CIV/T/233/90
CIV/T/234/90
IN THE HIGH COURT OF LESOTHO

In the matters of:

SAMUEL RAMPENA SERUTLA 1st PLAINTIFF
MAMOLETSANE K. MAKAKOLE 2nd PLAINTIFF
v.
LESOTHO NATIONAL INSURANCE COMPANY DEFENDANT

JUDGEMENT

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 30th day of May. 2001

By agreement of the parties CIV/T/233/89 and CIV/T/234/89 were consolidated because they relate to one and the same car accident which occurred on the 20th May, 1989. In the first case the plaintiff Samuel Rampena Serutla is claiming damages in the amount of M17, 930-00 calculated as follows:-

a) Medical and hospital expenses - M530-00;
b) Genera] damages for pain and suffering , loss of the amenities of life, etc Ml 7,400-00.

2

In the second case the plaintiff, 'Mamoletsane K. Makakole is claiming damages in the amount of R234,274-49 made up as follows:

a) Funeral expenses M3,674-49
b) Loss of support for the plaintiff M168,000-00
c) Loss of support for Moletsane Makakole M19,200-00
d) Loss of support for 'Majubile Makakole M19,200-00
e) Loss of support for Khauhelo Makakole M25,200-00.

On the night of the 20th May, 1989 the plaintiff 1 Samuel R. Serutla was driving his car with Registration number E 1977, along the Main South 1 Road from Maseru towards the direction of Mafeteng. The deceased Ketelo Makakole was his passenger.
At the same time one Moorosi Thedi Monyobi was driving a land cruiser along the same road going in the opposite direction, that is to say from Mafeteng direction towards Maseru. The land cruiser's registration numbers were A 8369. It was insured . by the defendant.

The two vehicles collided at Masianokeng just opposite the premises of Basotho Canners. As a result of that collision the deceased died instantly.

In his declaration the plaintiff alleges that the aforesaid collision was caused by the exclusive negligence of the driver of the insured vehicle who was negligent in one
3 or more of the following respects:-

i. the said Moorosi Monyobi was driving on the wrong side of the road;
ii. he drove too fast under the circumstances prevailing;
iii. he failed to keep the said vehicle under proper control;
iv. he failed to keep a proper look out;
v. he failed to avoid collision when by the exercise of reasonable care he could and should have done so.

The plaintiff 1 testified that at the relevant time he was staying at Moshoeshoe I International Airport and worked at Lesotho Bank as a building inspector. On the day in question he arrived at the place of the deceased at about 2.00 p.m. They started to repair the vehicles of the deceased until late that afternoon at about 5.00 p.m. After that they watched television until 12 midnight. As he did not have any watch that night he estimated time to have been 12 midnight from the programmes he saw on television. However, under cross-examination he conceded that he could be mistaken about the time. He admitted that the collision between his vehicle and the vehicle insured by the defendant must have taken place at 9.30 p.m. that night. That must have been the time he gave to his lawyer when his mind was still fresh about the events of that night.

He says that after passing the gate of the Basotho Canners premises he saw a vehicle coming towards him travelling at a very high speed. It was about seventy metres

away when he first saw it. It was in his correct lane of the road. As there were big stones and ditch on the left side of the road he decided to swerve his vehicle to the right in order to avoid a collision with the oncoming vehicle. However, when he was on the white centre line that other vehicle came to him and hit his vehicle on the left side. At that time the wheels on the right of his vehicle had already crossed the centre line. He therefore contends that the collision occurred on his (plaintiffs) correct lane. He earlier stated that when he first saw the insured vehicle, it was already being driven on the incorrect lane and was coming straight towards him in his correct lane.

Plaintiff 1 says that he was driving at the speed of about fifty kilometres per hour when the accident occurred. He did not do any other thing other than swerving to the right to avoid the collision. He never hooted in order to warn the driver of the oncoming vehicle that he was driving in the wrong lane. At that time the head lights of the other vehicle were switched on bright. He says that the last thing he saw was when the two vehicles collided. In other words he became unconscious as a result of the impact. He regained his full senses about two hours later when he was already in Queen E. II Hospital. He heard on the following day that his passenger had died as a result of that accident.

