

IN THE HIGH COURT OF LESOTHO

In the matter of:

JOSEPH MOKOENA

Plaintiff

v

OFFICER COMMANDING POLICE MAFETENG
ATTORNEY GENERAL

1st Defendant
2nd Defendant

JUDGMENT

Delivered by the Hon. Mr. Justice Sir Peter Allen
on the 28th day of September, 1988

This is an action brought by the plaintiff for damages for injuries caused in a traffic accident in Mafeteng District in October 1985.

The plaintiff (PW 1) now aged 26 years, is a former mine worker. His version was that at about 7.30 p.m. on Saturday 5 October 1985 he was walking beside the Main South 1 road which runs from Mafeteng to Matsaneng. He was on the right side facing Thabaneng ha Sempe and walking in that direction from Matsaneng. There were many motor vehicles coming towards him. It was dusk and the vehicles had no lights on yet.

One vehicle swerved off the road and came towards him. It was a white Land Rover with a Government registration number starting with 'X' but he did not see the

/figures ...

figures. There was a driver and a passenger sitting in the front. The plaintiff jumped backwards out of the way but it hit him and he fell down unconscious. He recovered consciousness in Queen Elizabeth II Hospital, Maseru on Monday 7 October. He had several facial injuries including a fracture of the cheek bone and jaw and loss of some teeth and cuts on his forehead.

He had been referred to that hospital from Mafeteng Hospital and he was discharged on 15 October 1985. He said that he had been working as a team leader in Western Area at Libanon Mine. In December he returned there and reported about his accident and requested to be re-employed. However his employers refused to re-employ him. He had tried unsuccessfully to find another job.

The hearing was adjourned for two days and the plaintiff was advised to try to find some documentary evidence of his being employed at the mine. At the resumed hearing he produced a photocopy of a payslip (exhibit A) which he said he had obtained from the mine on the previous day. The payslip is dated 24 August 1985 and the plaintiff's name does not appear on it. There is only a company no. 290793 which the plaintiff stated was the number allocated to him. He was asked to produce his passport in which, it appears, mine companies normally enter the holder's company number. It was not entered in his passport because it was a renewed passport issued on 31 March 1988. The plaintiff said that all the relevant information was in his old

/passport ...

passport which had been withdrawn when the new one was issued.

It was pointed out to the plaintiff that the pay-slip had been issued by Bafokeng South Mine which is in Bophuthatswana and is quite a different mine from Libanon Mine in Western Area where he had been working. The plaintiff explained that he had worked at Bafokeng South for just over a year. Before that he had worked at Libanon until mid-1983 when there was a strike and he had been discharged. He claimed that this was shown in his old passport. He had erroneously told the Court that he worked in Libanon because he had been there longest and he usually referred to it when he spoke of his past working in the mines. At the time of the accident in October 1985 he had been on leave from Bafokeng South and that was where he had returned to after the accident.

In addition the plaintiff had told the Court that he had been earning M.444 per month as a team leader. The document (exhibit 'A') showed that his gross monthly earnings in August 1985 were M.345.12 and his net pay M319.57. His explanation of this discrepancy was that he had received an increment after that. He did not produce any document to support this claim.

The plaintiff further alleged that in November 1985, after his discharge from hospital, he and other members of his family went to see their chief, Chief Sempe, at his office. The first defendant, Captain Mojakisane,

/was there ...

was there and he stated in front of them and the Chief that he was responsible for the accident and asked for the matter to be settled. But nothing was decided as the Chief wanted the plaintiff's father to be present.

The plaintiff called two witnesses to support his evidence about what was alleged to have happened at the Chief's meeting. Osia Moremi (PW 3), a 64 years old farmer, stated that he was invited to attend the meeting by the plaintiff's mother (PW 4) because he is related to the family. He insisted that the plaintiff was not present nor was his grandmother, whom he said he died in the 1970's. This witness said that the first defendant was present and that he told the Chief that the family need not make any further enquiries as he (the defendant) was the one who had caused the accident to the plaintiff and he wanted to know how much compensation he should pay. The Chief replied that no agreement could be made in the absence of the plaintiff's father.

