CIV\T\554\87

IN THE HIGH COURT OF LESOTHO

In the matter between:

SINA THATELI — Plaintiff

and

'M'ACHABELI JINGOES — 1st Defendant
TEBOHO MOOROSI — 2nd Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 22nd day of March, 1994

The plaintiff is claiming payment of the sum of M13,943-16 as a reasonable cost of repairs to her vehicle, interest thereon at the rate of 14% from the date of the issue of the summons and costs of suit.

The plaintiff is a businesswoman who runs taxis. On the 9th November, 1986 one of her taxis with Reg. No. A8080 was involved in a collision with the first defendants taxi with Reg. No. A3630. The collision took place at ha Moruthoane along the Main South I Public Road. The plaintiff's vehicle was driven by one Khoasi Liebaha who died two days after the accident as a result of the injuries he sustained. The first defendant's taxi was being driven by the second defendant who was subsequently charged

with culpable homicide. He pleaded guilty. He was sentence to a fine of M200-00 or Nine (9) months' imprisonment. On review by the High Court the sentence was varied to Nine (9) months' imprisonment without the option of a fine.

The plaintiff testified that her taxi was licensed to carry passengers between Maseru and Mafeteng. On several occasions when she drove her taxi along that route she often saw the first defendant's taxi travelling along the same route and carrying passengers. After the collision she took her vehicle to three different panelbeaters, namely S.M. Motors from whom he got a quotation of M19,000-00; Bataung Garage whose quotation was M16,076-00 and Evergreen Motors whose quotation was the lowest M13,943-16. She accepted the last quotation on which she is basing her claim. That quotation is Exhibit "A". She bought the vehicle in question for M21,855-00 in 1983.

The second defendant gave evidence on behalf of the plaintiff. On the day in question he was driving the first defendant's taxi travelling from Mafeteng to Maseru. When he came to Moruthoane's he overtook three vehicles and collided with the plaintiff's vehicle which was parked on the side of the road facing in the opposite direction. He admitted guilt because it was not safe to overtake at that spot and time. He knew that the taxi he was driving was not licensed to travel between Maseru and

Mafeteng. However the first defendant had instructed him that during the weekend i.e. Friday, Saturday and Sunday, he must operate between Maseru and Mafeteng because on those days there would be many people, especially miners from the Republic of South Africa, travelling along that route. The first defendant used to accept the money he collected by these trips to Mafeteng which she had authorised. Even the money he had collected on the day of the accident was paid to her and she accepted it.

The defence of the first defendant is not that the second defendant was not negligent but it is that she never authorised him to carry passengers between Maseru and Mafeteng. In other words the second defendant was on a frolic of his own for which she cannot in law be held responsible. Her vehicle Reg. A3630 was licensed to carry passengers between Moshoeshoe II and the railway station via ha Hoohlo. Exhibit "B" is her C-Permit in respect of this particular vehicle. The second defendant was well aware of the route and used to carry Exhibit "B" in the vehicle. In addition to that every morning she warned her drivers not to deviate from the prescribed routes. She never received monies for these secret trips to Mafeteng by the second defendant.

Lefa Ramahlatsa confirmed that every morning he or the first defendant warned drivers not to deviate from the prescribed

routes. He was employed by the first defendant as a driver of a minibus which was licensed to carry passengers between Maseru and Mafeteng. Later he was promoted to the position of a foreman. He testified that for most of the time and particularly during the weekends he had special trips carrying passengers to Durban. He was therefore not in a position to deny that during weekends the second defendant used to operate between Maseru and Mafeteng.

The first question to be decided by the Court is whether the first defendant authorised the second defendant that during the weekends the latter must carry passengers between Maseru and Mafeteng. The plaintiff testified that she often saw the first defendant's vehicle Reg. No. A3630 conveying passengers along that route. She saw the second defendant because he was driving that vehicle. According to my notes the plaintiff was not challenged on this point probably because the first defendant says that she was not aware of these secret trips to Mafeteng made by the second defendant.

