C. of A (CIV) No 4 of 1985

IN THE LESOTHO COURT OF APPEAL

In the Appeal of

MOOJANE THABO	Appellant
v	
SOLICITOR GENERAL	Respondent (Civil Case No. T/390/82)

And in the Appeal of

MOOJANE THABO	First Appellant
and	
MOSHOESHOE KHOMOTSANE	Second Appellant
and	
MOTHETSI MAFEREKA	Respondent

HELD AT MASERU

CORAM

Schreiner A.J A
Aaron J A.
Odes J A.

J U D G M E N T

Schreiner, A.J A.

This matter involves appeals from a consolidated hearing of two actions In case No. T/390/82 the owner of a bus Moojane Thabo sued the Solicitor General for an amount of M48,000 being damage done to a bus of which he was the owner The plaintiff's declaration alleges negligence on the part of one Zakaria Marumo, who was employed by the Ministry of Works and acted as a grader driver in the course and scope of his employment with the State for which the Solicitor General is the representative defendant

In the second action, Civil Case No T/178/83, Mothetsi Mafereka, a passenger in the bus which was involved in the accident sued Moojane Thabo as employer of the bus driver, Moshoeshoe The amount claimed is M20 354 82, being the excess over M12,000 which the passenger has already recovered from the third party insurer It is alleged that the negligence of Moshoeshoe was the cause of the accident

which is described hereafter

At the Pre-trial Conference held between the representatives of the respective parties, the quantum of plaintiff's claim in Case No T/178/83 was admitted It appears from the judgment of the court a quo read with the pre-trial minutes that the agreement between the parties in Case No. T/390/82 was that the question of quantum would stand over for determination until after the question of negligence had been decided

The plea in the action between the owner of the bus and the Solicitor General contains no claim for a reduction in the amount of damages in the event of it being held that there was fault on the part of the plaintiff's driver It contains simply a denial of negligence and an allegation that the accident was due solely to the negligence of Moshoeshoe Notwithstanding the absence of such a plea, i.e. a plea to the effect that, in the event of it being held that the accident was due partly to the fault of the driver of the grader, the Court must, nevertheless, make an appropriate deduction from any damages should it hold that there was partial fault on the part of the employees of both parties The Apportionment of Damages Order No 53 of 1970 enables and, indeed, directs, a Court to make such a reduction in the event of it finding fault on the part of the claimant as well as of the defendant. In A.A Mutual Insurance Association Limited v Nomeka 1976 (3) SA 45 (AD) the Appellate Division of the Republic of South Africa decided that, under the identical provisions of Act 34 of 1956 of the Republic, it was necessary to make an apportionment provided that the plaintiff's fault was put in issue on the pleadings and notwithstanding the fact that apportionment was not specifically pleaded (see page 55) I agree with this view. Section 2(1)(a) of the Order

directs that, in the event of there being joint fault, "the damages recoverable . . shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage" The terms of the legislation are such as to require that a reduction be made in certain circumstances and it would follow that, if those circumstances are shown to exist during the course of a trial, the provisions of the Act must be applied whether there is a specific plea raising the issue or not

It should, however, be stressed that it is desirable that the question of apportionment should be specifically raised in the pleadings if it is considered possible that there was fault both on the part of the defendant and the plaintiff The present proceedings illustrate this The Court a quo, Mofokeng J , found no fault in the sense of negligence on the part of the driver of the grader It was therefore not necessary for him to consider the question of apportionment When the matter came on appeal it was argued without reference to the possibility that the Apportionment of Damages Order might apply if there was fault both on the part of the driver of the grader and of the driver of the bus The amount of the reduction in the plaintiff's damages, should it be found that there was fault on the part of both drivers, was not debated. This would undoubtedly have been discussed had the matter been mentioned in the defendant's plea as an alternative to the denial of negligence on the part of the grader driver and the allegation that the negligence of the driver of the bus was the sole cause of the accident.

