CIV/T/359/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

MASERU ROLLER MILLS (PTY) LTD Plaintiff

V

PITSO MAKHOZA 1st Defendant
RETSELISITSOE MONYANE 2nd Defendant

REASONS FOR JUDGEMENT

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 8th day of January, 1991.

In this summons the plaintiff claims against the two defendants above, the following:-

1. Payment of the sum of M16,787.09.
2. Costs of suit.
3. Interest on the above amount calculated from the date of issue of summons to date of payment at the rate of 11% per annum.
4. Further and/or alternative relief.

I have observed under item 3 above that interest is sought to be calculated from the date of issue of summons. If by this was invisaged that payment of the amount claimed would be effected before the court became seized of the matter, there would be no quarrel with the claim under item 3. But if it was maintained that even after the court was seized of the matter and even perhaps found for the plaintiff at the end of the day it seems to me that the claim under item 3 could not be sustainable.

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The normal rule is that interest runs from the date of judgment, not before. If judgment is granted with interest and costs then interest starts running from the date of taxation. The basic rationale being that interest should not exceed the principal claim. The effect of this is to avoid accumulation of interest through delay before taxation.

On 4th December, 1990 the plaintiff's claims were dismissed with costs. The reasons for the dismissal follow.

Before oral evidence was led on behalf of the respective parties it was agreed as follows:-

(a) that the plaintiff and the 1st defendant agreed on the quantum of the plaintiff's claim.

(b) The only inquiry is whether the driver of the 1st defendant's vehicle was acting within the scope of his employment with the 1st defendant.

(c) That it was necessary to determine whether the driver of the 1st defendant's vehicle was negligent.

and

(d) If he was, then whether he incurred his principal's vicarious liability.

The plaintiff elected to proceed against the 1st defendant only. The second defendant was the driver and employee of the 1st defendant.

The oral evidence went as follows:-

P.W.1 Moipelaetsi Sethathi testified on behalf of the plaintiff that on 18th July, 1987 he was on duty driving the plaintiff's 8 ton Mercedes Benz truck.

P.W.1 had parked his truck along side the Main North 1 road. He parked this truck on the left hand side of the road but four feet outside it. He had parked this truck facing away from Maseru towards where otherwise he had been driving all along from his trip East. He wanted

/to buy

to buy food from a wayside shop.

Before he had switched off his truck and while still in its cabin he saw three vehicles coming towards Maseru; thus towards him for by then his truck was facing East already.

The foremost vehicle was indicating for a turn to its left. The hindmost vehicle had a very loud sound as it was travelling at a very high speed.

The hindmost truck struck the ~~middle car~~ a Pugeot Station Wagon immediately ahead of it while this latter was trying to give the foremost truck some chance to turn left by slowing down and inching to the right a little.

The Pugeot was struck by the hindmost truck and as the Pugeot spun around it hit the truck that was trying to turn left ahead of it. The foremost truck capsised and landed on its left outside the road.

Then the hindmost truck travelled over the bonnet of the Pugeot and proceeded towards P.W.1's truck and struck it.

P.W.1 testified that when struck the Pugeot had not gone across the broken white line diving the road carrying traffic to and fro. He stressed that the Pugeot and the foremost truck were following each other and had kept to their correct side of the road when the hindmost truck first struck the Pugeot.

Under cross-examination P.W.1 stated that the heavy hindmost truck he had been talking about was a MAN-truck and described it as a horse without a trailor.

P.W.2 PIET MOHOLISA corroborated P.W.1's evidence. P.W.2 was the driver of the Pugeot. He testified that he never crossed the white broken line tnotry to overtake the truck ahead of him.

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He testified that when he saw that the truck ahead of him was about to turn he looked at his rear view mirror and saw that the truck coming behind him was very close and travelling at too high a speed. Consequently the truck behind hit his which in turn hit the truck ahead and over-turned it along side the way. It was P.W.2's evidence that there was nothing he could do to avoid the accident.

