant herein) has no cause of action in the circumstances on the basis of contractual privity.**

4.2 **Had the Court a quo considered the Judgment of MCB Maphalala J in this regard, it would have found that the Learned Judge reached this conclusion after considering lengthy evidence on affidavits and therefore was better**

placed to determine the question whether there was *vinculum juris* between the parties, yet the Court *a quo* only had recourse to pleadings (Particulars of Claim and Notice of Exception only) and not evidence as contained in affidavits.

4.3 The Court *a quo* ought to have been bound by the Judgment of MCB Maphalala J on the basis of the principle of *stare decisi* in this regard.

5. The Court *a quo* erred in law and in fact in ordering the striking out of Paragraphs 5, 6 and 7 of the Particulars of Claim.

5.1 The Court *a quo* ought to have appreciated that the Policy document was not obtained unlawfully and therefore, in spite of the discharge of the Anton Pillar Order, the evidence therein contained was admissible in the action.

5.2 The Court *a quo* erred in holding or ordering that the Plaintiff would not use any information in relation to the policy document. This Order means that the Plaintiff can not properly plead its case because in any event the cause of action is predicated on the insurance policy as such it is inevitable to make reference to it in the pleadings.

5.3 The Court *a quo* erred in law in striking out Paragraph 6 and 7 of the Particulars of Claim in so far as same do not relate or contain information relating to the Policy document. In actual fact paragraph 7 relates to the Contract of Employment between Plaintiff and 2nd Defendant.

5.4 The Court *a quo* wrongly held that the 2nd Defendant was prejudiced in the inclusion of the information in relation to the insurance policy in the Particulars of Claim and thereby wrongly held that such allegations were scandalous and vexatious within the meaning of Rule 23 (2).

6. The Court *a quo* erred in granting costs including the certified costs of Counsel as this matter did not warrant the involvement of Counsel. The issues had been competently previously canvassed in the Court *a quo* as well as this Court without the involvement of Counsel and the inclusion of Counsel this time around was unwarranted as the issues were not intricate as to require the expert skill of Counsel."

[23] In paragraph 11 of his founding affidavit to the application for leave to appeal (which is not controverted because the 2nd Respondent filed no papers in opposition) the Appellant alleged facts which he proposes show reasonable prospects of success of the appeal.

[24] These allegations in sum are that the court *a quo* erred in holding that the Insurance policy is inadmissible evidence and could not be used to found the cause of action for the Appellant's claim because the Anton Pillar Order, via which it was obtained, was discharged by the High Court; there was no way the Appellant could plead his case without making reference to the Insurance policy as he did in paragraphs 5 and 6 of his Particulars of Claim; notwithstanding the discharge of the Anton Pillar Order, to hold that the Appellant makes no reference to any information in the Insurance Policy in these circumstances, would be to deny him the right of claim; there was no demonstrable prejudice whether actual or perceived to the 2nd Respondent warranting a striking out of the said paragraphs of the Particulars of Claim; and paragraph 7 thereof which was also struck off, does not relate to the Insurance policy but to the Appellant's contract of employment.

[25] The foregoing allegations, when weighed against the facts and circumstances of this case, exude not only the importance of the appeal to the Appellant, but also, at the very least arguable issues. The striking out of paragraphs 5, 6 and 7 of the Particulars of Claim (which I have setforth in paragraph [11] above) struck at the heartbeat of the Appellant's claim, thus occasioning irreparable damage and prejudice thereto. The claim is

unsustainable without those paragraphs. These are sufficient circumstances to impel the grant of the leave sought, as I hereby do.

[26] **THE APPEAL**

In whichever way it is viewed, the impugned judgment is intricately interwoven with a substantial part of the merits of the Appellant's claim. This informed the tenure of the grounds of appeal and cannot therefore be avoided in this judgment. I have contextualized the appeal into two (2) issues, namely:-

(a) The Exception.

(b) The application to strike out.

Let us not consider these issues as circumscribed within the notice of appeal.