At the trial evidence was first led on behalf of the plaintiff in Case No 390/82, Moojane Thabo. Thereafter there was

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evidence on behalf of the Solicitor General. No evidence was specifically led in the other action, Case No. 178/83, and consistently with what was discussed at the pre-trial conference at which representatives of all three parties were present, the plaintiff in Case No. 178/83 relies on the evidence of the defendant in Case No 390/82 and its case was argued on the record as a whole.

During the afternoon of the 25th August 1981 a collision occurred between a bus driven by Moshoeshoe and a road grader driven by Marumo who, by the time the action came to be heard, had died The trial court thus did not have the benefit of hearing his evidence and assessing his version of the events leading up to the collision

The collision occurred on a bridge not far from the entrance to it on the road between Hlotse and Pitseng and in the vicinity of Setene's place where it crosses the Hlotse River The bridge itself is narrow and does not allow of two vehicles passing each other The approaches to the bridge are open and the gradient from either side down to the bridge and the river is not steep The road has a gravel surface which, at the time when certain photographs were taken, appears to have bene in good condition The vision of a driver approaching the bridge from the direction from which the bus approached it is not materially affected by any bend in the road, though there is a slight curve about one hundred yards before entering the straight leading to the bridge.

Moshoeshoe says that he approached the bridge at a speed of about thirty kilometres per hour having slowed down from sixty kilometres per hour This is not a high speed in the abstract, but might, int he circumstances discussed below, have been somewhat

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excessive Moshoeshoe says that he saw the stationary grader on his righthand side of the road and the bus in front of him passing over the bridge. He says that there was room for the front bus to get passed the grader onto the bridge. He put it this way

> "The bus that was ahead of me crossed the bridge, the grader was still stationary as the bus passed As I drove close to the grader, I was so close and there was still a clear chance for me to pass, but as I was about to enter the bridge the grader moved As it moved it left from the right of the road moving towards the left entering the bridge I did hoot but I noticed that the driver of the grader did not hear the hooter as I blew it".

There being not enough room on the bridge for the two vehicles, the left end of the blade of the grader struck the front right tyre of the bus and punctured it The bus swung left probably because of the impact with the grader, nearly going off the bridge through the railing, and then careered to the middle of the bridge moving always to the righthand side, presumably because of the punctured tyre. It failed to reach the end and fell off the right side of the bridge through the railing The exact position of the grader after the collision is not clear, but it would seem probable that it came to rest at or near the point of impact with the bus

I deal firstly with the conduct of Marumo It seems clear that had he looked back up the road before setting his grader in motion after the first bus had passed, he would have seen the second bus approaching. The photographs of the grader shows a cab standing relatively high on the vehicle with glass windows providing a good view in all directions. It is not clear from the evidence whether the grader was facing the bridge or the road at the time it came to a halt to allow the first bus to pass The grader driver would either have had to look to his left or over his shoulder in order to ascertain

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whether the road was clear and it was safe for him to move onto the bridge. Being on the incorrect side of the road and moving from a stationary position it is clear that he was obliged to be extremely careful when moving onto the bridge

Marumo's actions did not however accord with this standard Having come to a halt on the wrong side of the road to allow the first bus to pass over the bridge, Marumo moved his vehicle onto the bridge and into the path of the second oncoming bus A grader is a slow moving vehicle and there is no doubt that he moved at a time when, to do so, created a dangerous situation. Whether he moved because he did not look back to see whether another vehicle was following the first bus, or whether he did look but failed to notice the plaintiff's bus, or whether he saw the bus but thought he might slip into the bridge ahead of it, cannot be ascertained. On any basis, however, Marumo was negligent and his negligence was, undoubtedly causally connected to the ultimate collision