The plaintiff's mother, Mathapelo Mokoena (PW 4), stated that on another day before the meeting she had been sent by the Chief to see the defendant at the police station. She was alone with the defendant in his office there and he told her that he was responsible for the accident. Then, on another day early in November 1985, she attended the Chief's meeting together with the plaintiff and someone called Sellone and her late elder sister who died in 1987, and PW3 Osia Moremi, whom she referred to as

/Ramokoro ...

Ramokoro Moremi, a relation of the family by marriage. Mathapelo stated that, in front of them all and the Chief, the defendant admitted that he was the one who caused the accident by colliding with the plaintiff who was walking by the road side at the time. She added that the Chief decided that he wanted the plaintiff's father to be present before considering the matter any further. At that time the plaintiff's father was working at Johannesburg and nothing more was done about the matter after that.

The dental surgeon Dr. Matjoa (PW 2) testified that he examined and treated the plaintiff while he was at Q.E.II Hospital. The plaintiff had a comminuted fracture of the left cheek bone (maxilla), a depressed fracture below that and a fracture of the chin at the midline of the mandible. There were also lacerations on the forehead. The fractured segments of the lower jaw were wired and so too were the upper and lower jaws wired together for about six weeks. Four teeth (lower incisors) were removed.

The effects of these injuries were that there was a visible deformity of the left side of the face, the cheek bone stuck out prominently. This limited the movement of the mandible and the plaintiff could not open his mouth fully. There was also the possibility of fibrosis of the face muscles and some pain. The corrective plastic surgery for his face, if desired, would be very expensive in the Republic, at least R.2000-3000. The dental surgeon put in his report (exhibit B).

/The plaintiff ...

The plaintiff complained that the injured side of his face was insensitive so he used the other side for eating. He finds that prolonged speaking causes pain in his jaws and even running also pains his jaws. Instead of having the wires removed locally the plaintiff went to Baragwanath Hospital at Soweto of his own volition and the wires were removed there.

For the defence the first defendant Captain Mojakisane (DW 1) testified and so did the passenger in the Land Rover on that day, L/Sgt Thabisi (DW 2).

Capt. Mojakisane stated that he was driving a police Land Rover registered number X9941 from the direction of Matsaneng towards Mafeteng at sometime between 7.45 and 8.00 p.m. on 5 October 1985. It was already dark and the headlights of his and other vehicles were full on. There was another motor vehicle about 200 metres ahead but he could only see the vehicle's red rear-lights. He saw the vehicle zig-zagging in the road at one point and then it went on.

When he arrived at that place he saw a person lying beside the road on his left side. He stopped, got out and examined the person and saw that he had head injuries and he was still alive. He decided to follow after the vehicle in front as he suspected that it had knocked the man down without stopping. He woke up his passenger who was sleeping, but he only chased after the vehicle for a short distance before he realised that he ought to go back and assist the victim, so he returned to

the scene.

By that time there were two other vehicles at the scene and one of them, driven by a teacher from St. John's High School, took the victim to Mafeteng Hospital. The defendant drove to the police station and prepared a medical form which was sent to the hospital. He also informed Sgt. Rasebolelo, the traffic sergeant at Mafeteng.

Next day the defendant visited the victim in Mafeteng Hospital but found that he was still unconscious and unable to speak. He agreed that he later saw the plaintiff's mother 'Mathapelo (PW 4) at the police station. He told her that he was still trying to identify the unknown vehicle which had knocked down her son. He denied admitting to her that he was responsible for the accident.

He went to the Chief's office on 6 October to inform the Chief about an accident to one of his subjects. He denied attending any meeting or seeing the Chief in November or December of that year. He also denied admitting to the Chief and other people that he was responsible for the accident. He had never seen Moremi (PW 3) before. He agreed that he met the plaintiff at the police station later when he came to enquire about his case and he told him that he was still trying to trace the driver and vehicle which had probably knocked him down. The defendant said that he had no quarrel with the plaintiff or any of the witnesses and he did not know why they would incriminate him or speak against him.

/When asked ...

When asked the colour of his Land Rover the defendant said at first that it was white. Then he changed his answer and said it was beige.

L/Sgt Thabisi (DW 2) agreed that he was asleep in the passenger seat of the Land Rover at the time. If he was on duty he should have been awake. He was awakened by Capt. Mojakisane telling him that there was a person lying by the roadside. He saw the victim and the red lights of a motor vehicle going in front of them towards Mafeteng at high speed. They started to pursue the vehicle but quickly gave up the chase and returned to the scene. The victim was unconscious and a school teacher told them that he would take the victim to hospital at once, and he did so.