(a) The Exception

This is predicated upon the following grounds:-

> **"1.1 The Plaintiff's claim is founded on a contract of Insurance between the 1st and 2nd defendants in terms whereof the 1st Defendant undertook to pay to the 2nd Defendant on behalf of its employees listed in the Schedule to the Policy of Insurance (annexure "G. 1" "PAG 2" to the Particulars of claim), compensation for the death and or permanent disability including medical expenses of any such Employee.**
>
> **1.2 There is no contractual nexus between the Plaintiff and the 1st Defendant entitling the Plaintiff to claim directly from the 1st Defendant any benefit arising from the Contract of Insurance. No contractual nexus between the Plaintiff and the 1st Defendant is apparent from the Contract of Insurance.**
>
> **1.3 The Plaintiff bases his claim on an alleged wrongful repudiation of an Insurance claim arising from injuries allegedly sustained by the Plaintiff during the course of duty with the 2nd Defendant.**

1.4 To found a claim under the Contract of Insurance, the Plaintiff has to allege and prove the following:-

1.4.1 A contract between the Plaintiff and the 1st Defendant or Alternatively:

1.4.2 a *stipulatio alteri*, in which the Plaintiff has to allege and prove the following:-

1.4.2.1 that the contract upon which the Plaintiff wishes to rely upon shows a clear intention to benefit the Plaintiff, not in the sense that they will necessarily be an advantage to him but in the sense that the Plaintiff will be brought in as a party to the contract, thereby obtaining rights but also incurring obligations;

1.4.2.2 the Plaintiff must accept the benefits, i.e must indicate that he is willing to become a party to the contract and that he has in fact done so;

1.5 The Plaintiff has neither alleged a contract between himself and the 1st Defendant nor a *stipulatio alteri* and his claim for compensation under the contract of insurance lacks the necessary averments to sustain a cause of action for relief under the contract.”

[27] It is self evident from the tenure of the exception that it embraces the institution of *stipulatio alteri*, the object of which is to secure some advantage for a third party. Its essential and distinctive characteristics, are that it is a contract between two persons that is designed to enable a third party to come in as a party with one of the other two.

[28] Acceptance by the third party results in his taking the place of the stipulans or contracting party vis a vis the promittens. The only condition being that the offer should still be open.

[29] It is appropriate at this stage to refer to the following apposite remarks on this subject-matter in the **4th edition of Lord and Getz on the South African Law of Insurance, by D.M. Davies p. 277 -278,** as follows:-

> **"The *stipulatio alteri* was not generally recognized in Roman law: *alteri nemo potest*. But it was recognized by the Dutch jurists of the sixteenth and seventeenth centuries*: extraneo potest stipulari.* The institution is established in South African law: one party to a contract may promise another that he will confer some benefit on a third person who is not party to the contract. In Crookes NO v Watson, Schreiner J A Said: 'the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. Broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other.**
>
> **As the *stipulatio alteri* is not peculiar to the law of insurance, recourse must be had to South African law in general.**
>
> **The *stipulatio alteri* is a convenient instrument for the institution of a third person as beneficiary under a life policy. A typical clause is: The Company hereby agrees to pay the sum of R1,000 which will become due on the death of John smith (the life assured) to Martha smith, or should she predecease him, to his estate.' It is used also to extend over to third persons in indemnity insurance. A typical clause (from a public liability insurance policy) is: 'the Company will --- indemnify also any director or employee of the insured as though he were the insured in respect of any sums of which he shall become legally liable in the event of accidental bodily injury to any person or damage to property as within described, caused while such director or employee is acting in the course of and in the scope of his capacity as a director or employee of the insured's business. In these examples the insurer promises the insured to pay or indemnify a third person, namely Martha or the insured's director or employee respectively.**
>
> **The contract between insurer and insured does not itself confer any rights on the third person; he acquires such rights only by accepting the benefit or offer held out to him."** (emphasis mine)

[30] The exposition of the **Crookes N0 case,** with reference to other cases of like contemplation, in **Farlam & Hathaway, CONTRACT, Cases,**

Materials and Commentary pages 403 – 404, is also instructive. The learned authors stated as follows:-

