CIV/T/182/87

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOTUMI MOKHITLI	Plaintiff
and	
THABO MPHOFU	1st Defendant
THABISO MPHOFU	2nd Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 31st day of July, 1991

The plaintiff is claiming damages in the sum of M18,100-00 from both defendants jointly and severally one paying the otehr to be absolved. As a result of a colli ssion between the plaintiff's vehicle Reg. No. AA182 and the first defendant's vehicle Reg. No. A 1842, the plaintiff's vehicle became a write-off. The plaintiff alleges that the collision occurred as a result of the negligence of the second defendant who was driving the first respondent's vehicle along Mohale's Hoek - Quthing road acting within the scope and during the course of his employment with the first defendant. He alleges that the second defendant was negligent in the following respects: he drove the same vehicle at an excessive speed; he failed to keep a proper look-out for other traffic on the road and more particularly for plaintiff's vehicle; he drove on his incorrect side of the road; he failed to stop when by doing so he could have avoided the collision.

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The first defendant filed a Notice of Intention to defend the action but the second defendant did not. In his plea the firstJ defendant raises two defences, namely that the second defendant did not drive the said vehicle during the course and within the scope of his employment with the first defendant. He drove the said vehicle while on a frolic of his own and without authorization or approval whatsoever from first defendant. Secondly, that the driver of the plaintiff's vehicle drove at an excessive speed; he drove on the incorrect side of the road; he faield to take all appropriate measures which he should have taken to avoid the collision.

At the trial the plaintiff called as a witness one Heinz Fiebig who is the managing director of a company called Bedco Auto Clinic which specializes in panelbeating. He testified that he knows panelbeating and that the plaintiff brought his vehicle to him for panelbeating. The registration number of that vehicle was AA 182. He made a quotation for him. The damage was so extensive that he decided that the vehicle was a write off. The book value of the vehicle was M19,600 and the scrap was valued at M1 500. He made the quotation Exhibit A. He said that the vehicle he saw was a 1985 model. Although he had not written any examinations he had practical experience in panelbeating and motor vehicles repair in general.

The plaintiff testified that on the day in question he was a passenger in his own taxi driven by one Sampo Ralebitso who is late. It was after 8.00 p.m. and the headlights of his vehicle were already switched on.

After passing Masitise he saw a tipper truck travelling in the opposite direction coming towards them. It was moving on the incorrect side of the road and the headlights were not dimmed. It was moving at a high speed. The lights of his own vehicle were dimmed. The truck came straight towards them and collided with his vehicle causing extensive damage to the right side of his vehicle. His driver was killed in that accident. Thereafter the second defendant came to him and plaintiff asked him to help him carry the people who were injured to the hospital. The second defendant refused and said that his own people were also injured. The second defendant drove away even before the police came. The accident occurred after his vehicle had passed a culvert.

The second defendant was criminally charged and he pleaded guilty to the charge. He was convicted and committed for sentence by the High Court. In cross-examination the plaintiff denied that it is an afterthought that the truck's lights were not dimmed. His driver was driving at a speed of between 45 and 50 kilometres per hour. He says that he actually looked at the speedometer because he sat on the front seat so that he could warn the driver when he drove at a high speed. He and his driver were not drunk that night. The road at the culvert was narrow and allowed only one vehicle to pass at a time. He denied that the truck got to the culvert before his vehicle. When it was put to him that his vehicle was bought for M2,0000-00 from one Thinyane Kobeli he said he did not know that but he had given his brother about M19,000-00 to buy the vehicle for him.

The plaintiff says that he knew that the truck of the first defendant was hired by L.C.U. but he does not know that according to the contract it was supposed to work during weekdays and not during the weekend. He does not know that the second defendnat drove the truck on a frolic of his own on the day of the accident. However, he says that owner of the vehicle had to keep the truck in a safe place during weekends so that the second defendant could not use it. He had no personal knowledge that the truck was hired by L.C.U.

The first defendnat called Mr. Molapo Mothuntsane who is the Deputy Traffic Commissioner. He testified that his duties include registration of motor vehicles and the keeping of records concerning vehicles registered in this country. He produced a copy of a registration certificate for motor vehicle Reg. No. AA 182 which was a Toyota Combi, model 1977 and the owner was M.A. Mokhitli. The registration certificate was marked Exhibit B. The vehicle was transferred from one Thinyane Kobeli. The change of ownership forms are Exhibit C. In that document the vehicle is described as aToyota Hiace, 1977 model.

Another document handed in by Mr. Mothuntsane is a declaration in respect of a sale of registrable goods for purposes of sales tax Exhibit D. In that document the vehicle is shown as a Toyota 1977 model and the value at which it was sold was M2,500-00 for which an amount of M300-00 was paid as sales tax.

The first defendant testified that in February, 1987 he owned a truck with registration number A 1842 which he had bought from one Samuel Matekane. The vehicle was hired by L.C.U. and was used in Quthing. The agreement between himself and L.C.U. was that the vehicle would be used from Monday to Friday only. During the weekends it was to be parked at the Roads Camp in Quthing and was not to be used at all. The second respondent was his driver and had been instructed not to use the vehicle during weekends. He says that on the Sunday in question when the collision occurred the second defendant was driving the vehicle on a frolic of his own and whatever delicts he committed cannot he said to have been committed during the course and within the scope of his employment. The second defendant was travelling with his girl friend and was not on any errand of L.C.U. He further alleged that the second defendant was not negligent. When it was put to him that in the application for rescission of the default judgment granted against him he deposed that the vehicle which collided with plaintiff's vehicle did not belong to him but instead to one Samuel Matekane, he said that he never said so but said that he bought the vehicle from Samuel Matekane, however the registration documents were still in the name of Samuel Matekane.

