

CIV/T/502A/96

IN THE HIGH COURT OF LESOTHO

In the matter between

PAKISO TSIKOANE

PLAINTIFF

VS

TIKEN LETSOPHA & 2 OTHERS

DEFENDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI
On the 4th Day of June, 2002

On the 6th June 1996, vehicle A - X1291 a 4x4 landcruiser was travelling in a westerly direction along the Main North 1 highway. Vehicle A was at the time being driven by DW1 - TIKEN LETSOPHA who is the 1st defendant in this matter. He was travelling in the company of his two colleagues - DW2 and 3. 1st Defendant was at that time a member of National Security Service (NSS). NSS was then

part of the defence forces. The 1st defendant and his travel companions started their journey from Leribe that evening. They had gone passed T.Y. and Lekokoaneng on their way to MASERU. It was round about 19.45 to 20.00 hours when vehicle A climbed a slightly steep road and was about to start negotiate a curve when it met and collided with vehicle B - D3467 - combi near HA FUSI BUS STOP.

Vehicle B was travelling in the opposite direction. It was in a convoy of about five motor vehicles. There were three or four motor vehicles in front of it. There was one vehicle coming behind vehicle B at the place and time of the accident. Evidence clearly shows this court that the size of the traffic on that road at the time was moderate. All the vehicles were travelling eastward except vehicle A. The place indicated as the point of impact is almost on the straight road. Evidence of the occupants of vehicle A is to be effect that vehicle B had just completed negotiating the curve when it came out of its lane – and entered the lane of the oncoming traffic where it met and collided with vehicle A.

The driver of vehicle B told the court that the collision between their motor vehicles occurred on the straight part of the road. The driver of vehicle A and his passengers testified to the effect that they had not yet commenced to negotiate a curve when vehicle B came out of the convoy – overtaking the motor vehicle immediately in front of it.

He was now travelling in the path of the traffic which was travelling in the opposite direction. Vehicle A was at that time, the only motor vehicle travelling west in the direction of MASERU. The greater portion of the traffic which was on that road at that time was travelling eastward – towards Lekokoaneng.

Plaintiff is claiming damages from the defendant. Plaintiff claims that he suffered the alleged damages as a result of that accident which occurred because of the negligent driving of the 1st defendant whom he blames to have caused the resultant collision between the two vehicles – (A+B). The driver of vehicle A is accused of driving negligently in the following terms:-

- (a) He failed to keep a proper look-out for other motorists.
- (b) He drove on the wrong side of the road.

- (c) He failed to apply his brakes timeously or at all.
- (d) He failed to stop while he could have avoided the collision by doing so.
- (e) He drove at an excessive speed under the prevailing circumstances.

In his plea the 1st defendant denies all allegations of driving negligently. He denies liability for damages, which the plaintiff incurred as a result of the collision between the two vehicles. The 1st defendant testified that the collision happened between the two vehicles – i.e. A and B on that side of the road which is the correct lane for the vehicular traffic travelling in the westerly direction to MASERU. This claim by the 1st defendant that the collision occurred between the two vehicles (A and B) on his correct side of the road, finds support in the evidence of DW2 and 3 together with the photographs which were taken at the scene of accident next day by DW2.

Photograph 1 shows the skid marks made by the wheel of the vehicle on its correct side of the road. Brake marks stretch on that side of the road where vehicle A was travelling. DW2 also indicated an oil mark on the ground on that same side of the road. These track marks are a prima facie evidence that the vehicle which made them was travelling along that portion of the road where they are found. VEN DER MERWE V FOURIE 1959 (3) SA 568 E at page 5 70E.

Evidence led on behalf of the plaintiff places the point of impact on the correct side of the road for vehicle B. According to the evidence before the court there are points of impact at two different places. The two vehicles collided only once – not twice. So only one of those places indicated as point of impact is really and truly such a point of impact.

Which one of the two places indicated as a point of impact does this court accept as such? In her evidence Sgt. MARITI the police officer who attended that scene of the accident told the

court that she drew the Accident Plan L.M.P. 29 from the indications made to her at the scene of the accident immediately after it has occurred. Those indications including the point of impact were made to this Sgt. MARITI by the driver of the motor vehicle which was travelling in front of vehicle B at the time of the accident. How did this driver see what was taking place and how and where it happened behind him?

These indications were made in the absence of the drivers of the vehicles involved in that accident. The next day Sgt. MARITI discussed her findings and the charge she preferred against the driver of vehicle A. The driver of vehicle B supports the indications made and the decision arrived at as the result thereof by Sgt. MARITI. The communication does not appear to have gone well between Sgt. MARITI and the occupants of vehicle A.

The driver of vehicle A claims that he indicated the point of impact on his correct side of the road. The police officer

refused to accept the indication and also refused to put a mark on the sketch plan LMP 29 indicating that as a point of impact. The police officer is also alleged to have refused to record any statement from the driver of vehicle A. The police officer admitted before this court that she did not record the statement from the driver of vehicle A. She also admitted that she did not put a mark or a sign on the Accident plan - LMP29 to indicate a point of impact that was indicated to her by the driver of vehicle A. This witness conceded that there is provision on LMP29 form for indications of more than one points of impact. Despite there being a provision this witness admitted that she deliberately made that omission, on the grounds that the accused – the driver of vehicle A pointed out to her that he will explain everything in court.