> **"[121]**
>
> **JJ Crookes, as settlor, concluded a notarial deed of trust in 1936 in terms of which he donated certain shares 'irrevocably on trust' to two trustee, one of whom was himself, who were to apply some of the income for the education, maintenance and support of his daughter Elaine until she was 25. On her reaching the age of 25 the trustees were to pay her a net income of up to £1 000 per annum for life, and on her death the trust fund was to be distributed among her lawful issue equally, failing lawful issue, equally among her other surviving brothers and the issue of any deceased brother, and failing surviving brothers among her next of kin.**
>
> **As the trust fund had increased far beyond his expectations, and as the value of money had fallen, Crookes sought to vary the terms of the trust deed to increase the annual payments to his daughter, and also to make her a capital payment. The trustees (one of whom was still J J Crookes himself) moved the Natal Provincial Division for an order declaring that it was competent for the trust deed to be amended accordingly by mutual agreement between the settlor and the trustees. All the children of J J Crookes agreed to the proposed alteration, as did Elaine's husband.**
>
> **The Natal Provincial Division dismissed the application and the trustees appealed successfully.**
>
> **CENTLIVRES CJ: (285) --- [T]he question ---- arises as to the principles of Roman Dutch law which is applicable in the present case. We are not concerned with the English law of trusts which has never to my knowledge been held to be applicable in South Africa. The cases quoted by the appellants' counsel support the view that a trust deed executed by a settlor and trustee for the benefit of certain other persons is a contract between the settlor and the trustee for the benefit of a third person and that the settlor and the trustee can cancel the contract entered into between them before the third party has accepted the benefits conferred on him under the settlement. This question was carefully considered by this Court in the case of Commissioner for Inland Revenue v Estate Crewe and Another 1943 AD 656. In that case the Court directed that there should be further argument on the following points:**

(a) Whether or not the trust deed in that case was contract made for the benefit of third parties which took the form of a contractual *fideicomississum or a donatio sub mod ut res res titautor alil?*

(b) If it was a contract of that nature did Sir Charles Crewe retain the right of revoking during his lifetime any of the benefits conferred by the deed on such third parties?

(c) If he retained such a right did any property pass to any beneficiary before the death of Sir Charles Crewe?

Dr de Wet in his learned thesis on Die ontwuikkeling van die ooreenkoms ten behoewe van 'n derde discusses the authorities at length and on p 141 says that there were three theories which I gather to be as follows: (1) as soon as the agreement is executed between the settlor and the trustees (for convenience sake I am using the terms I have used in this judgment) the beneficiary obtains an irrevocable right. (2) The beneficiary obtains no right on the mere execution of the agreement between the settlor and the trustees. The agreement constitutes an offer of a donation by the settlor to the beneficiary through acceptance of which the beneficiary obtains a jus perfectum against the trustees. (3) The beneficiary does obtain a right on the mere execution of the agreement between the settlor and the trustees, but his right is dependent on the will of the settlor, who can before the beneficiary accepts discharge the trustees of the obligation to hand over the subject-matter of the agreement to the beneficiary. Dr de Wet favours the third theory which he says is that of the majority of the commentators. -----------

In Crewe's case (Supra) the matter was fully considered by the majority of the Court. Watermeyer, CJ, who delivered the majority judgment, said on pp 674 and 675 in reference to Dr de Wet's view:

> **'It may be that the series of decisions of the Appellate Division culminating in the case of McCullogh v Fernwood Estate Limited, 1920 AD 204, precludes this Court from accepting his' (Dr de Wet's) contention, but, be that as it may, even assuming that a right of some kind is acquired by the beneficiary, what is its nature? It is clearly inchoate because, until the benefit stipulated for has been accepted by the beneficiary, he can be deprived of it by agreement between the contracting parties (see Van der Plank v Otto, 1912 AD 353).'"**

[31] The institution of *stipulatio alteri,* by virtue of being part of the Roman Dutch Law also forms part of the law of Swaziland.

[32] To be availed of the remedy offered by this institution the Appellant must show *vinculum juris* between the 1st Respondent and himself. This must be disclosed in his Particulars of Claim in unequivocal terms

[33] This is because the cardinal rule of pleading is that it must be lucid, concise, logical and in an intelligible form to enable the opposing party to reply to it. The pleading should contain the material facts upon which the pleader relies for his claim. To constitute sufficient averments to sustain a cause of action, the Particulars of Claim should contain **"every fact which would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment ....it does not comprise of every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved----" see Mckenzie v Farmer's Cooperatives Meat Industries Ltd 1922 AD 16 at 23.**

