CIV/T/18/80

IN THE HIGH COURT OF LESOTHO

In the matter of :

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| BLUE MOUNTAIN INN(PTY)LTD | Plaintiff (Defendant in reconvention) |
| v | |
| H. M. ABDULLA | Defendant (Plaintiff in reconvention) |

JUDGMENT

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 23rd day of March 1982

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The plaintiff has been described in the pleadings respectively as Blue Mountain Inn(Pty)Ltd and as Blue Mountain Inn. For reasons which will appear later it matters not whether the plaintiff is a limited company or a firm.

On the 8th of February 1977 the plaintiff's vehicle, a V.W. Reg. No. A 24, was driven by Mrs. P. Chaplin an employee of the plaintiff. It was involved in a collision with a Datsun delivery van Reg LD 175 owned and driven by the defendant. Both vehicles were severally damaged and were "write offs". It has been agreed that the plaintiff suffered loss in the sum of M2190 and the defendant suffered loss in the sum of M1550. The plaintiff claimed the collision occurred solely through defendant's negligence. The defendant denied negligence and counterclaimed that the collision occurred solely through the plaintiff's negligence. In reconvention this was denied by the plaintiff, alternatively, that there was contributory negligence.

Mrs. Chaplin testified that she was driving alone along the main tarmac highway between Bethlehem and Ficksburg. It was during the day. She was going to Ficksburg and travelling

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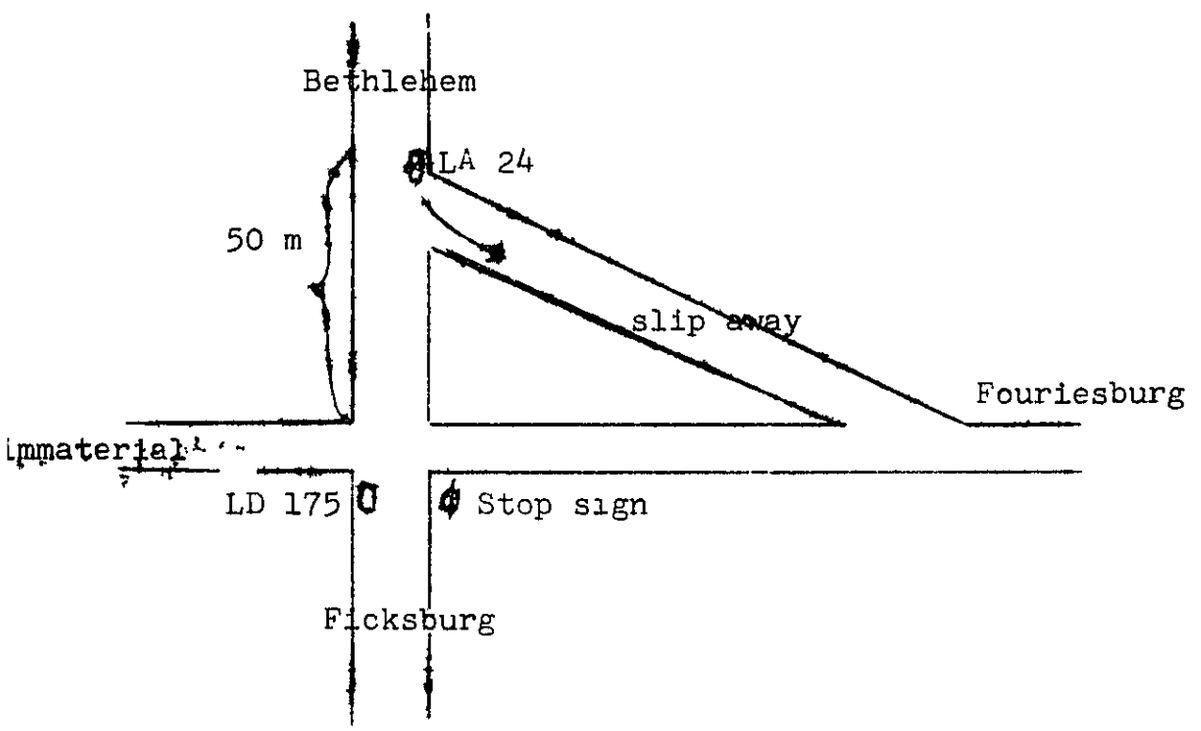
at 90 km an hour the maximum speed limit in Republic of South Africa at the time. She was approaching the Fouriesburg intersection which was on her left. There was no traffic behind her. There was no evidence of traffic lights or robots at this intersection. Motorists travelling from Bethlehem and intending to go to Fouriesburg would use a slip away some 50 meters before the actual cross roads to get ultimately into the main Fouriesburg Road whilst motorists travelling in the opposite direction, and intending to go to Fouriesburg, would have to turn right at the cross roads into the Fouriesbrug road proper. No plans were produced by either party but by agreement a rough sketch would look like this :




