IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 1465/10

In the matter between

THABSILE SONTO NHLENGETHWA **APPLICANT**

and

MOTOR VEHICLE ACCIDENTS FUND **RESPONDENT**

Neutral citation	**Thabsile Sonto Nhlengethwa *vs Motor Vehicle Accidents Fund (1465/10) 24 September [*2013] SZHC 210**
Coram:	**Ota J.**
Heard:	**5th September 2013**
Delivered:	**24th September 2013**
Summary:	**Civil procedure: Motor Vehicle Accidents Fund Act 1991 (as amended); Section 11 (1) (b) thereof limiting compensation of non-fare paying passenger to E12,000=00 for the amenities accounted therein in the event of an accident; Applicant claiming in excess of this limit and failing to advance material facts in support of her claim in her founding affidavit; Held Applicant entitled to payment of the sum of E12,000=00 in these circumstances.**

OTA J.

[1] The Applicant launched proceedings against the Respondent claiming *inter alia* the following reliefs:-

> **"1. Directing the Respondent to pay to the Applicant the sum of E55,250=00 for the purpose of rehabilitating the Applicant's eyes with glasses and corneal transplant and secondary implant.**
> **2. Costs of application.**
> **3. Further and or alternative relief ".**

[2] The application is predicated on a 14 paragraph affidavit sworn to by the Applicant, Thabsile Sonto Nhlengethwa, to which is exhibited annexures A, B and C respectively.

[3] For its part, the Respondent opposed this application with a 5 paragraph affidavit sworn to by one Helmon Mfana Vilakati, described in that process as the Managing Director of the Respondent.

[4] Now, when this matter served before me for argument on the 5th of September 2013, learned Counsel for the Respondent Ms Mathonsi implored the Court to proceed to dismiss this application in the absence of the Applicant. Counsel's contention is that the Applicant failed to comply with

the requirements of Rule 16 (4) (a) and (b) of the Rules of this Court, in the face of the withdrawal of her attorneys of record on the 20th of May 2013. Thereby rendering the necessity of any further service upon her *otiose.*

[5] Rule 16 (4) (a) and (b) states as follows:-

> **"(a) Where an attorney acting in any proceedings for a party ceases to act, he shall forthwith deliver notice thereof to such party, the Registrar and all other parties, provided that notice to the party for whom he acted may be given by registered post.**
>
> **(b) After such notice, unless the party formerly represented, within ten (10) days after the notice, himself notifies all other parties of a new address for service as required under sub-rule (2) it shall not be necessary to serve any documents upon such party unless the Court otherwise orders.**
>
> **Provided that any of the other parties may before receipt of the notice of his new address for service of document, serve any documents upon the party who was formerly represented."**

[6] In compliance with the rules, the Notice of withdrawal of attorneys of record was duly sent to the Applicant by registered post on the 21st May 2013, as is evidenced by the certificate of posting which is annexed to the notice of set down dated the 11th of June 2013.

[7] I agree with the Respondent that the Applicant has failed to appoint other attorneys of record within 10 days from 21st May 2013, in terms of the Rules and that the *dies* upon which such appointment was to be done has long lapsed.

[8] In the circumstances, I proceeded to hear argument on this matter in the absence of the Applicant and to determine same based on the strength of the matrix of papers serving before Court.

[9] Now, the Applicant's case as conveyed via her founding affidavit is best summarized as follows:-

1. On or about 16th July 2006, the Applicant was a passenger in a motor vehicle driven by one Mardas Lucas Vilane which was driving along Mliba / Dvokolwako public road.

2. Whilst passing Talukatini area, the motor vehicle was involved in an accident when it knocked down a cow.

3. The accident was attended by the Mliba Police who issued out a police report, annexure A.

4. As a result of the accident, the Applicant was treated at Kalajoncy Hospital in AH reegville, South Africa.

5. She subsequently filed a claim with the Respondent as evidenced by the claim form annexure B.

6. Having filed a claim with the Respondent, the Respondent referred the Applicant to Dr Danie Louw in Nespruit for futher medical examination.

7. That on the 31st of August 2009, Dr Danie Louw prepared and sent his report to the Respondent and Applicant, which report is exhibited as annexure C.

8. That Dr Louw examined and prepared his report based on the extensive injury which the Applicant sustained in her left eye as a result of the accident.

