CASE No. C OF A (CIV) 25/2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

WBHO CONSTRUCTION (PTY) LIMITED APPELLANT

and

BELINAH MPHENETHA RESPONDENT

CORAM: STEYN, P.
PLEWMAN, JA
MELUNSKY, JA

HELD : 3 APRIL 2006
DELIVERED: 11 APRIL 2006

SUMMARY

Damages *– Motor collision – minibus taxi/damaged, cost of repairs – evidence of experienced and credible witness testifies as to costs of sub-contractors and suppliers of materials. Evidence acceptable. Vehicle to be repaired in South Africa – respondent obliged to pay 14% VAT to repairer in terms of South African law – suggestion by appellant that some or all may be recoverable in Lesotho – no evidence to establish this – respondent not obliged to rebut every possibility raised by appellant. Damages for loss of profits arising out of damage to bus – all expenses associated with use of bus to be taken into account – trial court not deducting major expenditure for spares etc. – award corrected by Court of Appeal. Period over which loss of profits to be calculated – factors to be taken into account –*

respondent unable to pay costs of repairs – relevance in assessing period. Appellant alleging respondent should sell another vehicle to pay costs of repairs – not reasonable in circumstances – no duty on respondent to mitigate damages in this way. Period assessed by trial court excessive and reduced. Award of interest of 25% by trial court excessive – interest to run from date of judgment – rate of interest determined by Court of Appeal.

JUDGMENT

MELUNSKY, JA

[1] This is an appeal against a decision by **Majara J**. in the High Court. The matter arises out of a collision that occurred on 21 September 2002 between a minibus taxi E1290 owned by the respondent and a motorized grader driven by an employee of the appellant in the course of his employment and within the scope of his duties. As a result of the collision the respondent's vehicle was extensively damaged and she sued the appellant in the High Court for damages under two main headings – the cost of repairing her vehicle and the loss of income which she sustained due to her inability to use the vehicle for a lengthy period. The respondent based her claim on the contention that the collision was due to the sole negligence of the driver of the grader.

[2] In the court a quo the appellant placed in issue both the question of negligence and that of damages. **Majara J** held, however, that the collision was indeed due to the sole negligence of the appellant's driver and she awarded the respondent damages under both of the aforesaid headings together with interest at the rate of 25% per annum

and costs. The appeal was noted against the judgment both in respect of the merits and the quantum of damages but in this Court counsel for the appellant, Mr Loubser, abandoned the appeal on the merits and confined his argument to certain aspects of the damages and the award of interest.

[3] It is necessary to relate some of the background facts which are not in dispute. The respondent is a widow. She carried on a bus and taxi business in Lesotho. For this purpose she owned various vehicles but the precise number was not revealed in evidence. The vehicle that was damaged in the collision was a 24 seater Toyota minibus. The body of the vehicle had been built in about 1999 by a firm known as United Bus Bodies owned by Mr Bhoolall Doorjan. Not surprisingly the respondent requested Mr Doorjan to inspect the damaged vehicle and furnish her with a quotation to repair it. Due to the damage the minibus was not capable of being driven and Mr Doorjan travelled to Lesotho at the respondent's expense for this purpose. He inspected the vehicle at Tsakholo and gave the respondent a written quotation dated 18 November 2002. According to his quotation, and indeed, Mr Doorjan's evidence in the court a quo, the cost of repairing the vehicle amounted to R88 980.42. As the vehicle would have to be repaired at the workshop of United Bus Bodies in Durban, the quotation included an amount of R8500 for towing costs. Also included in the figure of R88980.42 was an amount of R10927.42, representing value added tax ("VAT") at the rate of 14%.

[4] Although Majara J awarded the appellant the full amount of R88980,

Mr Mohau, who appeared for the appellant before us, readily and correctly conceded that this figure should be reduced by R1250, which was included in the quotation. The amount of R1250 represented the cost of repairing the damaged back bumper of the minibus but there was no evidence that the damage to this part had been caused in the collision.

