CIV/T/172/80

IN THE HIGH COURT OF LESOTHO

In the matter of :

P.M. LEBAKENG — Plaintiff

V

CO-OP LESOTHO LIMITED — 1st Defendant
A. MPHOTO — 2nd Defendant

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. J. Unterhalter
on the 3rd day of December, 1982.

This is an action in which Plaintiff claims from the 1st and 2nd Defendants jointly and severally the one paying the other to be absolved, payment of the sum of R3,565.00 with interest thereon at the rate of 6% per annum from the date of judgment to date of payment. Costs of suit are also claimed. The claim was originally for R4,265.00 but at the hearing application was made to alter the amount to R3,565.00 with appropriate amendments to paragraphs 9 and 10 of the particulars of the claim, and the application was granted.

No minutes of a pre-trial conference were presented to the Court but counsel were agreed that it had been placed on the record that there were only two issues for trial in the action, one being the question of negligence and the other being the amount of damages. It had also been recorded that on the 27th of January 1979 the defendants had admitted that the Plaintiff was the Hire Purchaser of motor vehicle LA 7635.

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It is admitted that at all material times the second defendant acted in the course of his employment by the first defendant as a driver. The plaintiff alleges that on or about the 27th January 1979 and on the road from Maseru to Mafeteng near Thota-Moli Mazenod a collision occurred between a motor vehicle LA 7635 then being driven by the plaintiff and a motor vehicle having registration number LA 6174 then being driven by the second defendant. The plaintiff alleges further that the sole cause of the said collision was the reckless and negligent driving of the second defendant and particulars in regard to such negligence are given. It is further stated that as the result of the collision the motor vehicle driven by the plaintiff was extensively damaged, the difference in value of the vehicle before and after the collision being R3,565.

The defendant's plea in effect, save for admitting that a collision occurred between the vehicles on the 27th January, 1979 at the place alleged and that the vehicles were being driven as alleged, denies the remaining allegations.

At the trial Mr. W.E. Murray gave evidence regarding his examination of the damaged vehicle LA 7635 this being the one of which the plaintiff was the Hire Purchase owner. The witness said that he was an insurance loss adjuster and an assessor of thirty years experience, his function being to assess losses for various Insurance Companies. He mentioned many features of extensive damage and said that the vehicle was beyond economical repair. He gave the value of the vehicle before damage as M4,265 basing this on figures stated in the Commercial Vehicle Dealers' Digest and on his own independent view. He said that the Digest showed the trade-in value for the vehicle of the type in question at

/M3,780

M3,780 and the retail value, namely, what a garage would normally sell such vehicle for, as M4,750. He considered that a fair value would be the average between those figures, namely M4,265. As to the scrap value he said that the best offer obtainable was M700.00, it being difficult to get offers in country districts because of the cost of moving damaged vehicles in remote areas.

There was nothing in the cross-examination of this witness that impugned his evidence and there was no evidence led by the defendants to rebut it. I find, therefore, that the plaintiff has satisfactorily proved that the reduction in the value of the vehicle is the sum of M3,565.

Mr. Lebakeng gave evidence as to his having driven the vehicle LA 7635 on the 27th January 1979 along the road between Maseru and Mafeteng. He said that he was travelling on his left side and saw coming towards him from the direction of Mafeteng a truck which was not keeping a straight direction but was going in a zig-zag way. He said that he hooted, that his warning was not heeded, he moved to the extreme left of the road and stopped. The front part of the truck collided with the front part of his vehicle.

The witness goes on to give certain explanations in respect of the Police plan. As there was no witness called by either side to prove the plan, that is to testify as to having drawn it or to testify to the facts that it represented, it is unnecessary to deal with this evidence.

In cross-examination the witness admitted that he had his driving licence first issued to him on the 4th January 1979, that is 23 days before the collision, and that at the time of the accident he was 21 years of age. This may have

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been a probability to consider as weighing against the plaintiff on the score that being a young and inexperienced driver he may not have driven his vehicle carefully. This factor, however, falls away by reason of what happened when the second defendant gave his evidence.