Learned attorneys for the parties have referred me to the following cases Noguda v. Union and South West Africa Ins. Co. Ltd. 1975 (3) S.A. 685(A.D.) at 688A; Neuhaus No v. Bastion Ins. Co. Ltd 1968(1) S.A. 398(A.D.) at 405H - 406; AA Mutual Insurance Association Ltd. v. Nokema 1976(3) S.A. 45 at 52E; Sierborger v. South African Railways and Harbours 1961(1) S.A. 498(A.D.) at 505-508; Snyman v. Van den Berg 1978(2) S.A. 850 (A.D.) - (Headnotes) at 850 and 851; Pullen v. Pieterse 1954(2) S.A. 195(T); Bata Shoe Co. Ltd(SA) v. Moss 1977(4) S.A. 16 (W.L.D.) and to a textbook on the Law of Collisions in South Africa 41-47. Quite frankly apart from general principles I do not find much comfort in traffic accidents precedents since no set of facts are similar to another set of facts, and in any

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event similarity, per se, is not the be all and the end all since peculiar factors relevant to the circumstances leading to the accident have to be taken into account. All what can be said in this connection is that it is clear as anything can be that Mrs. Chaplin had the right of way on this main road, i.e. that a motorist coming from the opposite direction and intending to turn right to Fouriesburg had a duty to be extremely careful. He owed this duty to traffic behind him and to traffic approaching from Bethlehem, and to traffic (if any) on the other roads including the existence or otherwise of slip aways. Mrs. Chaplin, as I had intimated, was not going to Fouriesburg. She was going straight to Ficksburg. As a matter of precaution she says on approaching the intersection she slowed down but only slightly. She saw defendant's vehicle approaching from the opposite direction and saw that it halted at the cross roads for a couple of minutes or so. The defendant says he too saw Mrs. Chaplin's vehicle approaching from the distance and confirms he halted before turning right. There was no traffic behind him. The defendant says he did not have constant vision of the vehicle driven by Mrs. Chaplin when it was far away as the road dipped, but when she came within sight again, he saw her indicator light flashing to the left and he assumed she too was going into the Fouriesburg road using the slip away. He says she was too much to the left of her side of the road. That of course is no sign that she was turning left though it so seemed to him after seeing her left indicator light. He admitted however that he did not wait long enough to see that she did actually enter the slip away but began to turn to his right. Mrs. Chaplin says she only had about 50 meters separating her and the defendant's vehicle. She applied her brakes but could not avoid colliding with the defendant's vehicle in the middle of the cross roads. The defendant says she collided inside the Fouriesburg road next to a stop sign erected to warn motorists coming from Fouriesburg to join the main road. On this point I tend to believe that the collision occurred on the left of the actual cross roads although when the vehicles finally came to rest they did so inside the Fouriesburg Road by the stop sign perhaps by the force of impact.

Mrs. Chaplin testifies that her left indicator light was not on, that she did not inadvertently move it, that she could not have forgotten about it after a previous left turn, and that

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after the accident she heard the defendant admit to the police when they arrived that he was at fault. This last assertion the defendant denies. It was common cause that Mrs. Chaplin and the defendant were shocked and injured. So was the defendant's cousin (more seriously) who was seated next to him. The latter bore the brunt of the impact. They were all laid on grass waiting for help to arrive and probably grateful to be alive. Two hitchhikers picked up by the defendant at the rear of the van were uninjured. The traffic police eventually arrived and took measurements. They took the injured people to hospital. At a later date the defendant was sent "admission of guilt" form charging him with negligence. The defendant, an Indian gentleman trader in Lesotho, says he consulted a lawyer in Fouriesburg and described that he saw Mrs. Chaplin's left indicator on and told him that he did not feel he was negligent. The lawyer told him that he (the lawyer) thought that he(the defendant) was only 10% negligent but advised him to plead guilty nevertheless. The defendant explained that he did a lot of business in Fouriesburg, that he did not want to have a long drawn legal battle with the South African traffic police, and did not want to waste time. I am unable to find that this is an unreasonable attitude to take in motor traffic prosecutions where a fine of M50 or so is involved. If the defendant was believed to have been so grossly negligent by suddenly crossing Mrs. Chaplin's way an "admission of guilt" form would not have been the appropriate procedure for his manoeuvre would have savoured of extreme recklessness. The Fouriesburg Traffic Police were asked to provide the sketch or plan which was allegedly drawn by them at the time by attorneys of both parties but this could not be found and was either lost or mislaid.