Apart from reporting the matter at the police station and taking the traffic sergeant to the scene, this witness had no more to do with the matter. But he denied that the defendant stopped at the scene and got out to examine the victim before pursuing the other vehicle. The L/Sgt said that they merely slowed down and looked out of the windows before driving on after the vehicle. He also insisted that the Land Rover was white in colour. He denied that their vehicle had knocked down the plaintiff.

Unfortunately in this case there were contradictions and discrepancies in the evidence on both sides. I found Capt. Mojakisane's version difficult to believe. If he did not see the plaintiff being knocked down then he could

/not know ...

not know which of the many vehicles on that road had been responsible. There did not seem to be any sense in pursuing a vehicle, which he could not identify, which he did not have good reason to suspect had caused an accident, and which he could not expect to overtake anyway. Furthermore, I cannot understand how he could leave a person with a serious head injury lying in the road without stopping to give immediate assistance and attention. He could at least have left the L/Sgt at the scene. But, as an experienced police officer, he should have known that attending to an injured victim takes priority over chasing a possible offender.

It was also suspicious that he changed the colour of his police vehicle from white to beige when he was questioned about it. I believe the L/Sgt that the Land Rover was white. I found the defence to be unlikely and unimpressive.

However, the onus of proof lies squarely on the plaintiff to prove his claim on the balance of probabilities. There were a number of gaps in the plaintiff's case as well as contradictions and inconsistencies. Unfortunately the witnesses called were relatives who were both likely to be biased in favour of the plaintiff and there was no independent eye-witness to give the Court an unbiased account of what happened at the Chief's meeting, especially of the alleged admission by the defendant. The obvious person to be called to testify was the Chief himself, but neither side called him.

/The plaintiff ...

The plaintiff said that he was present at the Chief's office with his mother (PW4), Moremi (PW3) and his late "grandmother". His mother agreed with that list and added that the "grandmother" died only last year. But Moremi (PW3) disagreed with both of them. He insisted that the plaintiff was not present and that the "grandmother" could not have been present either because she died way back in the 1970's. So what is the Court expected to believe? The plaintiff produced both of these witnesses as witnesses of the truth and yet one of them contradicted the other witness as well as the plaintiff himself.

The plaintiff first told the Court that he had been working at Libanon Mine in Western Area and, then, when asked to produce documentary proof of that, this document produced two days later came from a different mine altogether. The plaintiff's explanation that he usually referred to the Libanon Mine because he had worked there longer than at Bafokeng South was not very convincing. He was testifying on oath in Court and he was asked specifically to state at which mine he was working before the accident. There was no good reason for getting it wrong, especially as he also claimed to have gone back there after the accident in order to try to resume his job. He must have known to which mine he went and which mine he was talking about.

Furthermore, the document produced (exhibit B) did not have his name on it, only a company number. Obviously he would be required to prove that this number had been allocated to him. He knew that he had a new passport which

/did not ...

did not contain any entries in it made by a mine office which he claimed had been entered in his old passport. Since he could not prove the connection by means of his passport, the obvious answer should have been to ask at the mine office from where he obtained the payslip, to supply him with a document stating his name and the fact that the number on the payslip had been allocated to him. That should not have been very difficult to obtain if he had explained to the office that it was required for a court case. The plaintiff cannot ask or expect the Court to believe that this payslip refers to him without some such proof. Otherwise it could belong to anybody and he might have borrowed it merely to use in Court. I am not prepared to take his word for it.

In addition, the plaintiff testified that his pay was M.444 per month whereas the payslip refers to an amount which is over M.100 less than that claimed. His explanation that he received an increment just afterwards was also not proved, yet he could have requested the mine office to supply a copy of a later payslip showing the increased wage rate. Why was this not done? I also find it difficult to believe that an increment on such a low rate of wages would have been as much as over M.100 per month. I certainly would not find this to be credible without satisfactory documentary proof.