[34] In upholding the exception, the court *a quo* held that there is no *vinculum juris* between the Appellant and the 1st Respondent disclosed in the Particulars of Claim, and Appellant's claim is therefore not well founded; the court held that there is no averment in the Particulars of Claim or any indication in the annexures thereto, that the 1st Respondent was notified that the Appellant accepted the benefits conferred by the Insurance Policy on the 2nd Respondent his Employers; the court also held that the consequences of the Applicant's contention, were they found to be correct, would be that upon the conclusion of similar contracts of

employment, and without the 1st Respondent being aware of the fact, the 1st Respondent would be bound to some 38 unnamed employees who could then institute proceedings against the 1st Respondent in the way in which the Appellant has done; the court opined that the wording of the Insurance Policy demonstrates that this cannot be so; the court further held that the Insurance policy shows that the benefit was to be paid to the Employer, 2nd Respondent for the managers and that it was the 2nd Respondent who paid the premium on the insurance, which all show that the Appellant does not have a right of direct claim against the 1st Respondent. The court also placed reliance on the case of **Sage Life Ltd v Van der Merwe (supra),** in arriving at its conclusion.

[35] It is now opportune for me to deal with the relevant facts in the case the starting point of which is the Insurance Policy. A close scrutiny of the Insurance Policy, shows that it is indeed a third party insurance, whereby the Employer (2nd Respondent) is not the beneficiary. The Employer is the party even though the benefit of the policy goes to the third persons , named therein as 38 employees in the supervisory or management Cadre.

[36] The tenure of the South African authorities discussed above, show that upon the happening of the insured event, a manager or supervisor of the 2nd Respondent will have a right of direct claim against the 1st Respondent, where he accepts the benefits under the Insurance Policy and notifies the Insurance Company of such acceptance. This is the basic principle of our law in order to bind the offeror. This is in line with the analogy given by **Schreiner JA in Crookes NO Case (Supra),** to the effect that **"the typical contract for the benefit of a third party is one where A and B**

make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. Broadly speaking the idea of such transaction is that B drops out when C accepts and thenceforward, it is A and C who are bound to each other." (underlining mine)

[38] In the peculiar circumstances of this case, it is immaterial that each beneficiary is not individually named in the policy, but are lumped up together as 38 employees in the management cadre. The cardinal factor is that the Insurance Policy was entered into with a view to benefit all 38 employees. This entitles any one of them to ratify and accept the contract whilst it is still subsisting.

[39] As the court remarked in the case of **Hyman v Wolf & Simpson 1908 TS 78,**

> **"The contract must be made, if not in the name of C, then with a view to his benefit and for that benefit entirely; and C must ratify and accept the contract while it is still open to him to do so. Those are essential conditions of C's right to recover."**

[40] What then would satisfy the acceptance and ratification requirement of such contract?

[41] Generally, the ordinary rules of offer and acceptance are used to determine whether the third party has accepted the benefits of the stipulation in his favour. In **Bulter v Ault 1950 (A) SA 229 (I)** it was held that what is required is an **"outward act of signification"** and not merely a **"mental act of approbation"** It is also the position of the law that

notification of acceptance addressed to the offeror is ordinarily required, but the need to do so can be waived by the parties.

[42] Acceptance can be made in any manner, expressly, impliedly (by conduct) or by a certain method of dealing, except in cases where formalities are prescribed by statutes or the parties, then the laid down mode of acceptance has to be followed. The paramount factor is that the acceptance should be communicated in unequivocal terms. As the court observed in the case of **Reid Bros (South Africa) Ltd v Fisher Bearings Co Ltd 1943 AD 232, per Watermeyer ACJ:-**

> **"[A]binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn-----------."**

[43] Furthermore, the case of **Godfrey v Baruk 1966 (2) SA 738 (D) 742 B** is authority for the proposition that, in cases where in accordance with the general rule, communication of acceptance is necessary in order to conclude the contract, an offeree might demand performance before communicating his acceptance to the offeror. If the offeror objects that the contract has been concluded, there seems no reason why this objection should not be met by regarding the demand as communication of acceptance, provided of course the offer is still open for acceptance. See **The Law of Contract in South Africa (5th ed) by R.H. Christie pgs. 69– 70.**