The second defendant said that the first defendant instructed her to convey passengers to Mafeteng during weekends. He was cross-examined at length by the first defendant's attorney. He was not at all shaken and he gave me the impression that he was telling the truth. I was warned by the first

defendant's attorney that I should not believe him because he was the former employee of the first defendant and as such he was likely to give false evidence against her. There is no evidence that after the aforesaid collision the first defendant expelled him. The evidence by the first defendant is that after he served his sentence in prison he never returned to his former employer. There was no animosity between them until the second defendant left. He is now employed elsewhere where he appears to be happy. Be that as it may I approached his evidence with caution when I noticed that he was giving evidence on behalf of the plaintiff and yet in the summons the plaintiff prays for judgment against both defendants.

According to the evidence before the Court the second defendant regularly operated between Maseru and Mafeteng. I do not think that the first defendant is so dumb that he could not have realised that the second defendant was doing so. She is a businesswoman of some long standing who cannot be cheated so easily. A vehicle which is supposed to cover about hundred miles per day moving between Moshoeshoe II and the railway station, regularly triples that distance why could the first defendant not notice that there was something wrong. It seems to me that she authorised second defendant to undertake these trips to Mafeteng because they brought in a very good income.

In Estate Van Der Byl v. Swanepoel, 1927 A.D. 141 at p. 151 Wessels, J.A. said:

> "It is within the master's power to select trustworthy servants who will exercise due care towards the public and carry out his instructions. The third party has no choice in the matter and if the injury done to the third party by the servant is a natural or likely result from the employment of the servant then it is the master who must suffer rather than the third party. The master ought not to be allowed to set up as a defence secret instructions given to the servant where the latter is left, as far as the public is concerned, with all the insignia of a general authority to carry on the kind of business for which he is employed. "The law is not so futile as to allow the master by giving secret instructions to a servant, to set aside his liability." (Per Blackburn in Limpus v. General Omnibus Co. (32, L.J. Ex. at page 40).'

I have come to the conclusion that the first defendant had given to the second defendant instructions that during the weekends he must carry passengers between Maseru and Mafeteng with her vehicle bearing Reg. No. A3630.

It was submitted that under the liability of the employer for the acts of his employee under the principle that the latter committed the act in the course of his employment, the first defendant must be found liable for the damage suffered by the plaintiff.

In The Law of Delict, 7th edition by Professor R.G. McKerron at page 95 the learned author states the law as follows:

> "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. 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 his own business and for his own purposes?"

On page 96 the learned author refers to the case regarding frolic and deviation from route. In Storey v. Ashton, (1869) L.R. 4 Q.B. 476 a carman was returning to the office of his employer, a wine merchant, with returned empties. When he was near his destination, a fellow servant who was with him induced him to drive to his house, which was about two miles out of the way, and pick up something for him. While driving in this direction the carman negligently run over the plaintiff. The carman's employer was held not liable, on the ground that the carman having started an entirely new journey was 'on a frolic of his own, without being at all on his master's business'.

With Storey's case may be compared Feldman (Pty) Ltd. v.

Mall. 1945 A.D. 733. See also African Guarantee & Indemnity Co., Ltd v. Minister of Justice, 1959 (2) S.A. 437 (A.D.); General Tyre & Rubber Co. (S.A.) Ltd. v. Kleyhans, 1965 (1) S.A. 533 (N) (Greenberg J.A. dissenting) that in the circumstances of the case the deviation by the servant was not such a complete relinquishment or abandonment of the master's business as to exempt the master from liability.

The second defendant was employed as a driver to carry passengers for reward along a specified route within the Maseru urban area. He deviated from that route and went to Mafeteng which is about hundred kilometres away. I do not think that that was a complete relinquishment or abandonment of his master's business as to exempt the master from liability because of the authority he had obtained from the first defendant.

In the result judgment is granted for plaintiff in the sum of M13,943-16 with interest at the rate of 14% from the date of the issue of summons and with costs against both defendants jointly and severally, each paying the other to be absolved.

J.L. KHEOLA
JUDGE

22nd March, 1994.

For Plaintiff - Mr. Phafane
For Defendants - Mr. Matsau.