CIV/A/20/94

IN THE HIGH COURT OF LESOTHO

In the appeal of:

MARGARET KHAPWIYO APPELLANT

and

'MAPITSO KHOJANE RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo, Acting Judge on the 21st day of July, 1995.

This is an appeal from the Court of the Chief Magistrate, Maseru in which the learned Chief Magistrate found for the respondent by awarding the respondent damages in the sum of M7,894-32, interest thereof at 6% per annum a tempora morae and costs of suit.

The Chief Magistrate's judgment was delivered on 7th January, 1992 and I have been made to understand that the 7 January, 1991 is erroneous and must be taken as incorrect. I am satisfied with this explanation.

After judgment was delivered as aforesaid it appears that respondent made an application to levy execution against the appellant and the court a quo granted the application subject to the proviso that applicant provided surety de restituendo in the

event of the appeal succeeding. At the hearing of this appeal I was informed that none of these directions had, possibly by agreement, not been complied with.

The applicant (who is respondent before this court) had applied for execution of judgment before the learned Chief Magistrate who heard the action on the grounds that:

> this appeal had lapsed or alternatively he was entitled to execution in terms of the Rules of the subordinate court.

The Chief Magistrate had granted the application but as I have shown ordered the applicant to provide security de restituendo in the event of the respondent (now appellant) succeeding on appeal. The Chief Magistrate had also found that the respondent's (appellant before this court) appeal had lapsed. Respondent (appellant) had appealed against this finding of the Chief Magistrate and asked this court to have the appeal re-instated. I allowed the re-instatement.

According to the proceedings, it appeared that Respondent's vehicle had got involved in an accident with Appellant's vehicle. That respondent's vehicle had been a write-off and respondent's husband had died in the accident. Respondent had then claimed 3rd party compensation for the loss of her husband, been paid and had turned on the appellant to claim loss of her motor vehicle in the Magistrate's court, Maseru as aforesaid.

In the Magistrate's court respondent who was plaintiff had claimed for:

(a) Outstanding balance in terms of Hire Purchase Agreement: : M6,894-32

(b) Loss of possession, ownership and deprivation of use of the vehicle : 3,105-68

M10,000-00

costs of suit and further or alternative relief.

The Chief Magistrate had awarded full damages in terms of prayer (a) above and reduced prayer (b) to M1,000-00 so that the total award for damages amounted in all to M7,894-32, costs thereof plus interest at 6% p.a. a tempora morae.

It was against this finding that the appellant appealed to this court and couched his reasons for appeal in the following terms:-

(a) The learned Chief Magistrate erred and/or misdirected himself in law in awarding Plaintiff damages for the outstanding balance in terms of Hire Purchase Agreement with Agricultural Development Bank.

(b) The learned Chief Magistrate erred and/or misdirected himself in awarding specific damages in the absence of substantial and precise proof thereof.

(c) The learned Chief Magistrate erred and/or misdirected himself in law in taking judicial notice of the usual movements of a vehicle that sustains a frontal wheel puncture at high speed.

(d) The learned Chief Magistrate's decision is against the weight of evidence.

It so happened, and rather fortuitously, that Mr. Mafantiri counsel for the appellant charged that after all respondent was

not entitled to the damages he sought for, after all, respondent had already been paid. Mr. Ntlhoki for the appellant conceded this but claimed the money paid respondent was 3rd Party claim in which respondent had instituted proceedings before this court to claim from 3rd Party insurance for the loss of her husband. I then wondered if one was entitled to claim loss to person and property separately and piece meal or to claim in one lump sum. I accordingly charged both counsel to address me separately and specifically on this issue, namely: whether in an Aquilian action claims flowing from the same cause of action may be claimed separately or in one lump sum and whether, if claimed separately the claimant may not be met by a plea of res judicata.

It was contented on behalf of the appellant that a claim based on balance of Hire Purchase was no claim at all and the court could not associate itself with it for there is no relationship at all between the value of the vehicle that was lost in the accident and the balance of Hire Purchase Agreement that the respondent had entered into with the Agricultural Development Bank. Besides, respondent had not proved even on a balance of probabilities that the vehicle which was lost in the accident was a business vehicle. Counsel for respondent objected to this approach i.e. reference to vehicle being a business vehicle saying the matter was new as it was neither raised nor canvassed in the Magistrate's court where, if raised

the respondent would have been expected to react. There was, in my view, substance in Mr. Ntlhoki's objection and it was sustained.

The general rule where damages are claimed for the depreciation in value of an article, the basis of assessment is the difference between the value of the article immediately before it was damaged and its value immediately afterwards - see Deyden, v. Orr (1928)28 S.R. N.S.W.216 - AUS. To succeed it has been said that the plaintiff must prove loss, as where, as in this case, the vehicle was a total loss. Defendant is also liable for loss of the use of the article until it can be repaired or replaced.