He spent two weeks at Morija Hospital because he had six ribs broken. He says that he has not completely recovered because when the weather is bad he still feels the pain.

Under cross-examination he said that he was born on the 8th May, 1959. The accident or collision took place on his correct lane of the road and that the right front wheel was just touching the white centre line. The rear wheel could be about twenty to thirty centimetres on his side of the white line. The point of impact was about one and half metres into his side of

the road and the other vehicle was still on the incorrect side of the road when it hit the left front of his vehicle. He denied that it was his vehicle that was on the incorrect side of the road. He did not at all cross the white centre line. The policeman who made a sketch plan of the scene of the accident is wrong to show the point of impact as being on the correct side of the vehicle insured by the defendant. His vehicle was pushed to the incorrect side of the road by the impact. He saw the brake marks on the road on the following day. They were from his correct side of the orad to the other side and extended into that incorrect side for about a metre.

Plaintiff 1 says that the steering wheel of the insured vehicle was tied with barbed wire and that he inferred that that was the reason why it was out of control and moving in a zigzag course. He admitted that he wrote Exhibit "B", however he denies that his vehicle ever crossed the centre line before the collision. What he wrote in Exhibit "B" does not tally with his evidence before Court.

The next witness called by the plaintiff] is one Lebajoa Seate. He testified that he worked as a nightwatchman at Basotho Canners. On the 20th May. 189 he was on duty. At about 1.30 a.m. he saw a motor vehicle coming from Mafeteng direction. It was

a land cruiser which was moving at a very high speed. It was moving on the wrong side of the road. It was in the wrong lane. The land cruiser was also moving in a zigzag course. He even asked one of his colleagues whether that vehicle would cross the bridge. At the same time he saw another vehicle, a car, travelling from the Maseru direction and was on its correct side of the road. The land cruiser never moved to its correct side of the road until the two vehicles collided in the correct lane for the car. He did not see that the car tried to swerve to the right side of the road before the collision occurred.

It is surprising that the policeman. Trooper Mahasele (P.W.5) who attended the scene of accident and drew the sketch plan of the scene of the accident, Exhibit "K", makes no reference to such skidmarks or brake marks which must have been very long. Looking at the sketch plan it is clear that from the point of impact (X) to F (fixed point) is a distance of nineteen paces. That fixed point is more or less the same distance as the Roma road junction. There was really no such skidmarks because even the driver of the insured vehicle (D.W.I) said that he never applied his brakes before the accident. Lebajoa Seate is either mistaken or not telling the truth.

The next witness called by plaintiff 1 is Trooper Mahasele (P.W.5) who attended the scene of the accident and drew the sketch plan of the scene of the accident (Exhibit "K"). He testified that the two vehicles involved in the accident were a van and a car. The Reg. Nos of the van were A 8369 and E 1977 for the car. On the sketch plan the van is marked Vehicle "A" and the car Vehicle "B". The driver of Vehicle "A" was Moorosi

Monyobi. Vehicle "B" was driven by Plaintiff 1. According to him the point of impact was in the left lane when one is travelling from Mazenod to Maseru. It is marked as "X" on Ex. "K". There was a broken white line on the centre of the road. "X" was half a pace from

the centre line and two paces from the edge of the road (marked "D" on Ex. "K"). It ("X") was five paces from the edge of the road ("C") on the right side.

He said that after the collision Vehicle "B" was pushed back by the impact for a distance of fourteen paces from the point of impact. There were skidmarks caused by Vehicle "B" as it moved backwards. This indicates that the brakes were applied very hard in order to cause those skidmarks ("J") which were in the correct lane for Vehicle "A". After the collision Vehicle "A" moved for a distance of sixty-seven paces before it collided with an electric pole. It capsized.

P.W.5 says that he found six (6) empty tins of beer in vehicle "A" and there was beer spilled on the floor of the vehicle. In Vehicle "B" there were documents that were scattered on the floor. He also found the dead body of the deceased. He established where the point of impact was because that is where he found water from the radiator,
pieces of glass and soil.

On the sketch P.W.5 shows the directions of both vehicles just before the collision. Vehicle "A" left its correct lane when it was opposite the Roma "T" junction. Vehicle "B" left its correct lane when it was opposite the Masianokeng Wholesale gate.

marked "K" on the sketch plan. He used arrows to indicate the directions taken by the two vehicles before they collided.