[44] The question is whether there is a laid down mode of acceptance in this case? It is crystal clear from the Insurance Policy that the 1st Respondent did not lay down the form that the acceptance and ratification should take. Faced with this difficulty, learned counsel for the Appellant Mr Nkomondze, contended, both in the court *a quo* as well as this court, that the fact of the Appellant's acceptance of his employment contract, coupled with his lodging of a claim with the 1st Respondent subsequent to the fact of his alleged disability, which facts are advanced in his Particulars of Claim in clear and unequivocal terms, constitute both the acceptance and notification to the 1st Respondent. This, it is alleged, entitles the Appellant to step into the shoes of the 2nd Respondent in the Insurance Policy, thus acquiring the right of suit against the 1st Respondent. Herein lies the point of divergence between the parties because the 1st Respondent contends to the converse.

[45] In line with the guiding principles which I have comprehensively espoused above, I am inclined to concur with Mr Nkomondze, that the averments appearing in the Particulars of Claim disclose a nexus or *vinculum juris,* between the Appellant and the 1st Respondent.

[46] These averments appear in paragraphs 5 – 8 of the Particulars of Claim which I have hereinbefore set out in extenso. They bear no repetition. Their sum is that the 1st and 2nd Respondents entered into a contract of insurance for the benefit of the Appellant amongst others. The 1st and 2nd Respondents intended to confer a benefit on the Appellant in such a way as to enable him, by accepting it, to come in as a party. The Appellant accepted the benefits contracted for by the 1st and 2nd Respondents when

he signed his contract of employment. The Appellant further showed requisite acceptance and ratification of the contract by lodging a claim with the 1st Respondent in the wake of his alleged disability.

[47] I agree that by the foregoing averments the Appellant pleaded all the essentials of a *stipulatio alteri* in the Particulars of Claim and thus his right of action against the 1st Respondent.

[48] Notwithstanding the foregoing, the court *a quo* took the view that because the Insurance Policy provides that payment should be made to the 2nd Respondent on behalf of the managers or beneficiaries, it follows that none of the managers had a right of direct action against the 1st Respondent, even in the event of acceptance and ratification of the contract. With respect, this view is erroneous. It runs counter to the facts of the case of **Crookes NO v Watson (Supra),** on which the court *a quo* copiously relied. It completely loses sight of the fact that the concept of *stipulatio alteri* envisages that the beneficiaries, upon acceptance and ratification of the contract, will step into the position of the 2nd Respondent and will thus be entitled to payment directly by the 1st Respondent. As the court noted in Crookes NO: Broadly speaking the idea of such transaction is that B (2nd Respondent) drops out when C (Appellant) accepts, and thenceforward it is A (1st Respondent) and C who are bound to each other.

[49] However, for the sake of completeness, the analogous observation of the court in the case of **Trademen's Benefit Society v Du Preez 5SC 269**,is condign in these circumstances:-

> **"Once a just cause has been established, a third party may, in my opinion, adopt and ratify a stipulation made on his behalf by another. From the moment of such ratification being announced to the promisor, he is bound to complete his promise for the benefit of such third person, exactly as if the relation of principal and agent had subsisted between the original promissee and such third party."**

[50] Another error committed by the court *a quo* was to have placed undue and rigid reliance on the case of **Sage Life Ltd v Van der Merwe (Supra)** in arriving at its decision. This is because the facts and circumstances of **Sage Life** are easily distinguishable from the facts of this case.

[51] Having taken the liberty of perusing **Sage Life (Supra),** I find myself unable to fault Mr Nkomondze when he submitted as follows in paragraphs 7.3 – 7.4 of the Appellant's heads of argument.

> **"7.3 The facts of both cases are strikingly dis-similar. In the Sage Life case the plaintiff had not, at all, pleaded or made allegations of *stipulatio alteri* in his Particular of Claim yet *in casu*, the plaintiff has elaborately pleaded a *stipulatio alteri.***
>
> **7.4 The policy document in the Sage Life case was elaborate and detailed in its terms regarding the rights of claim by third parties, etc, however *in casu* the Policy Document does not even provide an indication of who has a right of Claim under the policy, save for how claims will be paid."**

[52] In placing reliance on the **Sage Life case**, the court *a quo* detailed the terms and conditions of that Insurance Policy as follows, in paragraph [20] of the impugned judgment.

