**IN THE HIGH COURT OF SOUTH AFRICA**

(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal Nr : 149/2001

In the matter between:

**NA MASEKO** Applicant

and

**AUTO & GENERAL INSURANCE CO LTD** Respondent

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| **HEARD ON:** | 19 JUNE 2002 |
| **HEARD BY:** | HANCKE et MUSI JJ |
| **DELIVERED ON:** | 25 JULY 2002 |
| **JUDGMENT BY:** | MUSI J |

## Introduction

The appellant sued the respondent for payment of the amount of R33 448,63 being for damages suffered by the appellant as a result of damage caused to the appellant's motor vehicle in a road collision. The motor vehicle concerned was insured by the respondent and the claim was based on the relevant insurance contract. The court a quo dismissed the action with costs. The appellant now appeals against the judgment of the court a quo.

**Applications**

The appellant has directed two applications to this Court. The first application is for condonation of the late filing of a bundle of documents comprising exhibits handed in during the trial but which were not incorporated in the record prepared for the appeal. The second application is for amendment of the appellant's papers in order to substitute Mrs L Maseko for the appellant. It should be noted that in the summons the plaintiff is cited as NK Maseko, a female person, but Mr NA Maseko testified at the hearing that he is the plaintiff and he applied, albeit belatedly after the conclusion of the evidence, for amendment of his pleadings to reflect his correct names. Such application was rejected by the magistrate.

It is quite clear that Mr NA Maseko was in fact the plaintiff in the matter and was erroneously cited as NK Maseko. In that sense the application to amend was merely to correct a misnomer and was wrongly dismissed. The dismissal is however, of no consequence in view of the manner in which the appeal comes before us. In this judgment any reference to the plaintiff or appellant shall be reference to Mr NA Maseko, because for all practical purposes he is the plaintiff and appellant in these proceedings and he in fact signed the power of attorney authorising this appeal.

An affidavit has been filed in support of the application for condonation of the late filing of the bundle of documents and an explanation given for the failure to annex the documents to the record and condonation will not result in any prejudice to the respondent. It is desirable moreover that the full record be before the court. This application is therefore granted right away and there shall be no order as to costs.

The application for amendment stands on a different footing and it was common cause that its fate will be decisive of the entire appeal. I now deal with it. It is settled law that amendment of pleadings will usually be allowed unless the application to amend is *mala fide* or the amendment would result in prejudice to the other party which cannot be cured by an appropriate order as to costs. That includes amendments for substitution of parties, even where a completely different party is substituted and such application can be brought even on appeal as in this case. See **<u>LUXAVIA (PTY) LTD v GRAY SECURITY SERVICES (PTY) LTD</u>** 2001(4) SA 211 (WLD) at p 216-220 and the cases cited therein. The crux of the matter therefore is whether any of the two limitations to the grant of an amendment referred to above (irremediable prejudice and mala fides) are present in the instant case.

**<u>Lack of *mala fides*</u>**

Mr De Wet for the respondent, submitted that a substantive application supported by affidavits should have been filed. He contended that this was necessary as there was an onus on the appellant to show that his conduct in relation to the application was *bona fide*. Indeed there are a number of issues that the appellant needed to explain.

Firstly, the claim is based on a written contract of insurance (exhibit A). It clearly states that the insured is Mrs L Maseko. Yet the appellant insisted on issuing summons in his own name. If he had any misconception and thought that his conversation with Mrs Van Zyl as per exhibit D constituted a separate insurance contract in respect of the damaged Volkswagen Golf motor vehicle, that should have been dispelled with the production of the full contract. The contract reflects the Golf as the second vehicle insured. At any rate the appellant was legally represented and any conscientious, diligent attorney would not issue summons in a matter of this nature without first perusing the relevant contract. Worse still, even when the respondent disputed the plaintiff's *locus standi* and pleaded that it contracted not with NK Maseko but with Mrs L Maseko the appellant persisted that he was the insured. He crowned that by persisting under oath with that averment and then sought an amendment to reflect his correct names. This was a conscious, deliberate assertion made in the face of clear evidence to the contrary, namely, that he was no party to the contract with the defendant. Quite clearly the appellant and his lawyers bungled his case. He was duty bound to come clean and explain this. As matters stand, no such explanation has been forthcoming. Indeed counsel for the appellant could not give any nor was he expected to do so from the bar.