Indeed enough testimony is to be gathered from the extent of the accident regarding the great force with which the 1st defendant's driver's truck struck the vehicles ahead of it. From this alone it is plain that the 1st defendant's driver was highly negligent. However even though he was available before court none of the parties called him to testify.

At the close of plaintiff's case the 1st defendant applied for his discharge on the grounds that no proof of negligence on his driver's part had been established. I have already stated that the speed at which that driver was travelling, coupled with the extent of the resultant damage to the vehicles involved he must have been negligent.

The only remaining question to answer is whether the 1st defendant is vicariously liable for the damage incurred by the plaintiff. In order to do this the plaintiff bears the onus to prove that the 1st defendant's driver at the time of the accident was acting within the scope of his employer and in furtherance of the latter's interests.

Evidence led by D.W.1 LIHOETE NKAEKAE shows that he is the 1st defendant's employee. His duties involve supervision of his master's vehicles. Every driver in the employ of his master is answerable to him.

He testified that as this was on a Saturday the 1st defendant's trucks were not working but had been parked in a yard where they usually are parked on such occasions. Their keys are kept in the reception area of the 1st defendant's Hotel and can be released on D.W.1's

/instructions.

instructions. That day he gave no such instructions to anybody to let 1st defendant's driver of the MAN-truck have them.

D.W.1 discovered at around 4 p.m. that the truck in question was not where it should be. He discovered it at around 7 p.m. that day and its driver told him he had gone in it to collect his children and clothing.

As supervisor D.W.1 is charged with the responsibility of control on the movements of his master's trucks. He had not allowed D.W.1 to use the truck that day. He never instructed this driver to take the horse that day.

Under cross-examination D.W.1 conceded that 1st defendant is a successful businessman but vehemently denied that the 1st defendant could instruct anybody to use the trucks without his knowledge as the foreman. As foreman instructions regarding the use of the trucks are transmitted through him by the 1st defendant. That day the 1st defendant was away in Durban. It was reported to him by D.W.1 what had occurred to this particular truck and the circumstances relevant thereto.

D.W.1 said even though he was not on duty on the day in question he knew that the trucks were not working that day.

D.W.2 the 1st defendant gave evidence illustrating the manner in which he has determined his business to run. He has authorised D.W.1 to take charge of the control of the trucks and report to him.

He testified that because it was a Saturday his driver was not on duty. The driver is usually on duty from Monday to Friday. As he was away in Durban he did not know why the driver took the truck. He only depended on D.W.1's word as to how the driver could have taken the truck. He learnt that he had taken it without D.W.1's permission.

It was argued for the plaintiff that D.W.1 had too

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much at stake to own up and say he had given permission to the driver to take the truck away. It was argued that D.W.1 had his job to think about. He therefore could not risk losing it by owning up that the truck was released with his knowledge. While there might be some merit in this submission its full force is destroyed by the insistence that the driver took this horse to promote the interests of the 1st defendant's business. Evidence showed that D.W.2's business interests with regard to this truck consist in the carting of liquor. This truck only manages to secure such interests when it is pulling the trailor. Evidence abounds that the trailor was not at the scene of the accident. The trailor had remained in the yard. Only the horse was at the scene. D.W.2 testified that the horse has hardly any space in or on it where liquor supplies which he usually carries in the trailor could be placed in order to be carted.

I was impressed with his statement that in rare occasions when the stocks on sale are exhausted on week-ends small trucks are used to cart and replenish further supplies.

For this reason it seems clear to me that the driver of the MAN-truck in taking the horse on a Saturday - a non-working day - was doing so without his master's or supervisor's knowledge and permission but rather did so in pursuit of some frolic of his own.

The 1st defendant is thus freed from liability to the plaintiff who has failed to discharge the onus placed on him. As stated earlier the plaintiff's action is dismissed with costs.

J U D G E

8th January, 1991

For Plaintiff : Adv. Fischer

For 1st Defendant: Mr. Koornhof

For 2nd Defendant: In Person