> **"[20] The Sage Life case is applicable *in casu* as far as the principle set out therein is concerned. Lewis J stated the following, at 167F to 168D:-**
>
> > **'A number of such terms make it abundantly clear that the contract is between ABSA Group Life Assurance Scheme**

> **and Sage Life. Various other terms of the contract support that interpretation ---- a further term of significance is set out in clauses 5.1 and 5.2. These provide that with the payment of the death benefit (which I should note is not in issue in this matter), the scheme shall give notice to Sage Life of any event which gives rise to a benefit thereunder and must give 90 days' notice of such claim. Clause 5.2 which deals with the payment of a permanent disablement benefit, is directly relevant to the claim made by the respondent. It is that the Scheme shall give notice to Sage Life of any event which gives rise to a benefit within 90 days after such event occurring. Clause 5.2 goes on to give Sage Life the sole discretion as to whether to consider claims submitted after 90 days notification period. Clause 5.2 provides also that, on the total and permanent disablement of a member or spouse, Sage Life will pay to the Scheme for the benefit of such member or spouse the disability benefit that is set out in the contract. It is apparent from these terms that it is only the scheme and the excipient / defendant that have obligations and rights arising out of this contract. Moreover, it is clear from the contract between the scheme and Sage Life that Sage Life does not have any right to claim premiums from any individual member of the scheme; its right is to make claims against the scheme itself. Likewise it is the scheme's obligation to pay the premiums rather than the individual's obligation to do so."**

[53] While it is apparent from the above that the Insurance Policy in **Sage Life,** set out clear terms on how a claim should be pursued by the beneficiaries, this is not such a case. In the absence of fraud or duress, a written agreement must be construed strictly in accordance with its wording and not to be interpreted with reference to extraneous matters, such as the terms and conditions of another contract. To the extent that the court *a quo* purported to place reliance on the terms and conditions of the contract in **Sage Life** in arriving at its decision, the court totally misdirected itself.

[54] The Particulars of Claim indisputably disclose a cause of action against the 1st Respondent. Any other question regarding the potency of the alleged acceptance, ratification, and notification are questions of evidence to be ascertained at the trial, since the Insurance Policy itself is silent on these issues. These issues are not *ex-facie* the pleadings. Here again, I agree entirely with Mr Nkomondze, that in view of the fact that these issues are not *ex-facie* the pleadings, the proper order in the interest of justice would have been to refer the matter to trial.

[55] The observation of the learned editors **Herbstein and Van Winsen** on this issue, in the text **The Civil Practice of the Supreme Court of South Africa (4th ed) page 492,** commends itself to me:-

> **"Exception may be taken only when the defect in the pleadings appear ex-facie the pleading, since no facts may be adduced to show that the pleading is excipiable thus, where it is apparent *ex-facie* particulars of claim that the court lacks jurisdiction, or that a plaintiff does not have *locus standi*, or that there is misjoinder or non-joinder, the defendant may take exception rather than file a special plea.**
>
> **For the purpose of deciding an exception, the court takes the facts alleged in the pleadings as correct. It had been held, however, that the principle that a court is obliged to take the pleadings as they stand for the purpose of determining whether an exception to them should be upheld is limited in operation to allegations of fact, and cannot be extended to inferences and conclusions not warranted by the allegations of fact. This principle does not oblige a court to stultify itself by accepting facts which are manefestly false and so divorced from reality that they cannot possibly be proved."**

See **Edwards v Woodnutt NO 1968 (4), SA 18 4 (R) at 186 E-H, Vijoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 754 F –G.**

[56] It remains for me to emphasize, that whatever the case may be in regard to other contracts embodying a *stipulatio alteri*, insurance policies

extending benefits to third parties, plainly contemplate that the insurer is to be obligated to the third party on the happening of the insured event and that such obligation is not automatically to cease, or to be subject to withdrawal upon the occurrence of the very event on which it depends. This is in appreciation of the fact that third persons often learn of the existence of the policy only after the occurrence of the event insured against.

[57] Substantial justice thus demands, that in appropriate circumstances, upon the happening of the insured event, the third party or his representative must be given an opportunity to accept the benefit within a reasonable time.

[58] For the above stated reasons, the decision of the court *a quo* upholding the exception ought to be set aside, as I hereby do.