Secondly, there needed to be an indication that Mrs L Maseko consented to being substituted. In the absence of a confirmatory affidavit from her, she should have been joined in the application. Compare **BARRIE MARAIS & SEUNS AND ANOTHER v ELI LILLY (SA) (PTY) LTD AND OTHERS** 1995(1) SA 469 (WLD) where the proposed new party was joined. The involvement of Mrs L Maseko may not be as straight forward as suggested by Mr Gilliland for the appellant. He submitted that her substitution would not cause any complications in the matter because it was always the respondent's case that she was the insured and its defence on the merits would be unaffected by the substitution. It should be noted that the respondent repudiated liability and alleged that it refunded to Mrs Maseko all the premiums paid after the collision. It may well be that she has accepted the amount of R3 374,08 allegedly paid into her account and thus accepted repudiation of the contract and that may explain why the appellant decided not to involve her in the case in the first place.

*Ex facie* the record, the conduct of the appellant in persisting with prosecution of the case in his own name was reckless and *mala fide* and in the absence of a full explanation the present application cannot be regarded as *bona fide*.

**Irremediable prejudice**

One of the grounds upon which respondent opposed the application was that the proposed amendment would deprive it of the defence of prescription and that the resultant prejudice would be irremediable. It was common cause that the appellant had no cause of action against the respondent and that is precisely why it is sought to substitute Mrs L Maseko. In other words, the appellant was no creditor of the respondent and since the summons herein was not issued by the creditor as defined in section 51(1) of the Prescription Act No 68 of 1969, the running of prescription was not interrupted. The instant application for amendment would have had the effect of interrupting prescription but it is too late as the claim has already prescribed. See **STANDARD GENERAL INSURANCE CO LTD v ELI LILLY (SA) (PTY) LTD** 1996(1) SA 382 (WLD); **ASSOCIATED PAINT & CHEMICAL INDUSTRIES (PTY) LTD T/A ALBESTRA PAINT AND LACQUERS v SMIT** 2000(2) SA 789 (SCA). (The claim herein prescribed during July 2001 after the expiry of a period of three years from the date of repudiation.) In the circumstances the amendment cannot be granted.

There is a further ground on which this application could be dismissed. The appellant had no *locus standi*. Although this issue was not formally pleaded, it was nonetheless duly canvassed at the hearing and it ought to be regarded as an issue that was to be decided between the parties. Compare **BRITISH DIESELS LTD v JERAM AND SONS** 1958(3) SA 605 (NPD) at 606C. Indeed the magistrate decided upon that issue when she found that the appellant had lied when he said that he was the insured and that the correct contractant was Mrs L Maseko. The effect of the proposed amendment would be to re-open an issue that has already been decided upon. Compare **SCHMIDT PLANT HIRE (PTY) LTD v PEDRELLI** 1990(1) SA 398 (D&CLD) at 407A-D.

In conclusion, I must point out that the application for amendment was brought at the last minute at the instance of Mr Gilliland. He was candid that that was the only way in which the claim could be resurrected and acknowledged that the appellant's case had been bungled. I have sympathy for counsel but the appellant is the author of his own misery. He is, however, not without a remedy. If the fault is not his, he can consider recovering his damages from his Kroonstad attorneys on the basis of professional negligence.

The application for amendment is dismissed and so is the entire appeal and the appellant, Mr NA Maseko, is ordered to pay the costs of both the application and the appeal.

**HM MUSI, J**

I CONCUR:

**SPB HANCKE, J**

**On behalf of the Applicant : Adv JG Gilliland**
**Instructed by**
**Naudes**

**On behalf of the Respondent : Adv PJT de Wet**
**Instructed by**
**Symington & De Kok**

/Jacobs