The fact that the defence case is far from convincing does not mean that the plaintiff should automatically succeed in his claim. He still has the burden of proving his case and I cannot say that he has convinced me of the

genuineness of his claim to have been working in that mine at that wage. Nor can I accept the conflicting evidence of his two witnesses about who was supposed to have been at the Chief's meeting. It follows from that that whether or not the defendant did actually admit that he was responsible for the accident has still not been satisfactorily proved. I am not prepared to hold that I believe the Captain's denial because that, too, was unconvincing. The result can only be unsatisfactory from the plaintiff's point of view as it is his case and it is up to him to prove it. In view of these various contradictions and inconsistencies I find that I am unable to rely sufficiently upon the plaintiff's alleged identification of the vehicle involved in the accident.

With regard to the damages claimed I will repeat what I said in Court about the plaintiff's claim for M.2000 as contumelia. This head of claim is clearly inappropriate and I do not know why the plaintiff's attorney has included it. Contumelia is the intentional invasion of a person's rights to his dignity and reputation and liberty. It is a claim for an insult inflicted against any of these rights. It is applicable in such cases as claims for defamation, assault, false arrest, false imprisonment, malicious legal proceedings, rape, seduction and adultery. Unless one of the above rights was infringed I cannot see how it could be applicable to injuries caused in an ordinary traffic accident. Consequently I would not be willing to consider a claim under this head.

/With regard ...

With regard to the M.38,000 claimed for loss of present and future earnings, I would have thought it reasonable to claim for loss of earnings only for a specific period. The medical evidence does not disclose any permanent physical handicap which would prevent the plaintiff from working in other jobs, such as in a shop or factory or agricultural labour. He said that he had tried to obtain work but had not succeeded. I do not believe that he has tried hard enough. He is only 26 years old and otherwise physically fit. He had the use of all of his limbs and he should make some real effort to find work suitable to his mental and physical capabilities. Furthermore, there was no evidence of what the M.38,000 actually represented.

Claims for loss of earnings are for special damages which must be set out in full, with calculations shown, and then proved properly. A vague claim made in the hope that the Court will do all the calculations is not going to get the plaintiff very far as far as I am concerned. In this particular case the plaintiff failed to prove that he had worked in a particular mine at a specific wage, as I have already found, and so his claim under this head would have failed anyway.

Finally, with regard to the general damages claimed, which the plaintiff asks the Court to assess at M.10,000, Mr Phafane was unable to cite any Lesotho cases. He referred to an unreported case from the Eastern Cape

/Division ...

Division of Van Blerch v Marine & Trade Insurance Co. Ltd in May 1971 in which an apprentice vehicle body-builder aged 20 years was involved in a vehicle collision in which he sustained multiple injuries to various parts of his body including a fractured jaw and cheek bone and loss of teeth. There were other serious injuries in addition, such as a severe head injury causing personality changes, fractures of the right arm and left leg and foot and an injury to his genitals. The general damages for shock, pain, suffering, disfigurement, loss of amenities and disability were assessed at R.9000. This was clearly a more serious set of injuries and consequences than in the present case.

In Laubscher & Anor. v Commercial Union Assurance Co. of S.A. Ltd 1976(1) SA 908, a small boy was injured in a vehicle collision and his jaw was broken in three places and it had to be wired up. This altered the shape of his mouth and his lips could not be made to meet together; and he could not open his mouth as fully as before. He was awarded R1250 general damages.

Another unreported case in the same year was Strauss v Santam Insurance Co Ltd in which a 54 years old farmer was injured in a vehicle collision and he sustained facial injuries including a fractured jaw and loss of all teeth in the lower jaw resulting in problems when eating. There were also facial scars. He was awarded R.3750 general damages. The trial judge said that he was prepared to take into account the considerable change in the value

/of money ...

of money when assessing damages. In this he was following an observation of Schreiner J.A. in Norton & Ors. v Ginsberg 1953(4) SA 537 (A.D.) which I believe is no less true today.

Consequently in the present case, taking all these factors into account, I would have assessed general damages at M.4500 if I had awarded any.

As it is, for the reasons which I have already explained, the plaintiff has unfortunately not succeeded in proving his claim on the balance of probabilities.

With regard to costs, I have to say with regret that I consider the testimony of the first defendant, Captain Mojakisane not to have been completely truthful and honest in several areas and consequently my decision in this case might well have been different if the plaintiff had only taken more trouble to prove his case. Therefore I am not disposed to condemn the plaintiff in costs.

Accordingly this claim is dismissed but there will be no order for costs.

P. A. P. J. ALLEN
J U D G E

28 September, 1988

Mr. Phafane for the plaintiff

Mr. Lenono for the defendants