[59] **(b) <u>The application to strike out</u>**

I now turn to the application to strike out paragraphs 5, 6 and 7 of the Particulars of Claim as urged by the 2nd Respondent. The grounds advanced thereto, are as follows:-

> **"1. The Plaintiff's cause of action is predicated on the following facts which appear at paragraphs 5, 6 and 7 of the Particulars of Claim.**

1.1 The existence of an insurance policy, Policy Number MB MMA 001 14816 ("the policy").

1.2 The said policy and (sic) entitles the plaintiff to certain rights and benefits.

1.3 The plaintiff seeks to rely on the said policy in order to found a cause of action against the defendants.

1.4 The plaintiff has annexed the said policy as annexure G1" to the Particulars of the Claim.

2. It is common cause that the Plaintiff secured the said policy through an Anton Pillar application that was brought ex parte and on urgent basis. The order was granted under High Court Case No. 1451/2010 per Agyemang J on 30th April 2010. A copy of the order is annexed hereto marked "A".

3. The second defendant challenged the validity and correctness of the Order annexure "A".

4. On 28th March 2012 per Maphalala MCB J, the court discharged the interim order granted on 30th April 2010 and dismissed the Anton Pillar application.

5. In terms of the judgment of this court dated 28th March 2012, the plaintiff cannot place reliance or use the policy to found a cause of action against the defendants.

6. Accordingly, the second defendant seeks to have paragraphs 5, 6 and 7 in so far as they seek to make reference or place reliance on the policy, struck out on the basis that the averments are vexatious and scandalous".

[60] The 2nd Respondent's complaint, both in the court *a quo* and this court, is that the information gleaned from the policy document obtained via the Anton Pillar ex parte order, which was subsequently set aside by **MCB Maphalala J,** was used by the Appellant to found a cause of action. Learned counsel for the 2nd Respondent, Mr Ngcamphalala, while conceding that the document was not unlawfully procured, however, lamented as illegal, its usage to found a cause of action without first

seeking and obtaining the leave of court to do so. In the same vein, Mr Ngcamphalala conceded that not the whole of paragraph 7 of the Particulars Claim should be expunged.

[61] Mr Nkomondze for his part, contended, that the court *a quo* erred in striking out the said paragraphs. His take is that the facts relating to the Insurance Policy were already in the knowledge of the Appellant by reason of his having lodged a claim with the 1st Respondent. This fact is evident from the judgment of **MCB Maphalala J.** Further, there was no way the Appellant could plead his case without placing reliance on the contents of the Insurance Policy already within his knowledge, as this forms the crux of his entire claim. Counsel conceded that the best the court *a quo* could have done was to strike out the Policy document annexed in these proceedings, in view of the fact that the Appellant did not seek the leave of court to urge it. It was further Mr Nkomondze's stanze that in the absence of any prejudice suffered by the 2nd Respondent the court *a quo* erred in striking out the said paragraphs.

[62] A lot of water has gone under the bridge on whether or not the Insurance Policy was used to found the Appellant's cause of action. I do not wish to unnecessarily burden this judgment with the pros and cons of such an order and the material procured in consequence thereof. One thing that is however of overwhelming judicial concensus is that such an order will not be granted, if it is to be used as a vehicle for a search for and attachment of evidence solely for the purpose of founding a cause of action.

[63] **Herbstein et al, the Civil Practice of the High Court of South Africa (4th ed) page 1498,** put this concept in the following words:-

> **"The court stressed that such an order will be available only to preserve specific evidence for trial, not for purposes of founding a cause or causes of action, and dismissed the applicant's claim for certain orders on the grounds that they were designed to give authority for a search for and attachment of, evidence in order to found a cause or causes of action."**

[64] In the instant case, I am at pains to comprehend why the 2nd Respondent is tenacious in its pursuit of the proposition that the Insurance Policy, obtained via the Anton Pillar order, was used to found the Appellant's cause of action. Such an argument, in my view, is surely at variance with the established facts of this case.