After the close of the plaintiffs' case the defendant called only one witness, the driver of the insured vehicle - Moorosi Thedi Monyobi (D.W.I). His evidence is to the effect that on the day in question he was the driver of Vehicle "A". It was a Government vehicle because he worked as a driver in the Ministry of Education. On that day he had been in Mafeteng where he had paid his mother a visit. Before he left Mafeteng he picked up one "Malefu Mohlotsane. They left at about 8.00 p.m. proceeding to Maseru. He arrived at Masianokeng junction at about 9.30 p.m. When he was at the curve he saw a vehicle in his correct lane coming towards him. He hooted and flickered the headlights of his vehicle to warn the driver of the oncoming vehicle. There was no reaction and it continued to come towards him. He was unable to swerve his vehicle to the left side of the road because there was a crash barrier and a sign post. He decided to serve to the right because there was an open space there. As he was turning the steering wheel the two vehicles collided forcing his vehicle to fall on the right side of the road.

After the collision and the capsizing of his vehicle, he struggled very hard to get out of it. When he got out he saw policemen helping the occupants of the other vehicle. He and the driver of the other vehicle were immediately taken to the hospital. A wheelchair was used to carry the driver of the other vehicle into the hospital because he could not walk.

D.W. I says that he sustained minor bruises as a result of that accident. He says that he was driving at the speed of sixty kilometres per hour. He denies that he was driving at a very high speed. He agreed with the point of impact as shown on the police sketch plan (Exhibit "K").

He says that he never drove on the incorrect lane until his vehicle collided with that other vehicle in his correct lane.

D.W.I agreed with the suggestion that his foot was still on the accelerator pedal when the collision occurred. In other words, he never reduced his speed. He says that when he saw the lights of the other vehicle he was about seventy paces from them and that he was not sure that it was a vehicle. He denies that his judgment was impaired by his drunkenness. He denies that there were any empty tins of beer in his vehicle. He never claimed any damages because his injuries were minor.

The defendant closed its case after calling only one witness. The onus of proving that Monyobi was negligent and caused the injuries which were sustained by plaintiff 1, is on the plaintiffs. He also caused the death of the husband of plaintiff 2. The general rule is that "he who alleges must prove". (Ramahata v. Ramahata LAC (1985-1989), 184 at 185).

The main issue in this case is to make a finding about the exact position of the point of impact. If the point of impact is in the correct lane that was being used by the plaintiff 1, then it will be easy to come to the conclusion that Monyobi who drove the

10

vehicle insured by the defendant was negligent. However, if the point of impact is in the correct lane which was used by Monyobi, it will mean that plaintiff 1 was negligent and caused the collision of the two vehicles.

The evidence of plaintiff 1, (Serutla) and Lebajoa Seate (P.W.2) was that Monyobi was driving in the wrong lane and came straight towards Serutla who was driving in his correct lane of the road. According to them Monyobi never changed his direction until the two vehicles collided. Serutla testified in no uncertain terms that he never left his correct lane and never crossed the white lane in the centre of the road. For instance at pages 23 - 24 of the record Question by Defendant's Counsel: "Now 1 want to put it to you that it would be defendant's version that this accident, in fact happened on the correct side of the road for the land cruiser, in other words on your incorrect side of the road, the point of impact, not talking about where the vehicles were before the accident, it was put to you that at the time when the two vehicles collided they were both on your incorrect side of the road, what do you say to that?

P.W.1: I say no

D.C.: Now did you at any time cross the white line or did you just stop at your right wheel on the white line?

P.W.1: I had my right wheel on the centre line.

D.C.: Okay, you had told this Sir, now what I want to know is, any time prior to the accident did you cross the white line at all? P.W.1: Not at all

11

D.C.: You are sure of that? P.W.1: Yes I am sure of that.

In his letter to his counsel which is Exhibit "B" in these proceedings, Serutla (P.W.I) said that he crossed the white centre line and went into the correct lane for the vehicle driven by

Monyobi (D.W.1). In other words he admitted that he was driving in the wrong lane when the collision occurred.