9. That in his summary Dr Louw observed that the Applicant is completely blind in her left eye and though the vision in her right eye is normal, she will still need glasses to correct the vision in her right eye at a cost of E3,000=00.

[10] In its answering affidavit the Respondent sought to defeat the Applicant's case with the following defences as correctly captured in paragraphs 2.1 to 2.5 of the Respondent's heads of argument in the following terms:-

> **"2.1 That the medico legal report which the Applicant relied on remained the record of the Respondent until the discovery stage of the proceedings;**
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> **2.2 That the Applicant failed to make the necessary allegation to sustain her prayer to be paid the sum of E55,250=00(Fifty Five Thousand Two Hundred and Fifty Emalangeni);**
>
> **2.3 That the Applicant simply filed the doctor's report without supporting facts under oath why this amount ought to be paid to her;**
>
> **2.4 That it would not be competent and lawful of this Honourable Court to order the Respondent to pay Applicant the amount of E55,250=00 (Fifty Five Thousand Two Hundred and fifty Emalangeni) because of the statutory limitations as envisaged by section 11 (I) (b) of the Motor Vehicle Accident Acts;**
>
> **2.5 That the mandatory provision of section 11 (1) (b) of the Act limits the Fund to E12,000=00 (Twelve Thousand Emalangeni) in respect of a person injured whilst being conveyed in a motor vehicle not for a reward, not in the course of the business of the owner or the driver of**

that motor vehicle and not an employee of the driver or owner of that motor vehicle."

[11] In support of the aforegoing allegations, learned Counsel for the Respondent contended, that the Applicant, it is common cause, was a non-fare paying passenger on the said vehicle and as such her claim is limited in terms of section 11 (1) (b) of the Motor Vehicle Accidents Fund 1991 (as amended) (the Act).

[12] That the import of the section is that even if a passenger does not fall within anyone the categories mentioned in sub section 1 (a) (i) – (iii), he or she remains entitled to claim, such claim however, being limited to E12,000=00, in respect of loss of income or loss of support and the costs of accommodation in a hospital or nursing home, treatment, provision of service or goods as a result of bodily injury to or death of one such person plus the costs of recovering such compensation but excluding the payment of compensation in respect of any other loss or damages. For this proposition counsel relied on the cases of **Santam Insurance Ltd vs Taylor 1995 (1) SA 514 (A) and MMF vs Marambana (1996) 3 All SA 8 (A), 1996 (4) SA 48 (A).**

[13] Learned counsel further contended that in any case, the Applicant has failed to make out a case for the amount claimed in her founding affidavit, due to her failure to urge facts to establish her entitlement to same. Counsel relied on the **Civil Practice of the Supreme Court of South Africa (4th ed) page 366** for this contention.

[14] Now, there is no doubt that Dr Danie Louw's medical report annexure C puts the total cost of rehabilitating the Applicant's left eye with a corneal transplant and secondary implant at the amount of E52,250=00.

[15] The Respondent however contends that Applicant is not entitled to be paid this sum, because being a non- fare paying passenger, she is entitled to a maximum payment of the sum of E12,000=00 Emalangeni for the treatment in terms of section 11 (1) (b) of the Act.

[16] To substantiate this claim the Respondent averred as follows in paragraph 5.5 of its answering affidavit:-

> **"It is common cause that Applicant was a passenger in the motor vehicle as a non – fare paying passenger and as such her claim is limited to E12,000=00 (Twelve Thousand Emalangeni) even in respect of hospital treatment".**

[17] The Applicant failed to file any affidavit in response to the aforegoing allegations of fact. In the circumstances, the fact that the Applicant was a non-fare paying passenger on the said vehicle remain uncontroverted and unchallenged. It is therefore in law deemed admitted by the Applicant and as establishing the facts alleged therein. See **The Attorney General vs Sipho Dlamini and Another Civil Appeal No. 4/2013 para [83].**

[18] The question arising at this juncture is, whether this state of affairs brings the Applicant's claim within the purview of section 11 of the Act which provides as follows:-

> **"LIABILITY LIMITED IN CERTAIN CASES**
>
> **(1) The liability of the MVA Fund to compensate a third party in connection with any one occurrence for any loss or damage under section 10 resulting in any bodily injury to or the death of the third party who, at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned, shall be limited ....**
>
> **(a) To the sum of E25,000=00 in respect of any bodily injury or death of any one such person or the sum of E250,000=00 in all in respect of any bodily injury to, or the death of, any number of such persons (but in either case exclusive of the cost of recovering such compensation) who at the time of the occurrence which caused that injury or death was being conveyed in the Motor Vehicle in question—**