[65] This is so because, the uncontroverted evidence is that prior to the Anton Pillar order and institution of the proceedings, the Appellant had already lodged a claim with the 1st Respondent based on the Insurance Policy. It is obvious to me that the Appellant was well aware of the terms of the Insurance Policy to be able to do this. Furthermore, the ex parte Anton Pillar order was apparently granted by virtue of the Appellant disclosing *prima facie* that he has a cause of action against the 1st Respondent. The facts urged obviously revealed the terms of the Insurance Policy and this is indisputable from order (3) of the Anton Pillar order on page 41 of the record, which accurately describes the original Insurance Policy document as Policy Number MBMMA 0014816, described as the Multimark III Policy and its schedules. The fact that the Appellant already had prior knowledge of the terms of the Insurance Policy prior to the Anton Pillar order, is also discernable from the summary of the evidence in the judgment of **MCB Maphalala J** of 28 March 2012, setting aside the ex

parte Anton Pillar order. The resume of facts in that judgment was based on the affidavit filed by the Appellant via which he obtained the ex parte Anton Pillar Order.

[66] In the face of the above stated facts, I am disinclined to accept the proposition that the averments made on the Policy which appear in paragraphs 5 and 6 of the Particulars of Claim were based on the Insurance document obtained via the ex parte Anton Pillar Order. It is obvious to me that the Appellant already had the requisite information prior to that order. The court *a quo* fell into error when it struck off those paragraphs based on these allegations and for the further reason that the document was unlawfully obtained. This is clearly inconceivable, regard being had to the fact that the Insurance document was obtained via an ex parte Anton Pillar order which is a lawful process. It cannot then be construed as unlawfully obtained by reason of the fact that the Anton Pillar order was subsequently set aside. This proposition is unknown to law. I reject it.

[67] The presence of the Insurance document itself in these proceedings is another kettle of fish. It has no business appearing in these proceedings without the leave of court having been first sought and obtained.

[68] Speaking about this principle in the case of **Mathias International Ltd and Another v Monique Baillache and Others Cape Town High Court Case No. 23347/09;** the court said:-

> **"The evidence to which the First Respondent objects in the Replying Affidavits cannot be said to have been unlawfully obtained. However, for the reason given, it was impermissibly employed in support of the**

> **Application for interdictory relief---- the proper enquiry in my view, is whether it would be appropriate for the Court to condone the Applicant's failure first to seek the Court's permission to use the evidence; in other words whether to grant the required permission *ex-post facto.* No doubt the court can in its discretion grant such condonation in an appropriate case, but the underlying principle bound up in what I have chosen to call the deploying party's "implied undertaking" would be rendered nugatory if condonation were granted in any but an exceptional case. I do not regard this as such a case; on the contrary, I consider that to grant condonation in this matter would be to send entirely the wrong message on important issues incidental to the implementation of Anton Pillar orders."**

[69] In these circumstances, the proper order that the court *a quo* could have made instead of striking out paragraphs 5, 6 and 7 of the Particulars of Claim, as also conceded by Mr Nkomondze, would have been to strike the Insurance document off the proceedings, if the court was disinclined to condone it.

[70] The foregoing notwithstanding, I see no prejudice which the 2nd Respondent stands to suffer by the presence of the Insurance document in these proceedings, as it would still have had to discover the document for the trial, if required to do so. Substantial justice demands that in the absence of prejudice, the court should not permit technicalities to impede the due course of justice, but should proceed to the determination of the substance of the matter in order not to render justice grotesque.

[71] **CONCLUSION**

In light of the totality of the foregoing, this appeal succeeds.

[72] **ORDER**

I make the following order

1. That the Appellant's appeal be and is hereby allowed with costs.
2. That the order in paragraph [46] (a) & (d) of the impugned judgment to wit

   "(a) that the 1st Defendant's exception be upheld with costs;
   (d) that the application to strike out be granted with costs,"

   be and are hereby set aside. In their place I substitute the following order:-

   "(a) That the 1st Defendant's notice of exception be and is hereby dismissed with costs;
   (d) That the 2nd Defendant's application to strike out paragraphs 5, 6 and 7 of the Particulars of Claim be and is hereby dismissed with costs."

3. That the Plaintiff's claim be and is hereby referred back to the High Court for trial before another Judge.

____

E.A. OTA

JUSTICE OF APPEAL

I agree

____

DR. S. TWUM

JUSTICE OF APPEAL

I agree

____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

For Appellant: **Mr. M. Nkomondze**

For 1st Respondent: **Adv. F. Jourbert S C**
(instructed by Magagula & Hlophe Attorneys)

For 2nd Respondent: **Mr. B. Ngcamphalala**