B:1?

32/85

Case no 429/83.
MC

SOUTH AFRICAN EAGLE INS. CO. LTD.

- and -

LENNOX SIPHO BAVUMA

VIVIER AJA.

Case no 429/83
MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SOUTH AFRICAN EAGLE INSURANCE COMPANY LIMITED. ..... Appellant

- and -

LENNOX SIPHO BAVUMA ..... Respondent

Coram: CORBETT, MILLER, NICHOLAS JJA et ELOFF, VIVIER AJJA.

Heard: 8 March 1985.

Delivered: 28 March 1985.

J U D G M E N T.

VIVIER AJA :-

The respondent (as plaintiff) instituted an action for damages in the South-Eastern Cape Local Division against the appellant (as defendant) under the Compulsory Motor Vehicle Insurance Act, No 56 of 1972. He alleged that on 27 February 1980, and in Willoby Crescent, Port Elizabeth, he was injured when he was knocked down by a motor vehicle insured by appellant under that Act, and negligently driven at the time by one Sergeant. For convenience I shall refer to the parties as the plaintiff and the defendant respectively.

In further particulars plaintiff stated that he was not a workman, nor was the collision an accident for the purposes of the Workmen's Compensation Act, No 30 of 1941. In its plea the defendant alleged inter alia that plaintiff was a workman, and the collision an accident in

terms / .....

terms of Act 30 of 1941, and that, plaintiff having failed to comply with the provisions of Act 30 of 1941, his claim was unenforceable against the defendant.

After the close of pleadings the parties prepared a special case for the adjudication of the Court in terms of Rule 33(1) of the Uniform Rules of Court. It was agreed that plaintiff was a Black man and a workman as defined in Act 30 of 1941; that the collision was an accident in terms of that Act and that plaintiff had not lodged a claim for compensation nor had his employer furnished the particulars referred to in sec 8(5) of that Act.

Three letters, written subsequently to the defendant's plea, were incorporated in the agreed statement of facts. In the first letter the written consent of the Workmen's

Compensation Commissioner ("the Commissioner") was requested to institute proceedings against the third party insurers of the vehicle involved in the accident. The Commissioner granted his consent. Thereafter, in a second letter, the Commissioner confirmed that his consent in terms of sec 8(5) of Act 30 of 1941 had not been granted prior to the issue of summons but he stated that he had no objection to the proceedings continuing. The last paragraph of the special case reads :-

> "This Honourable Court is requested to determine only whether in the circumstances set out above there has been sufficient compliance with the provisions of Act No 30 of 1941 and whether plaintiff's claim is enforceable against the defendant."

The special case was heard by SOLOMON J, whose

judgment is reported: Bavuma v S A Eagle Insurance Co Ltd 1984(2) SA 786 (SECLD). In his judgment SOLOMON J expressed the view that compliance with sec 8(5) of Act 30 of 1941 was not a condition precedent to the institution of action under Act 56 of 1972. He held, however, that he was bound by the decision of the Full Bench in Tyulu and Others v Southern Insurance Association Ltd 1974(3) SA 726 (ECD) at 731 D-F, that compliance with the requirements of sec 8(5) is part of a plaintiff's cause of action and that the whole cause of action must subsist when summons is issued. He said that :-

> ".....in the circumstances I am obliged to hold that on the plaintiff's summons, as it now stands, there has not been compliance with the provisions of Act No. 30 of 1941, and that the plaintiff's claim is not enforceable

against the defendant."

He added, however, that in his view

> ".... even if the provisions of the Workmen's Compensation Act were not complied with prior to the issue of summons, the matter can be rectified by an amendment of the summons."

In the result, the learned judge made no order on the special case, but left it to the plaintiff to apply for an amendment.

In due course the plaintiff applied for an amendment to the particulars of claim. He now alleged that he was a Black workman as defined in Act 30 of 1941, that the collision was an accident in terms of that Act, that his employer failed to furnish particulars of the accident to the Commissioner for purposes of sec 8(5)

of that Act, and that, by virtue of the correspondence to which I have referred above, the provisions of Act 30 of 1941 had been duly complied with. The application for the amendment was opposed by the defendant, but was granted by SOLOMON J, who ordered the plaintiff to pay the costs of the application. In granting the amendment the learned judge held that he had a discretion to allow the plaintiff to introduce by amendment reference to subsequent events in order to complete his cause of action. With the leave of the Court a quo the defendant now appeals to this Court against the granting of the amendment.

Sec 8(5), which has since been amended by sec 3 of Act 29 of 1984, read as follows at the relevant time :-

"(5) No / .....

"(5) No proceedings in a court of law to recover damages against any person referred to in sub-section (1) may be taken by a workman without the written consent of the Commissioner unless he has lodged a claim for compensation, or unless, in the case of a Bantu workman, his employer has furnished par= ticulars of the accident to the Commissioner in terms of sub-section (1) of section fifty-one."

