IN THE HIGH COURT OF SWAZILAND

Civ. Case No.677/84

In the matter between

ELIJAH DLAMINI — Plaintiff

and

SWAZILAND ROYAL INSURANCE CORPORATION — Defendant

CORAM : HANNAH, CJ.

FOR THE PLAINTIFF : MR. V. DLAMINI
FOR THE DEFENDANT : MR. H. CURRIE

JUDGMENT

(14/07/89)

Hannah, C.J.

In this action the plaintiff claims damages against the defendant as statutory insurer in respect of loss of dependency arising out of the death of his son in a motor accident. In a special plea the defendant alleges that the plaintiff's claim is prescribed in that the summons was served on the defendant after the prescription period set out in section 21 of the Compulsory Motor Vehicle Insurance Order, 1973 had expired. The parties have agreed that this issue should be dealt with separately at the outset.

Section 21(1) of the Order reads:
"The right to claim compensation under section 18 from an authorised insurer shall become prescribed upon the expiry of a period of two years from the date upon which the claim arose:

Provided that prescription shall be suspended during the period of ninety days referred to in section 22(2).

The remaining sub-sections then provide for the manner in which relief may be obtained from the operation of sub-section (1) where a claim has become prescribed. As the plaintiff has taken no steps to obtain such relief it is unnecessary to set out these provisions.

It is common cause that the plaintiff's claim arose on 22nd April, 1982 and that for the provisions of. section 21(1) to have been strictly complied with the summons should have been served not later than 21st July, 1984.

Also that the summons was not in fact served until 9th November, 1984. However, the plaintiff contends that strict compliance with section 21(1) was waived by the defendant and that it is not now open to the defendant to plead prescription.

The plaintiff's contention is based on the following facts which emerged from the evidence of Zombodze Magagula who is the defendant's asistant claims manager and who was the only witness called on this preliminary issue. He accepted that on 6th March, 1984 the defendant wrote a letter to the plaintiff's attorney stating:

"We wish to advise that we have written a letter to the owner of the insured vehicle asking him to complete a motor accident report form. As soon as we receive the same we shall, no doubt, revert to you."

Also that on 30th July, 1984 the defendant wrote a further letter stating that it had received no response from the vehicle owner and concluding:

"To assist us will you please provide vouchers in respect of the various items totalling E4,000 on the statutory claim form and as we have absolutely no information regarding the accident are you able to provide us with a copy of the police report?"

Mr. Magagula also accepted that on 21st September, 1984 the defendant wrote again to the plaintiff's attorney stating that the claim was being passed to its attorney for his consideration and seeking further information concerning the claim. 'Lastly, he accepted that on 3rd October, 1984 the defendant's attorney wrote to the plaintiff's attorney in the following terms:
"We have been instructed to act in this matter and we must say that we have great difficulty with the claim submitted on behalf of your client. In the first instance our clients tend to fight this claim on the merits as there is no proof that the insured vehicle collided with the deceased.

In the second instance there is no proof whatsoever that the children on behalf of whom the claims are submitted were in fact the children of the deceased. May we simply suggest that you issue Summons in this matter unless you -are able to satisfy us properly in writing regarding the claims and regarding the merits of the case."

One other piece of evidence given by Mr. Magagula upon which the plaintiff seeks to rely is that the report which the defendant was endeavouring to obtain from the owner of the insured vehicle was in fact received on 4th September, 1984 but the plaintiff's attorney was not informed of its receipt. Mr. Magagula, however, denied the suggestion put in cross-examination that there was any

obligation on the defendant to disclose this information or for that matter the contents of the report.

It is on the basis of the foregoing facts that Mr. Dlamini submits that prescription was waived. He says that the defendant encouraged the plaintiff to believe that it would enter into negotiations once the report from the owner of the insured vehicle was received but despite such encouragement failed to inform the plaintiff of the receipt of the report and expressly invited the plaintiff to launch proceedings in its attorney's letter dated 3rd October.

The defendant's conduct, says Mr. Dlamini, should be construed at very least as a tacit waiver of any reliance on the provisions of section 21(1).

The mere fact that negotiations have taken place between a claimant and a person against whom a claim is made does not debar the defendant from pleading prescription, even though the negotiations may have led to delay and caused the claimant not to bring his action until the statutory period has passed Halsbury's Laws of England 4th Ed. Vol.28 para.608; Hewlett v London County Council (1908) 72 JP 136. That is not only the position as governed by the law of England but, in my view, must be the position under the Roman-Dutch law. However, prescription can be waived, extended or suspended by- agreement, either express or tacit, and for Mr. Dlamini's submission to succeed it must be possible to find such an agreement in the correspondence referred to. It would be possible to -find such an agreement if the correspondence showed that the parties had agreed that there was a liability on the defendant to pay compensation and all that remained was for the court to determine the amount.

See Wright v John Bagnall & Sons Ltd 1900 2QB 240; Cohen v Snelling 1943 2 All E.R. 577; and Agnew v

Union and South West Africa Insurance Co. Ltd. 1977 (1) S.A. 612. However, the correspondence in the present case discloses no such agreement. On the contrary, it shows that until the receipt of the report from the owner of the insured vehicle in September, 1984 the defendant considered itself in no position to

enter into any negotiations with the plaintiff's attorney let alone to agree liability and thereafter it passed the matter to its attorney for his consideration. Having considered the matter the attorney repudiated any liability.

No agreement to waive prescription was ever made and the plaintiff's attorney should never have permitted himself to be lulled into a false sense of security by reason of the mere fact that the defendant was indicating in correspondence that it was not yet in a position to negotiate. He should have kept a firm eye on the statutory period of prescription and once the expiration of that period was imminent he should either have sought an agreed extension of time or should have issued process. He did neither.

All that remains to be considered is the suggestion in the attorney's letter of 3rd October that the plaintiff should issue a Summons. In my view, by no stretch of the imagination can this be construed as a waiver of the statutory period of prescription. There was no obligation on the defendant or its attorney to advise the plaintiff of any of the defences it might run and indeed it may well be that the question of prescription never even occurred to the attorney at that point in time.

Although the Court is bound to feel some sympathy for a plaintiff whose claim is debarred by prescription his remedy was to seek relief as provided for in the remaining sub-sections of section 21. He chose not to do so and this Court is, therefore, left with no alternative but to uphold the defendant's special plea and to dismiss the plaintiff's claim with costs.

N.R. HANNAH

CHIEF JUSTICE