The first issue that I wish to dispose of is that concerning the value of the vehicle of the plaintiff at the time of collision. On the 11th November, 1986 when ownership was changed from Thinyane Kabeli to the plaintiff it was declared that the vehicle was a Toyota Hiace and that it was a 1977 model. At the Sales Tax Department it

was declared that the value at which the vehicle had been sold was M2,500-00. In other words the plaintiff has in his possession or in the possession of his late brother's estate a registration certificate which clearly shows that his vehicle is a 1977 model but in 1987 when the same vehicle is involved in a collision we are now told that it was in fact a 1985 model and that the value of M2,500 was merely intended to cheat the sales tax department, the true value of the vehicle is M19,600. I cannot allow the plaintiff to get away with fraud for the second time. The ownership documents prove beyond doubt that the plaintiff's vehicle is a 1977 model valued at M2500.

The quotation by Bedco Auto Clinic (Exhibit.A) has very little probative value because it does not show the chassis number and the engine number of the vehicle that was brought to them for a quotation. All they recorded was the registration number. I think that was not enough because the plaintiff and his brother may have placed the plate numbers on a scrap they had found to replace the vehicle that was actually involved in the accident. I am making this allegation because the plaintiff said that the value of the vehicle was drastically brought down in order to cheat the sales tax department. They are dishonest and very untrustworthy people who are capable of distorting the facts for their own convenience.

I am of the view that P.W.1 was wrong to use the 1987 book-value because he had not seen the vehicle before the collision. Book-value is used when a vehicle is traded in because the buyer

can check the condition of the vehicle and then resort to the book-value. In the present case what P.W.1 had to assess was the cost of repairing the damage and then to decide that the repair of the damage exceeded the value of the vehicle. He did not do that but simply concluded that the vehicle was a write-off and resorted to a book showing the value of the 1985 model Toyota Hiace. Such a book is unhelpful in court when damages suffered by the plaintiff are concerned because the value of the vehicle before the accident must be established.

The term "course of employment" has been defined in a number of cases in the Republic of South Africa. In The Law of Delict , 7th edition, R.G. Mckerron summarizes the authorities in the following words at p. 95:

> "But the master's liability is not confined to acts done by the servant within the master's instructions or reasonably incidental thereto. It is now settled law, both in South Africa and in England, that the master's liability extends to all acts falling within the general scope of the servant's employment. (Estate Van der Byl v. Swaneppoel, 1927 A.D. 141, 147). Whether the act was within the scope of the servant's employment or not is a question of fact, depending upon the circumstances of the particular case. The test usually applied by our courts is: Did the servant do the act while about the business of his master, or did he do it while on the business of his master, or did he do it while on his own business and for his own purpose? (Mkize v. Martens, 1914 A.D. 382, 390)."

In the instant case it is common cause that the vehicle of the first defendant was hired by L.C.U. to carry quarry and was to be used from Monday to Friday. During the weekend it was to be parked at the Road's Camp. The first defendant testified that the second defendant had been specifically instructed to park the

vehicle during the weekend and not to use it. Evidence has been given that on that fateful night the second defendant was having a joyride with his girlfriend when he negligently collided with the plaintiff's vehicle. The second defendant gave a good impression to the Court and appeared to be an honest and credible witness. He explained that the affidavit in the rescission application was prepared by his attorney in a language he does not understand. His instructions were that he bought the vehicle from Samuel Matekane but the transfer of ownership documents had not been completed and the vehicle was still registered in the name of Samuel Matekane. I entirely accept his explanation because it may be that legally speaking his attorney found that the vehicle was still the property of Samuel Matekane. It is true that he was taken before a Commissioner of Oaths and that he acknowledged that he knew and understood the contents of the affidavit. It does not mean that the Commissioner of Oaths actually read back and explained to the defendant the contents of the affidavit. I am of the opinion that once the lawyer has misunderstood the instructions and the affidavits is prepared, that is the end of the matter. The misunderstanding between the client and his attorney can rarely be discovered by the Commissioner of Oaths.

I am of the opinion that the second defendant was driving the plaintiff's vehicle on a frolic of his own and that he alone is liable for the damages proved by the first defendant through the evidence of the Deputy Commissioner of Traffic, Mr. Modapo Mothuntsane.

The evidence of the plaintiff that the second defendant drove negligently by driving at a high speed on the incorrect side of the road and that he failed to stop when by doing so he could have avoided the accident, has not been rebutted. It is common cause that the second defendant was convicted on his own plea of guilty.

In the result judgment is entered for plaintiff in the sum of M2,500 with costs against the second defendant.

The claim against the first defendant is dismissed with costs.

J.L. KHEOLA
JUDGE

31st July, 1991.

For Plaintiff - Mr. Mohau
For Defendants - Mr. Nathane.