C OF A (CIV) NO.22 OF 1995

IN THE LESOTHO COURT OF APPEAL

In the matter between:

MARGARET KHAPHWIYO APPELLANT

AND

'MAPITSO KHOJANE RESPONDENT

HELD AT
MASERU

CORAM:
STEYN, AP
LEON, JA
V.D. HEEVER, AJA

J U D G M E N T

LEON, JA

The appellant was the unsuccessful defendant in the magistrate's court for the district of Maseru.

The claim arose in consequence of a motor collision which occurred on the 29th February 1989 at or near Sekameng Bridge when the appellant's truck collided with the respondent's van driven by her late husband. The respondent instituted two actions: one for the loss of support which she suffered in consequence of her husband's death in the accident and the second which is the subject of this appeal.

In this case the respondent, alleging the collision was

caused by the negligent driving of the respondent's driver alleged further that her vehicle was damaged beyond repair and her vehicle had been purchased in pursuance of a hire-purchase agreement with the Agricultural Bank of Maseru.

The respondent claimed that she had suffered damages as a result of the said collision in the total sum of Ten Thousand Maloti (M10,000.00) made up as follows:-

(a)	Outstanding balance in terms of the hire-purchase agreement	M6,894.32
(b)	Loss of possession, ownership and deprivation of use of the vehicle	M3,105.68
	TOTAL	M10,000.00

The matter went to trial before the Chief Magistrate both on the merits (i.e. the issue of negligence) and on damages. The magistrate found in favour of the respondent on the question of negligence. With regard to the claim under the Hire-Purchase agreement he held that the respondent's patrimony had been diminished as a result of the conduct of the appellant's driver as the respondent was obliged to pay the balance of the purchase price even though she no longer enjoyed the use of the lost vehicle which had been damaged beyond repair. So far as the second part of the damages claim is concerned the magistrate found that the respondent had proved that she had suffered damages in the sum of M1,000 which represented deprivation of the vehicle for five months at the rate of M200 per month.

The appellant appealed against the judgment of the Chief Magistrate to the High Court on a number of grounds only one of which need be considered here as that is the only one which is raised in this appeal. In the High Court Mofolo AJ dismissed the appeal on all grounds but granted leave to appeal to this Court.

The only ground of appeal raised is whether "the learned Acting Judge erred and/or misdirected himself in law in holding that the appellant is liable to the Respondent to the tune of the outstanding balance of the Respondent in terms of the Hire-Purchase Agreement with Lesotho Agricultural Development Bank".

As I understand the judgment of the High Court the learned Acting Judge accepted that the general rule is that 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 the value of its value immediately afterwards. He then considered the Roman Law from which it is clear that a plaintiff had a wide choice as to what action to institute against a defendant "so long as the claim was directly related to the loss." (My underlining)

The learned Acting Judge agreed with the Chief Magistrate that the principle was one of restitution i.e. the Court must place the plaintiff in the position in which she would have been but for the accident. The judgment then proceeds to refer to the question as to who can claim compensation when a vehicle is under a Hire-Purchase Agreement and concludes that the owner must sue

although he may cede his claim to the purchaser who may then sue as cessionary. This was not in dispute.

The learned Acting Judge then said this:-

> "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 Agricutural Bank".

Although that is not the issue which arises in this appeal the statement of the learned Acting Judge is plainly wrong. In her evidence in chief (see page 37 of the record) the respondent stated that at the time of the accident the outstanding balance under the Hire-Purchase Agreement was M6,894.68 and that at the time of giving evidence the balance was still over M200.00. This was elicited in cross-examination at page 38 of the record.

The question then which falls for consideration is whether the outstanding balance under the Hire-Purchase Agreement can be said to represent an amount by which the respondent's patrimony can be said to have been diminished as a result of the negligence of the defendant's driver i.e. as a result of the accident.

The case for the appellant is that the balance owing under a Hire-Purchase Agreement is not damages properly claimable in

Law as the liability under the Hire-Purchase Agreement would have remained whether an accident occurred or not. Reference is made to Smit vs Saipem 1974 (4) SA (A) 918 where it was held that the debtor under a Hire-Purchase Agreement can bring an action under the Lex Aquilia in his own name for the diminution in value of the property damaged but the present is not such a case. Sentiments relating to the diminution in value were expressed incases such as ERASMUS v DAVIS 1969 (2) SA (A) at p. 9 where it was also held that in order to prove such diminution in value the plaintiff would be entitled to establish the difference between the pre-collision and post collision value of his damaged property. In the present case there is no such evidence and that is not the basis of the claim.

The respondent concedes that what had to be proved was a calculable pecuniary loss a diminution in her patrimony resulting from the negligence of the driver. But proof of such loss can be achieved by a variety of methods. With regard to the claim under the Hire-Purchase Agreement it is contended that what the respondent was paying for a non-existent vehicle was the measure of damage she suffered as a result of the negligence of the defendant's driver. That is clearly incorrect, and I have no doubt that both judgments are clearly wrong. What the respondent was entitled to be paid as damages was the loss which she suffered as a result of the accident. Where the vehicle was damaged beyond repair that loss would be the value of the vehicle at the time of the accident. The balance owing under the Hire-Purchase Agreement was not a loss suffered in consequence of the

accident because it was a debt which would continue whether the accident had occurred or not. Moreover it does not assist at all on the real question i.e. the value of the vehicle at the material time. The only evidence which the respondent gave with regard to the damaged vehicle was that it was a Toyota 4 x4. There was no evidence as to its value, its year of manufacture, or its condition at the time of the collision. The Hire-Purchase Agreement included finance charges and interest and provides no evidence at all as to the value of the destroyed vehicle. Such evidence should be available and the respondent should be able to bring a claim on the proper basis. For these reasons and in fairness to the respondent I consider that the judgment should be altered to one of absolution from the instance, and not judgment for the defendant.

I am fortified in this conclusion by the fact that the appellant could and should have successfully excepted to the claim brought under the Hire-Purchase Agreement in which event a great deal of costs would have been saved.

In my judgment the appeal must succeed with costs and the judgment of the Chief Magistrate on the claim for M6,894.32 (i.e. the claim for the outstanding balance under the Hire-Purchase Agreement) must be set aside and altered to read:-

> "The defendant is absolved from the instance with costs".

R. N.LEON
JUDGE OF APPEAL

J.H. STEYN
JUDGE OF APPEAL

L.V.D. HEEVER
ACTING JUDGE OF APPEAL

Delivered at Maseru on ...19th... day of January, 1996.