It was submitted on behalf of the appellant that the amendment should not have been granted, as compliance with sec 8(5) of Act 30 of 1941 was part of plaintiff's cause of action; that plaintiff's cause of action had to subsist when summons was issued and that the Court a quo thus had no power to allow the plaintiff to introduce by amendment reference to sub=

sequent events in order to complete his cause of action and that, since sec 8(5) of Act 30 of 1941 required the prior written consent of the Commissioner, his subsequent written consent could not constitute compliance with the sub-section.

These contentions are not without substance. Nevertheless, the amendment was in my view properly granted.

In para 10 of the Statement of Case, the question of law to be determined was too narrowly stated. The Court should also have been asked to determine whether in the circumstances set out it was necessary for the plaintiff to comply with the provisions of sec 8(5) of Act No 30 of 1941. In considering that question, the Court would, in terms of sub-rule (3) of Rule 33 of the Uniform Rules of Court, have been entitled to draw any inference of fact or of law from the facts and documents as if proved at a trial. If it had done so, the Court

should, for the reasons hereinafter set out, have determined that there was no necessity for the plaintiff to comply with sec 8(5).

It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body, may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms. This rule is expressed by the maxim: quilibet potest renuntiare juri pro se introducto - any one may renounce a law made for his special benefit. See Ritch and Bhyat v Union Government 1912 AD 719 where INNES ACJ

said / .....

said at p 734:

> "The maxim of the Civil Law (C.2,3,29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well. (Grot., 3,24,6; n. 16; Schorer, n. 423; Schrassert, 1,c.1,n.3, etc.)."

See also Craies on Statute Law, 7th ed at p 269.

This rule has frequently been applied by our Courts in holding that statutory protection (often in the form of limitation of actions) afforded local authorities and Government departments is capable of waiver when the protection is not intended for the benefit of the public

but for the benefit of the local authority or Government department itself. So, for example, it was held in Steenkamp v Peri-Urban Areas Health Committee 1946 TPD 424 at 429, that the protection afforded by sec 172 of Ord 17 of 1939, which provided that all actions against a local authority shall be brought within 6 months of the time when the cause of action arose, was not intended for the benefit of the public or the ratepayers but for the protection of the local authority itself, and could there= fore be waived. See also: Durban Corporation v Lewis 1942 NPD 24 at 41; McDonald v Enslin 1960(2) SA 314(O) at 317 A-C and Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd 1971(4) SA 538(C) at 540 A.

It / .....

It is for the individual intended to be benefited by the statutory provision in question, to waive its performance, and it is not open to another person (not intended to be benefited) to insist that the statutory provision be observed - Maxwell on the Interpre= tation of Statutes, 12th ed at p 330, quoting the case of Hebblethwaite v Hebblethwaite (1869) 39 LJP & M. 15.

Whatever the precise purpose of sec 8(5) of Act 30 of 1941, there can be no doubt that it was introduced solely for the Commissioner's benefit (Tyulu's case, supra at 730 H). He is the only person who can grant consent for purposes of the sub-section, and the granting or refusal of his consent is a step taken in the interest of nobody else but himself. It is inconceivable that, had

the sub-section been introduced for the sole benefit of the workman, as was submitted by counsel for the appellant, the Legislature could have considered such strict requirements to be in the workman's interest.

In my view no public interests are involved; the sub-section is not there for the public benefit, nor does it concern any principle of public policy. There is nothing in the Act which either expressly or by necessary implication prohibits the Commissioner from waiving compliance with the sub-section. The provisions of sec 8(5) are therefore capable of being waived by the Commissioner.

The next question is whether the Commissioner, in the present case, waived compliance with the provisions

of sec 8(5). On a proper construction of the Commis=
sioner's second letter, referred to above, I am satisfied that he did so. The result is that, the Commissioner having waived compliance with its provisions, sec 8(5) cannot be relied upon as a bar to the proceedings. It is true that in the paragraph added by the amendment the plaintiff stated that :-

> "in the premises there has been compliance with the provisions of the said Act for the purposes of pursuing plaintiff's action herein"

and did not aver that by reason of the Commissioner's waiver of the said provisions the plaintiff was excused from compliance therewith but that is a point which on the form of the amendment, it was open to the plaintiff to

take / .....

take: the waiver clearly appears from the copy of the Commissioner's letter dated 28 February 1983, which is annexed, and the excuse from compliance follows from that as a matter of law.

It follows that, although the reasons differ from those of SOLOMON J, the amendment was correctly allowed.

In the result the appeal is dismissed with costs, such costs to include the costs consequent upon the em= ployment of two counsel.

W. VIVIER AJA.

CORBETT JA.)
MILLER JA.)
NICHOLAS JA.) Concur.
ELOFF AJA.)