(i) For reward;

(ii) In the course of the business of the owner or the driver of that motor vehicle; or

(iii) In the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) of this section does not apply, in the course of his employment; or

(b) In the case of a person who was being conveyed in the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of E12,000=00 in respect of loss of income or support and the cost of accommodation in a hospital or nursing home, treatment, provision of service or goods as a result of bodily injury to or the death of one such person, plus the cost of recovering such compensation but excluding the payment of any other loss or damages:

Provided that the total liability under this paragraph in respect of any number of such persons shall be limited to E100,000=00." (emphasis added)

[19] Section 11 (1) (b) above which is couched in clear and ambiguous words, limits the liability of passengers falling outside those contemplated by section 11 (1) (a) (i) (ii) and (iii) above, to the sum of E12,000=00 in respect of all the amenities specifically enumerated therein, as I have hereinbefore set forth in *extenso*.

[20] It seems to me that there is therefore much force in the Respondent's contention, that not being conveyed for a reward in terms of section 11 (a) (1) and thus a non – fare paying passenger upon the said vehicle at the material time of the accident, the Applicant's claim for treatment for injury sustained to her eyes by reason thereof, is limited to E12,000=00 as envisaged by section 11 (1) (b) of the Act.

[21] The aforegoing proposition finds support in the case of **Santam Insurance Ltd vs Taylor (Supra),** where the South African Courts in interpreting the provisions of section 22(D)d) read with section 22 (1) (bb) of the Compulsory Motor Vehicle Insurance Act 56 of 1972, a section which is similar to our section 11 (1) (b), stated as follows:-

> **"The liability of an authorized insurer to compensate a third party for loss or damage resulting from bodily injury to or the death of a person who was being conveyed in an insured motor vehicle and who falls within the ambit of S 22(1)(d) of the Act 56/2972 as amended is limited to the sum of E12,000=00 in respect of the items of loss or damage specifically mentioned in S22 (1)(bb) of the Act as amended (viz loss of income or of support and costs of accommodation in a hospital or nursing home, treatment, the rendering a service and supplying of goods resulting from death of or bodily injury to any one such person) in such a manner that liability for the payment of compensation in respect of any other loss or damage is excluded."**

See **MMF vs Marambane (Supra).**

[22] It was in obvious and apparent recognition of these facts that the Respondent, notwithstanding Dr Daine Louw's report proposing the sum of E52,250=00 as costs for rehabilitating the Applicant's left eye, made an offer of the sum of E12,000=00 to the Applicant for hospital treatment in respect of the said injuries. This was in an effort to align the Applicant's claim in terms of section 11 (1) (b) of the Act. The Applicant, it is on record, rejected this offer which elicited litigation.

[23] In any case, as rightly contended by the Respondent, the Applicant failed to make any material allegation of facts in her founding affidavit to sustain the claim for E55,250=00. It was not enough for her to urge Dr Louw's report, annexure C. The rules require that she makes out a case in her founding affidavit in this respect which she failed to do. As stated by the learned editors **Herbstein** and **Van Winsen** in **The Civil Practice of the Supreme Court of South Africa (4th ed) at page 366:-**

> **"The general rule which has been laid down repeatedly is that an Applicant must stand and fall by his founding affidavit and the facts alleged in it and although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation**

of fact stated there because those are the facts that the Respondent is called upon either to affirm or deny."

[24] The Applicant was thus required to make out a *prima facie* case in her founding affidavit. Eventhough this rule is departed from in certain circumstances in the interest of justice, this is however not such a case.

[25] It appears to me on these premise, that the Applicant is entitled to be paid the sum of E12,000=00 for the said hospital treatment as prescribed by the Act. I cannot go against such clear words of statute.

[26] In light of the totality of the aforegoing, I make the following order:-

1. Respondent be and is hereby ordered to pay the Applicant the sum of E12,000=00 for the purpose of rehabilitating the Applicant's eyes.
2. Costs to follow the cause.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE .....DAY OF 2013

OTA J.

JUDGE OF THE HIGH COURT

For the Applicant:	**No appearances**
For the Respondent:	**P.A. Mathonsi**