

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

SEEISO SEHLOHO

Appellant

v

KHOTSO SEKELEOANE

Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice F.X. Rooney
on the 1st day of November, 1982.

Appellant in Person,
Mr. Ramodibeli for the Respondent

On the 7th March, 1980 a truck driven by the respondent along the Leabua Jonathan Highway in the vicinity of Khubetsana ran into a flock of sheep owned by the appellant killing 25 of them

The appellant instituted proceedings against the respondent in the Majara Local Court claiming damages for his loss. He based his claim in terms of Rule 16 of the Laws of Lerotholi. The respondent subsequently made an application under section 26 (c) of the Central and Local Courts Proclamation 1938 for the transfer of the case to a subordinate court. The application was upheld and the subordinate court for the district of Berea became seized of the matter. This information is derived from the written statement made by the magistrate following the institution of the present appeal.

There are no pleadings forming part of the record and I must therefore assume that the trial magistrate decided that he should dispense with such a formality. When a case is transferred to a Subordinate Court, Section 25 of the Proclamation applies. This reads as follows :

"When a case is transferred from a Central or Local Court to a Subordinate Court, whether for trial or re-trial, by an order under section twenty-six (c) or section thirty (b), the

Central or Local Court

Central or Local Court shall report the proceedings to the Subordinate Court, and thereupon the Subordinate Court shall proceed to the trial or re-trial of the case as though, in a criminal proceeding, a complaint of facts constituting the offence had been made to the Court and, in a civil proceeding, as though a complaint therein had been made or filed in the Court."

I concede that the last words of the section referring to civil proceedings are somewhat obscure. I am however inclined to the view that what is intended is that proceedings subsequent to transfer shall be conducted in the same fashion as if they had been instituted in the subordinate court in the first place. It follows that the rules of the Subordinate Courts pertaining to the conduct of civil matters have full application, as if a summons commencing action had been issued under Order 7 of the Rules. The present appellant as plaintiff should have been required to give particulars of his claim and the orders relating to the filing of an appearance to defend, further particulars, special defences and plea should have been observed by both parties. The hearing of the case without regard to the rules of the court (including payment of court fees) was irregular.

The plaintiff, who was not represented, called four witnesses and applied to the magistrate for an inspection of the locus in quo. This was refused. After the plaintiff had closed his case the defendant's advocate Mr. Ramodibeli moved that the claim be dismissed on the grounds that no proof of negligence had been established. In reply, the defendant suggested that the Respondent should be called upon to make his defence. In the result the magistrate made an order of absolution from the instance. It is against that order that the appellant now appeals.

In the absence of pleadings, it is not clear as to whether the plaintiff was proceedings under the laws of Lerotholi or under the common law or both. The magistrate in his ruling dealt with the case as if it were based upon negligence. There is authority for the proposition that under Sesotho law a claim for wrongful damage to property may be based on negligence. (Makhakhe v. Liphoto J.C. 1953/54 referred to in Palmer's. The Roman Dutch and Sesotho law of Delict at page 122.

3/ The plaintiff led

The plaintiff led evidence from one Thabo Mariti (PW.1) a herdboyc in charge of the sheep that he was driving the animals across the road when they were struck by a lorry. A police officer produced a sketch map of the scene of the accident which included an observation that the road was straight at the point of impact. The plaintiff produced in evidence (without objection from the defendant's advocate) a copy of proceedings taken against the defendant in a subordinate court for negligent driving as a result of the incident. He was convicted of negligent driving and fined M120. Whether or not this evidence was admissible depends upon whether the courts in Lesotho are bound by the decision of the English Court of Appeal in Hollington v Hewthorn (1943) 2 ALL. E.R. 35. I express no opinion on this point in the absence of argument.

The magistrate in his judgment said :

" In our case the plaintiff failed to prove facts from which an inference of negligence on the part of the defendant may be reasonably inferred. The plaintiff failed to put the matter beyond a mere surmise conjecture. The facts placed by plaintiff do not lead to inference which is a reasonable deduction from facts actually observed and proved. The plaintiff to my submission placed evidence established only that accident was possibly due to negligence to which the plaintiff seeks to assign it, the case is not proved. The plaintiff has failed to discharge the burden of proof incumbent upon him. The plaintiff has left the case in equilibrium and the Court is not entitled to incline the balance one way or the other".

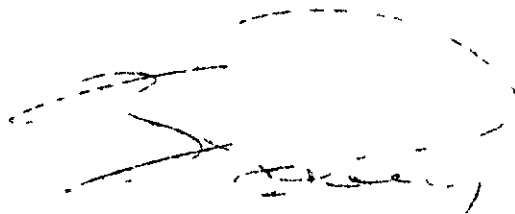
It has been said that in case of doubt as to what a reasonable court might do, the court should lean on the side of allowing the case to proceed. (See the remarks of Beadle C.J. in Supreme Service Station v. Fox and Goodridge (Pty) Ltd 1971 (4) S.A. 90 at 93. If the defence is something peculiarly within the knowledge of the defendant and the plaintiff has made out some case to answer, the plaintiff should not be lightly deprived of his remedy without first hearing what the defendant has to say.

4/ The defendant as the

The defendant as the driver of the truck knew how it was that it came about that he killed the sheep. He should have been required to enter upon his defence. The Order for absolution from the instance is set aside and this appeal allowed with costs.

For the removal of uncertainty I make the following additional order :

1. If the plaintiff wishes to proceed with the matter, he must file particulars of claim in the subordinate court.
2. All subsequent pleadings and proceedings should follow the Rules of the Subordinate Courts.
3. The trial should proceed before another magistrate, who may have before him the record of the evidence taken at the previous trial, but, that will not preclude the plaintiff from calling any additional evidence or recalling any witness and all such additional evidence shall be subject to cross-examination by the respondent's legal representative in the ordinary way.



F.X. Rooney,

JUDGE

1st November, 1982.