The point of impact as shown on the police plan-drawn by Sgt. MARITI as the officer who attended that scene of the accident, forms a prima facie evidence that the place indicated thereon invariably reflects the point of impact. MOORE V

MINISTRY OF POSTS AND TELEGRAPHS 1949 (1) SA 815 at 823. This is so where that police plan is not challenged. Sgt. MARITI testified that the indications from which she made the plan were made by eyewitnesses. These witnesses were not called to testify before this court. What evidential value is that plan which was made from such indications? In addition those so called eyewitnesses by the police officer made those indications in the absence of both the drivers. That type of evidence is inadmissible.

The indication of the point of impact as made before this court by the defendant's witnesses (DW2 and 3) is on the same grounds as those who indicated to the police officer. They are eye witnesses. They were travelling as passengers in the motor vehicle A at the time of the collision. They had an opportunity to observe what was taking place right before their own eyes and under their very noses. They were infact better placed than the driver of the motor vehicle that was travelling infront of vehicle B.

They were injured, and therefore they were taken to the hospital before the police arrived at the scene. The next day when the police officer was at the scene the police officer would not accept their version of events nor their indications. The police officer may not force the accused to record the statement but if the accused voluntarily makes the statement it is not proper for the police officer to refuse to record that statement. The accused cannot give instruction to the police officer regarding the performance of his or her duties. I do not accept that the driver of vehicle A - 1st defendant therein, gave instructions to Sgt. MARITI not to record his statement or indication made by him. All the witnesses claim that there were broken pieces of glass, oil, and other debris at the places they indicated as the point of impact. On LMP29 no debris is indicated although the police officer claimed it was present. Her failure to put any mark or sign rather than X to show broken glasses, soil and oil etc, seems to suggest the contrary.

The burden of proof that the accident was caused by the negligent driving of the 1st defendant rests upon the plaintiff; ---
----- This burden may be discharged on the balance of probabilities.-----

Factors such as the damage suffered by the vehicles may go some way in proving how that accident occurred. Both vehicles suffered damage to a varying degree of seriousness and extent. The location on the vehicles of this damage also indicates how they collided. Vehicle A sustained damage on the right wheel mudguard, right windows, right and left rear view mirrors, grill, bonnet, headlamp and both front indicators. (My underlining). Vehicle B sustained damage on the whole of the right side in front. (My underlining) this is the description of the damage according to L.M.P.29. The drivers of the vehicles accepted this description or agrees with it.

After the collision or as a result of that collision vehicle A careered wildly. It left the road and came to a halt in the

adjacent field where it capsised. Vehicle B made a U Turn and stopped one pace from the point of impact according to L.M.P.29. How it execute such a turn for such a distance? A combi has fairly long body. It may be four to five metres long. The damage on the right side of both vehicles is an indication that they collided right side to right side. The pressure or force of collision caused or forced the combi to turn and face back where it came from.

Strangely enough this turning is alleged to have been executed in its correct lane where it suddenly stopped. It is difficult to understand how the four metres long vehicle B could perform half turn at almost the same spot like a ballerina or ice scatter. It is just improbable that a vehicle can perform a U turn and stop at a distance only of one pace from the point of impact while the heavier vehicle A careered wildly for 56 paces.

The scenario created by the evidence led on behalf of the plaintiff is that vehicle B was travelling at a moderately slow

speed following the motor vehicle immediately in front of it when vehicle A came into their lane and collided with vehicle B. How did those other vehicles in the convoy avoid this apparently menacing vehicle which was not only travelling in the wrong side but was also travelling at an excessive speed. The answer was easy. The driver of vehicle B did not see as it was dark at night. He only saw the lights of vehicles travelling in front. The motor vehicle immediately in front of vehicle B swerved. It can be presumed then that all the motor vehicles in that convoy must have suddenly swerved to avoid colliding with it in the same way as that motor vehicle immediately in front of vehicle B.

Why then was vehicle B unable to swerved to the left or even right as there is no evidence of any traffic on its right. Vehicle A was the only traffic which was travelling or should be travelling in that right hand lane. If it left its lane as claimed by the driver of vehicle B, when did it do so? The suggestion seems

to be to the effect that it came all along the way on the wrong side of the road. This is most improbable.

When vehicle B stopped, it was now facing back where it came from. It stopped face to face with the motor vehicle which followed it. How did this vehicle A which was causing the alleged havoc in the convoy of traffic travelling eastward towards Lekokoaneng manage to hit only vehicle B in that convoy? The vehicle immediately in front of vehicle B which swerved to the left exposed it to the danger of the vehicle A coming to collide with it. That particular vehicle was not involved in that accident. Strangely enough its driver is the one according to Sgt. Mariti, who pointed out the point of impact of the two vehicles (A and B). I do entertain great doubts with regard to this driver's observations which could not even be put to test under gross examination because he was not called to testify. That evidence regarding his indications is hearsay and inadmissible. Plaintiff has failed on the balance of probabilities

to establish his case. The claim fails. It is therefore dismissed with costs.

K.J. GUNI
JUDGE



For Plaintiff - T. MATOOANE

For Defendant - M/S WEBBER NEWDIGATE