There is thus Mrs. Chaplin's oath against that of the defendant. Both Mrs. Chaplin and the defendant struck me as honest witnesses. I am unable to subscribe to the proposition that because Mrs. Chaplin spoke faultless English and the defendant in an accentuated one that one is more superior to the other nor do I accept that a traffic policeman's opinion,(extra judicial and not subjected to cross-examination) on negligence as sacrosanct. Mrs. Chaplin was adamant that her left indicator lights were not on as she would have noticed this on the dashboard and heard the ticking sound. Forgetting to switch indicator lights to neutral position, if they do not do so automatically,

is I think a common occurrence, and when one is travelling alone at high speed, there is no one to bring this to the notice of the driver. The lone driver is more apt to day dream or have his mind wonder for a longer period before it dawns upon him or her that he or she has in fact forgotten to turn the switch to the level position. Now Mrs. Chaplin says the defendant halted for a couple of minutes or so. The defendant too says he halted for a couple of minutes or so to see her intentions before he turned right. At this moment in time Mrs. Chaplin must have been, I would think, two or three hundred meters away from the slip away and defendant would most probably have had a good chance to safely clear the intersection. That he attempted to do so when she was some 50 meters away was courting disaster. I am not saying that a motorist's mind may not suddenly go blank or suffer a sudden abberation but such a possibility is less likely, everything considered, than the possibility of Mrs. Chaplin's indicators flashing to the left. A witness can be honest but mistaken. I think she was one of those. What must have happened is that the defendant having waited a couple of minutes or so failed to wait another second or so to see Mrs. Chaplin actually entering the slip away. I think forgetting to turn indicator lights into neutral position is such a common occurrence that a careful motorist should not take it for granted that this is universally the intention of the driver. I think Mrs. Chaplin's inadvertence was the major cause of the collision but it was contributed to, to some but much lesster extent, by the defendant's own impatience in not making certain of her intentions before he turned right (his duty of care was high) and therefore his own negligence contributed to the accident. I would apportion this as 65% and 35% respectively.'

Finally Mr. Molyneaux submitted, if I understand his argument correctly, that the plaintiff(the company or the firm) is somehow exempted from any liability for the acts of its servants unless the defendant proves that the servant when driving the vehicle was the agent of, or acting in the course of, his or her employment. Mrs. Chaplin had testified that though she was the manageress of the plaintiff, she was returning home after some private business, putting some children into school or something like that. The argument proceeds that unless some nexus is proved by the defendant the Apportionment of Damages Order 1970 does not apply. I regret I am unable to see any force in this argument. Blue

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Mountain Inn is a well known Hotel in Lesotho and it matters not whether it was run by a limited company or by a firm. The fact of the matter is that the plaintiff's vehicle was used with the plaintiff's authority and its consent and a relationship of agency must be presumed. The situation cannot be equated to that of a thief stealing a vehicle and then smashing it causing damage to another vehicle or injury to a person whilst using it. Many limited companies and firms, large and small, allow their managers(or other staff) to use company registered vehicles on both official and private business. In a two or three man private limited company or firm this is far from abnormal. The employee does not cease to be the company's servant and agent if redress is sought for damage caus through his negligence. The plaintiff company (or firm) gave no evidence except through Mrs. Chaplin.

My Judgment is as follows :-

1. The plaintiff (and defendant in reconvention) will pay the defendant (and plaintiff in reconvention) 65% of the damage to his vehicle.
2. The defendant(and plaintiff in reconvention) will pay the plaintiff(and defendant in reconvention) 35% of the damage to its vehicle.
3. The plaintiff will pay defendant 65% of his costs.
4. The defendant will pay plaintiff 35% of its costs.

No doubt the attorneys will work out the arithmetic.

CHIEF JUSTICE
23rd March, 1982

For Plaintiff: Mr. Molyneaux
For Defendant: Mr. Kolisang