I deal now with the alleged negligence of Moshoeshoe. He had a clear view of the road ahead of him He knew the bridge and must have known that, if the grader moved in the direction of the bridge, a very dangerous situation would arise. The presence of the grader on the incorrect side of the road should have made him appreciate that there was an unusual situation which required extreme caution. He said in his evidence that the reason why he did not apply brakes when the grader moved was that, had he done so, the bus might have skidded or overturned or missed the bridge entirely From this it must follow that though in absolute terms a speed of 30 kilometres per hour is relatively slow, it was not, in the circumstances, slow enough. Because of the existence of an unusual situation, the driver of the bus

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should have reduced his speed to an extent which would enable him to react appropriately and immediately to any movement of the grader. The distance between the point at which the grader was stationary and the point of the collision was approximately fourteen paces, and a period of some seconds must have elapsed between the time when it first started to move and the time when the collision occurred During that period, allowing for an ordinary reaction time, the driver of the bus should have been in a position to bring his vehicle to a stop before entering the bridge He did not do so This indicates that, either he was not keeping the grader under observation as he should have or that he was going too fast. The bus driver was therefore negligent.

The extent of the reduction of the damages sustained in Case No 390/82 now falls to be considered.

While the driver of both vehicles were negligent in the respects outlined, I am of the view that the driver of the grader, by moving his vehicle into the line of oncoming traffic, was executing an inherently far more dangerous manoeuvre than the driver of the bus. Being in control of a cumbersome machine, about to enter the road, the driver of the grader was under a duty not only to keep a proper look-out but also to exercise particular care in the circumstances Although the driver of the bus was also negligent in driving too fast, or in failing to keep a proper lookout, he was proceeding on the road and was, to an extent entitled to assume that his vehicle would be seen by the driver of the grader, and that the latter would allow the bus to pass before proceeding onto the highway as he had done when the bus ahead proceeded across the bridge.

The blameworthiness of the driver of the grader was accordingly

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significantly more serious than that of the bus driver Taking all factors into consideration, a reduction of one-third of the total damages awarded in this case would be appropriate

Having found operative negligence on the part of the driver of the bus the plaintiff in Case No. 178/83, an innocent passenger in respect of whom apportionment does not apply, is entitled to recover in full from the defendant.

- In Case No 178/83, the plaintiff was a passenger in the bus, and sued the owner of the bus on the basis of the driver's negligence There is obviously no room for reducing the damages to be awarded to him, as he himself was not negligent. Nor is there any room for apportioning liability for any part of plaintiff's damages to the Solicitor General, on the grounds of negligence of the driver of the grader, as the Solicitor General was not made a party to the action It follows that once it is found that there was operative negligence on the part of the bus driver, however slight that negligence may be, the plaintiff is entitled to recover the full amount of his damages from the defendant, even though the driver of the grader may also have been negligent. Where a collision is caused by the negligence of two persons, a person injured therein may sue both, or he may sue either one of them for the full amount of his damages. The mere fact that there has been a consolidation of the two trials does not mean that the Solicitor General has become a co-defendant in the action instituted by the passenger that is to be determined by the pleadings in Case No 178/83

The result is that the appeals in both cases succeeds and the respondent in each case is directed to pay the costs of the appeal.

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The orders of the court a quo are altered to read as follows

(In respect of Case No 178/83)

"Judgment is granted in favour of plaintiff in the sum of M20,354.82 with costs of suit".

(In respect of Case No. 390/82)

"(a) It is ordered that plaintiff is entitled to recover from defendant two-thirds of the damages suffered by him.

(b) Defendant is ordered to pay the costs of suit"

Case No. 390/82 is referred back to the court of first instance for the determination of the question of quantum of damages suffered by the appellant.

Signed W.H.R. SCHREINER
Acting Judge of AAppeal

I agree Signed S. AARON
Judge of Appeal

I agree Signed M.W ODES
Judge of Appeal

Delivered on the 26th day of May 1986 at MASERU.

For Appellants - Mr Snyman

For Respondents - Mr. Muguluma and Mr. Mofolo