However in his evidence before this Court P.W. 1 categorically denied that he ever crossed the white centre line. His new version is that the collision occurred in his correct lane of the road.

In his evidence at pages 111-116 (inclusive) Lebajoa Seate (P.W.2) insisted that the collision occurred in the correct lane for the vehicle driven by P.W.1.

The evidence of P.W.I and P.W.2 is in direct conflict with the evidence of Trooper Mahasele (P.W.5). He established the point of impact being where he found water from the radiator, pieces of glass and soil from the mudguard. In other words, P.W.5 used objective factors to establish where the two vehicles collided. Another very important objective factor is that when the two vehicles collided the vehicle driven by P.W.I was pushed backwards for a distance of fourteen paces. It is clear that P.W.I applied his brakes very hard when the collision occurred and the wheels were locked and

skidded as the vehicle was pushed backwards. The skidmarks start from the point of impact and cover a distance of fourteen paces. It seems to me that the evidence of P.W.5 conclusively established the point of impact.

That point of impact is in the correct lane for the vehicle driven by Monyobi. The vehicle driven by P.W.1 obviously left its correct lane and collided with the other vehicle in its correct lane. What is disturbing me is that P.W.I and P.W.2 have not been honest with the Court by insisting that the collision occurred in the correct lane for the vehicle driven by P.W.1. What is most damaging in the evidence of P.W.1 is that in Exhibit "B", which is a letter which he wrote to his lawyer on the 2nd August, 1990 he admitted having crossed onto to his incorrect side of the road and that the accident occurred on his incorrect side of the road. However in his evidence before this Court he is now denying that his vehicle crossed onto the incorrect side of the road before the collision occurred.

P.W.I is obviously not telling the truth because in addition to what he said in Exhibit "B", we now have the reliable evidence of P.W.5, which is independent evidence based on objective factors, that the collision occurred in the correct side of the road for the vehicle driven by Monyobi.

It seems to me that P.W.1 and P.W.2 laid their heads together in order to come up with an untrue story that the two vehicles collided on the correct side of the road for P.W.1. They apparently did not know what P.W.5 was going to say. In his evidence

P.W.5 said that P.W.I and D.W.I agreed with the point of impact he had established.
At page 208 of the record this is what P.W.I said:

"Mr Mphalane: Did they point at the point of impact at the same place, I mean where you have located at the sketch plan, all of them did they show it be here where it is?.....Yes, My Lord.

Did they differ in any way on the explanations to how the accident happened?
..... They were different in the explanation but they were at one with the point of impact".

It seems to me that P.W.1 and P.W.2 decided to embellish their evidence that the accident occurred in the correct lane of the road for the vehicle driven by P.W.1 in order to wrongly put the blame on Monyobi so that the plaintiffs may succeed in their claims for the damages. The truth has been established on a balance of probabilities that the accident occurred on the correct side of the road for the vehicle driven by Monyobi.

The difficulty which I have with the evidence of P.W.1 and P.W.2 that just before the accident occurred Monyobi was driving his vehicle in the wrong side of the road and that he was the sole cause of the accident, is that they have been proved to have told the Court an untrue story on the question of the point of impact. How can I believe their story that Monyobi was negligent? Monyobi was comparatively honest in his evidence. He admitted that he drove at a speed of sixty kilometres per hour in a fifty kilometre per

14

hour speed zone.

It is a well established rule that exceeding the speed limit is not negligence per se.
In Clairwood Motor Transport v Akal and Sons, 1959 S.A. 183 at p.184 it was
held thus:

"It is true that the speed limit at that time was 15 miles an hour, but the breach of a by-law is not, per se, indicative of negligence, it is merely one of the facts to be considered in all the circumstances".

I have found on a balance of probabilities that Monyobi was driving on his correct side of the road just before the accident.

I am aware that on Exhibit "K" P.W.5 indicates the directions of vehicles "A" and "B" with arrows just before the collision and on the reverse side of Exhibit "K" he states that vehicle "A" swerved to the left and vehicle "B" swerved to the right. It seems to me that his evidence on this point is hearsay and altogether inadmissible because he apparently relied on what he was told by other people. He did not rely on any wheel marks aor any skidmarks. In the case of skidmarks after the collision he clearly states that there were such skidmarks.