At strict Roman Law and lex Aquilia as practised, the lex speaks of a man killing your slave or quadruped being liable to pay to the owner whatever was the highest value thereof within the year immediately preceding. Book iv TITLE 111 p.166 of the Institute of Justinian p.167 the meaning of the words of the statute

'whatever was the highest value thereof within the year' is interpreted as if say, for example, A kills your slave who, at the moment of his death is lame,maimed and blind in one eye but within a year was sound and worth a price; the person who kills him is answerable not only for his value at the time of his death, but for the highest value within a year. The action

was penal under the statute and there were times when the defendant was bound to pay a sum not merely the equivalent of the damage occasioned, but by far in excess of it. By its construction, it has been settled

> 'that one must not only take account, in the way described, of the value of the body of the slave or animal killed, but must consider all other loss which indirectly falls upon the plaintiff through the killing.' (ibid p.168).

It becomes immediately clear that at Roman law a plaintiff had a wide choice as to what action to institute against a defender so long as the claim was directly related to the loss. But this was the law as applied in Rome for with time the lex Aquilia was extended by the law of Holland which envisaged totality of claims.

Therefore so far as whether outstanding balance on Hire Purchase is claimable in the circumstances of this case, even Roman Law in its crudest gave a hint of this where it has been said above:

> '_____ one must not only take account, in the way described, of the value of the body of the slave or animal killed, but must consider all other loss which directly falls upon the plaintiff through the killing.'

The idea, as the Chief Magistrate has observed, is 'restitution.' And as the learned Chief Magistrate has observed

in Erasmus v. Davies, 1969(2) S.A. 1 at p.17D where Muller, WN. A.R. quoting from Trotmant and Another v. Edwick, 1951(1) S.A. 443 (A.D.) at p.449 said:

> 'A litigant who sues in delict is entitled to recover from the wrongdoer the amount by which his patrimony has been diminished as a result of the conduct of the latter.'

it appears from this that the rule is such as to place the plaintiff in a position he would have been but for the negligent act of the wrongdoer.

It was argued in this case that although respondent's vehicle was irretrievably damaged in an accident caused by the appellant or appellant's agent and appellant was in law liable for restitution thereof, that a claim by the respondent based on Hire-purchase was extraneous, far-fetched and irrelevant. Counsel for appellant took this submission seriously and it did seem serious.

However, in this regard authorities appear in unison to the effect that where there is damage to property the wrongdoer is in any event liable to compensate the plaintiff though under Hire Purchase Agreement the question always arises as to who can claim compensation. It appears that it is settled law that the owner or dominus in such an arrangement is entitled to claim failing which the dominus may cede his title to the purchaser as

cessionary to sue. Therefore, in the present case, if the respondent who was plaintiff in the Magistrate's Court was still indebted to the Agricultural Bank under the Hire Purchase Agreement, it seems that the Agricultural bank being the owner of the vehicle was entitled to sue the appellant who was defendant in the Magistrate's Court. I must hasten to say it does not seem that in this case, under the circumstances, there was any need for the Agricultural Bank to sue or to be co-jointed.

The appeal before me is different. Although the respondent had a Hire Purchase Agreement with the Agricultural Bank, she discharged her indebtedness to Agricultural Bank and when she sued the appellant she was no longer under Hire Purchase Agreement with the Agricultural Bank.

For the proposition that damages are recoverable from a wrongdoer for damage caused to a vehicle under Hire Purchase Agreement there is plenty of authority and van Wyk v. Herbert, 1954(20) S.A. 571 (T) throws light in this regard where Murray, J. after laying stress upon the fact that the general rule is res perit domino is reported at p.575 to have said:

> 'Let it be assumed that the risk had passed to Fourie, and that on 23rd July plaintiff was entitled to hold Fourie to the sale and demand from him the purchase price, agreeing to cede to him his own right of the action against defendant. Even so I am made to subscribe to the view that

> the defendant is entitled to rely for his protection on contractual arrangements between plaintiff and Fourie to which he was no party. For the consequences of his action defendant was liable to the dominus of the car. That liability could be enforced either by the plaintiff as dominus, or, at Fourie's election to take cession and sue, by Fourie as cessionary.
>
> If Fourie was unwilling to take cession and sue, and the plaintiff concurred in this position, plaintiff still retained his right of action as dominus _____.
>
> These matters were no concern of defendant, who remained liable to the dominus, seeing that no cession was made. Assuming that plaintiff had the power legally to avoid any actual patrimonial loss by holding Fourie to his bargain, I cannot see how his position differed in law from that of an owner fully covered by insurance. The fact of such cover is admittedly not a matter upon which the wrongdoer can base a defence that in actuality the dominus has suffered no loss, and if the dominus elects to abandon his claim against the insurer, the wrongdoer is still liable to compensate the owner for the damage caused.'

- see also Rondalia v. Heinekom, 1972(2) S.A. 114 (T.P.D.) where Colman J. held that where car was sold under hire-purchase although ownership had not passed but risk had passed and the car was damaged in collision the owner was entitled to sue for damages.

Regarding whether loss to person and property can be claimed separately or only in one lump sum, the development of lex Aquilia in this regard is traced to De Villiers, J.A. where in Matthew v. Young, 1922 A.D. 422 p.504 he said:

> 'it seems to me to follow that damages claimable under the lex Aquilia as extended cannot be divided into two separate causes of action, one for damages to property and the other for bodily injury to the person.'