Second defendant said that he was a qualified driver of twenty years experience and that on the day of the collision he had been driving his vehicle from Mafeteng to Maseru. He said that he noticed the on-coming combi, that it crossed from its correct side, that he stopped his vehicle and the combi collided with his truck. He described the course of travel of the combi across the road as a zigzaging one, and said that the collision occurred on his side of the road.

In cross-examination it was put to him that his evidence was a mirror image of that of the plaintiff and it was untrue. He denied this. He admitted that in connection with the collision he had been charged with reckless and negligent driving and had pleaded guilty to the charge. He gave no satisfactory explanation as to why he had pleaded guilty. He stated in effect that what he had told the magistrate was what he had said in his evidence in the present action. There was then read to him what the magistrate had recorded as the facts outlined by the public prosecutor, namely that while driving the vehicle on the 27th January 1979, from Mafeteng to Maseru his vehicle moved to the right side of the road and collided with LA 7635 and pushed that vehicle until they both stopped on the side of the road. It was also recorded that the second defendant, as accused, accepted the public prosecutor's outline of the facts as correct. Charge Sheet and Record were handed in as Exhibit 'E' in terms of the ruling as to its admissibility given by the Court. Questioned

/as to this

as to this he stated that he had nothing to say but, nevertheless, persisted that the version that he had given in Court was the truth. In re-examination he said he understood the difference between a plea of guilty and a plea of not guilty and he added that the charge was read to him in English and in Sesotho.

In the light of this it is clear that the second defendant cannot be believed. I accept the evidence of the plaintiff and find proved the allegation that the cause of the collision was the negligent driving of the second defendant in having driven on to his incorrect side of the road.

In the course of preparing this judgment I gave consideration to the fact that exhibit 'E' had not been disclosed in the plaintiff's discovery affidavit. In terms of Rule 34(7), in those circumstances, the document may not be used for any purpose at the trial by the party who was obliged, but failed, to disclose it, unless the Court grants leave for it to be so used. It had been submitted by counsel for the plaintiff that as the document did not damage the case for the plaintiff it was not necessary to disclose it. This appears to be the reason for the decision in Freeman v Freeman 1921 W.L.D. 1. However, in Durbach v Fairway Hotel Ltd. 1949(3) S.A. 1081 S.R. Tredgold J. said the following at p. 1083 :

> "A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage

> circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation "

Rule 34(1) requires discovery of all documents relating to any matter in question in the action which are or have at any time been in the possession or control of a party required to make discovery.

Exhibit 'E' relates clearly to the issue of negligence, and had it been disclosed it may well be that the defendants would have appreciated the significance of the document and not have incurred further costs. On the other hand the second defendant may have had an explanation that could have been given to his legal representatives in consultation and presented as evidence at the trial. As it is, the attorney for the second defendant was taken by surprise and without the assistance of a consultation endeavoured as best he could to obtain an explanation from the second defendant in re-examination.

I requested that the legal representatives of the parties attend in Court so that they could make submissions regarding the plaintiff having failed to discover Exhibit 'E'. They attended and the matter was postponed to a date to be arranged with the Registrar. This was 30 November 1982. On that day when the matter was called there was no appearance for any of the parties. A letter had been delivered to the Registrar the effect of which is that neither representative wished to argue the matter further.

As the Court has admitted Exhibit 'E' and the attorney for the defendants does not, apparently, wish to request the

Court to alter its Ruling (which the court can do - Dickinson and Another v Fisher's Executors 1914 A.D. 424 at 429; Desai v Engar and Engar 1966(1) S.A. 647 A.D. at 654 D), the exhibit remains on record as part of the evidence in the action. The Court could act mero motu, but as the defendants' attorney, for reasons best known to him, does not make the request, I infer that he is of the view that such request, even if granted, will not ultimately advance the case for the defendants.

Therefore, despite the court's reservations concerning the admissibility of exhibit 'E' I hold that the plaintiff has proved his case.

The defendants are ordered to pay to the plaintiff, jointly and severally, the one paying the other to be absolved

1. The sum of M3565 -
2. Interest thereon at the rate of 6% per annum calculated from date of judgment until payment thereof.
3. Costs of suit; these to include the qualifying fees of Mr. Murray, and the plaintiff is declared a necessary witness.

J. UNTERHALTER
ACTING JUDGE.

For the Plaintiff :

For the Defendant : Mr. C.M. Masoabi