Mr. Mphalane, attorney for the plaintiffs, submitted that D.W.I was negligent

15

because he did not apply his brakes in order to avoid the collision. I disagree with this submission inasmuch as D.W.I clearly indicated that his intention was to swerve to the right side of the road where there was an open space. As he was doing that the collision occurred

before he had completed that turn to the right. Failure to apply brakes in the circumstances of this particular case does amount to negligence. He was trying to avoid the accident by swerving to the right.

The same applies to P.W.I inasmuch as he never applied his brakes by swerved to the right in order to avoid the collision. That is how he alleges.

D.W.I is accused of having had empty tins of beer in his vehicle. The Court is therefore asked to infer that he was drunk and caused the accident. It seems to me that drunkenness must be proved in a more convincing way that the mere presence of empty tins of beer in one's car. If there had been any suspicion of drunkenness D.W.5 ought to have had a medical examination of D.W.1. His breath ought to have been tested by a breatherliser. In the absence of such instrument P.W.5 ought to have used the old methods - such as smelling the breath of D.W.1 or asking him to stand on one lee.

I come to the conclusion that there was no evidence that D.W.I was drunk.

P.W.I and P.W.2 did not impress me as being truthful witnesses, so that their allegation that D.W.1's vehicle was moving in a zigzag course before the collision occurred cannot be taken as correct. They tend to embellish and exaggerate for their own convenience. They lied on an obvious fact which is the point of impact established by very reliable objective facts proved by P.W.5. No reasonable man can believe them on any issue in which D.W.I gave evidence contradicting their version.

It is trite law that where the versions of the plaintiff and the defendant are mutually destructive, as in this case, the plaintiff must satisfy the Court that his version is true and the version of the defendant is false.

In National Employers v Gany, 1931 A.D. 187 at 188/189 the Court said:

> "In these circumstances the Learned Judge should not have held that the heavy onus on the Plaintiff was discharged. He should not have accepted as conclusive the evidence of A. Gany, contradicted as it was by Clark, but should have held that neither story was sufficiently corroborated and have therefore given the verdict of not proven: In other words, he should have given absolution from the instance... Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests, is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect".

The onus was on the plaintiff to prove that before the collision occurred the

vehicle insured by the defendant was being driven on the wrong side of the road. That version was strongly contradicted by the defendant's evidence that, in fact, it was the plaintiffs' vehicle that was being driven on the wrong side of the road. I cannot say that the version of the plaintiff is true and that the defendant's version is false.

A balance of probabilities seems to favour the defendant.

Mr. Mphalane submitted that D.W.I also conceded that he was not able to identify whether the lights which were in front of him were that of a vehicle or not, but at that time he was seventy paces away. This can only point out that he was is some way intoxicated on the night in question. I do not agree with this submission because there are other things which could have obscured or distorted the vision of D.w.1; such as improperly working headlamps when dimmed or dirty headlamps. Before a conclusion can be reached that the obscure vision was due to intoxication, the other things I have mentioned ought to have been excluded by evidence.

In any case the D.W.I did not collide with the other vehicle because he did not know what it was. He hooted and tried to swerve to the other side of the road but the collision occurred before he could complete the manoeuver.

D.W.I said that as he came to a curve at Masianokeng/Roma junction he saw in front of him and in his correct lane some lights which seemed to be of a vehicle coming

straight towards him. He hooted and flickered the lights in an attempt to warn the driver of the oncoming vehicle to get back to his lane. It is not right to say that D.W. 1 was not able to identify whether the lights which were in front of him were those of a vehicle or not. He said they seemed to be the lights of a vehicle which was coming straight towards him. That is the reason why he flickered the lights and hooted as a warning to the other driver.

I have come to the conclusion that the plaintiffs have failed to prove on a balance of probabilities that there was any negligence on the part of Monyobi (D.W.I). I have decided not to consider the question of quantum of damages.

In the result the plaintiffs' actions are dismissed with costs.

J.L. KHEOLA
CHIEF JUSTICE
30th MAY, 2001

For Plaintiffs - Mr Mphalane
For Defendant - Mr Molyneaux.