This mood was echoed in Green v. Coetzer, 1958(2) S.A. (O.P.A.) where on a plaintiff having claimed and obtained judgment for damages to his motorcycle in a Magistrate's Court brought another action in the Supreme Court for bodily injuries as the result of the same collision due to the same negligent conduct of the defendant. Kuper J. was emphatic and decisive that any subsequent claim would be met by a plea of res judicata.

The reason for this is that a distinction has always been drawn between English Law and Roman-Dutch Law and students of Roman-Dutch have always been warned not to mix the two. Thus in Coetzee v. S.A.R. & Harbours 1933 (O.P.D.) 565 at p.574 Gardiner, J.P. made it clear that English rules of law relating to matters of negligence were to be accepted with caution because:

> 'There are differences in principle between the Roman Dutch action based on lex Aquilia and the English action for damages for negligence due to the historical development of English Law _____.'

Not without cause because in the English case of Brunsden v. Humphey, 14 (Q.B.D.) at p.141 the majority judgment of the Court of Appeal was that:

> 'damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for damage to the goods is no bar to an action subsequently commenced for the injury to the person.'

This judgment apparently provided the basis for the following statement of English Law in Halsbury's Laws of England, 3rd Ed. Vol.11 p.228 (para.395):

> 'A second action can be brought in respect of a separate cause of action, as for example where a person, owing to negligence, suffers loss to his property and also personal injuries. These are two separate causes of action and a separate action lies in respect of each.'

Gardiner, J. in de Wet and Another v. Payner, 1921 C.P.D. 576 finding himself in a quandary referred, approvingly, to Brunsden's case supra where, as we have seen, the Court of Appeal held there were two distinct causes of action i.e. damage to property and injury to person and held there was no overlapping in the two actions. The learned judge did not, however, say whether the principle in Brunsden's case applied equally in our law.

If this disquisition of the fine and subtle distinction between the English and Roman-Dutch Law on negligence appears a little blurred and not easy of determination and ascertainment, Beck's Pleading in Civil Actions - 5th Ed. p.164 quoting several cases in support has put the enquiry beyond any pale of doubt for he says when a plea of res judicata is raised it must be based on:

(1) prior action having been between the same parties;

(2) prior action to have concerned the same subject-matter;

(3) prior action must have been founded on the same cause of action.

This submission finds ample support in Voet (44:2:3) where he says:

> 'under no circumstances is the exception allowed than where the concluded litigation is again commenced between the same persons, in regard to the same thing, and for the same cause of action, so much so that if one of these requisites is wanting, the exception fails.' (I have underlined.)

And see also in African Farms and Townships Ltd. v. Cape Town Municipality, 1963(2) S.A. 555 (A) at p.562 where Steyn C.J. said:

> 'at any rate as a causa prete of the same thing between the same parties cannot be resuscitated in subsequent proceedings."

It will be seen that these English and Roman- Dutch Law principles on lex Aquilia differ essentially in that English law gives rise to distinct causes of action for damages to goods and injury to person even when these have been occasioned by one and the same wrongful act. The distinction is rather fine for in Roman-Dutch law action flowing from the same wrongful act gives rise to only one cause of action but where the parties are the same, subject-matter is the same and action is founded on the same cause of action and a party nevertheless claims separately and piece-meal and not in one lump sum, such a party will be met by the defence of res judicata. By the same token, if any of these requisites should be wanting, the defence or exception will fail.

Therefore, whether the respondent in this matter was right to claim for bodily injury and damage to his destroyed vehicle separately is answered in the affirmative for the claim for bodily injury was against a person or party other than the appellant.

As for the award of M1,000-00 for the depreciation of use of the vehicle I find no reason to fault the learned Chief Magistrate in this regard for respondent's loss in this regard was related to and rose directly from the loss of her vehicle which loss would in any event have necessitated in the natural cause of things hire of alternative transport. It does not seem that in her case the best evidence was required to sustain her claim so long as the respondent produced the best available evidence.

In Shrog v. Valentine, 1949(3) S.A. 1228 (T) it was held that in order to minimise his loss where the owner of damaged vehicle hires another transport, he is entitled to recover the expense to which he has been put in minimising damage. And that if he has incurred expense which the defendant considers unreasonable, it is for the defendant to show that the claimant could reasonably have avoided the loss at a lower expense. So that, apparently, unless the defendant had shown that the plaintiff

was unreasonable in hiring another vehicle the plaintiff is entitled to recover expenses of hiring such vehicle. In this case it was also held that claims will be sustained so long as reasonable.

As for appellant's other ground of appeal that the Chief Magistrate was wrong or misdirected himself in taking judicial notice of movements of vehicles, I am not aware that the learned Chief Magistrate took such judicial notice save expressing his view in the circumstances.

The result is that this appeal is dismissed in its entirely with costs to the respondent.

G.N. MOFOLO
Acting Judge
21st July, 1995.

For Appellant: Mr. Mafantiri
For Respondent: Mr. Ntlhoki