[5] Mr Doorjan has had over thirty years experience in the body-building industry. He was well-qualified to give evidence relating to the cost of repairing the appellant's vehicle and Mr Loubser did not dispute his expertise in this field nor his credibility as a witness. Initially Mr Loubser disputed four items in the quotation apart from the cost of repairing the back bumper. These were the towing charges of R8500, the cost of R8000 for straightening the chassis, an amount of R750 representing the cost of renewing the instrument cover and the claim for VAT. The first three items were challenged on the basis that the costs had been furnished to Mr Doorjan by outside contractors or suppliers and it was argued that the evidence of the witness was hearsay. It was not disputed that the chassis had to be straightened, that the instrument cover had to be replaced and that the vehicle had to be towed to Durban and Mr Doorjan testified that the costs relating to these items, as reflected in his quotation, were reasonable. His evidence in this regard was not challenged and Mr Loubser, quite correctly, did not press any further argument in regard to these items.

[6] The question of VAT was attacked on a different basis. There was some suggestion in the evidence that the respondent might have been

entitled to recover a refund of an unspecified portion of the VAT when the vehicle was returned to Lesotho after it was repaired. What evidence there was in this regard was elicited by the appellant's counsel from Mr Doorjan in cross- examination. Mr Doorjan's evidence was based on information given to him by one or more of his customers at some earlier time. He had no personal knowledge concerning the right of the respondent to claim a refund in Lesotho of some or all of the VAT that she had to pay in South Africa, nor whether the claim would he accepted by the Lesotho Revenue Authority and when, if at all, it would be repaid to her. All that has been suggested in the evidence is that there may be a notional right of recovery some of the VAT that she has to pay Mr Doorjan. The plaintiff's case, as pleaded, under this heading was that she had to pay for the repairs to her vehicle in accordance within the quotation of United Bus Bodies. This she established in evidence, subject to a small, deduction, on a balance of probabilities. She therefore discharged the onus resting on her. The fact that it was suggested that she might have a right of recovery from some other source does not disturb the probabilities. There is no duty on a plaintiff to lead evidence to contradict or rebut every possibility raised by the defendant.

[7] From all of the aforegoing it follows that the claim for damage relating to the cost of repairs and towing is reduced by R1250 to R87555.42, being R76803 and R10752.32 in respect of VAT.

[8] The second heading under which damages was claimed was referred to as "damages … in lost takings" in the pleadings and by the court a quo as damages for loss of income. The damages claim is essentially

one for the loss of the profit that she would have made out of the use of the vehicle had it not been damaged. The assessment of damages on this basis involves two separate enquiries: what was the daily or monthly profit that would have been made and over what period should the loss be determined. I will deal with each of these in turn.

[9] The respondent testified that her average daily takings from the use of the vehicle during 2002, after deducting the ordinary running expenses (such as the cost of fuel, payment of drivers' wages and minor consumables) amounted to M367. This figure was accepted as the respondent's daily loss by the learned judge a quo. According to her evidence, the average monthly takings for the period 1 January to 21 September 2002 amounted to approximately M10 500. This, however, does not represent the respondent's net monthly income as it does not have regard certain expenditure in respect of spares, tyres, services and other major items. Majara J. was of the view that these major items of expenditure should be ignored. She said:

> "*In my opinion, all that the court needs to do is award the plaintiff the amount she has proved she was making daily. What she did with it afterwards is neither here nor there.*"

The learned judge was therefore of the view that no further deduction should be made from what she called the respondent's "loss of income in the amount of M367 per day."

[10] The learned judge was clearly wrong in her approach. The

respondent's loss of profit can properly be arrived at only by deducting all expenses connected with the use of the motor vehicle in question. This includes amounts the respondent had to spend on items such as services, parts and tyres for the minibus. The expenses for the major items over the nine month period preceding the collision amounts to M58984. Not all of this, however, was expenditure incurred for the minibus that was damaged. The respondent testified that it applied to other vehicles as well. The question is what portion of this amount should be allocated to the vehicle that was involved in the collision.

[11] The respondent was not helpful in providing a solution. The reason is that her bookkeeping system did not appropriate the major expenditure to any particular vehicle. She did, however, put whatever proof was available to her before the trial court, save for omitting to explain how many vehicles shared the major expenses. It is extremely difficult to assess what amount should be deducted from the loss in income but this does not relieve us of determining a reasonable figure on the evidence before us, without being unfair to the defendant (cf **Sandler v Wholesale Coal Suppliers Ltd** 1941 AD 194 at 198)

[12] Mr Loubser submitted that this court should apply 75% of R58984 to the vehicle that was damaged. This seems to be unreasonable. The respondent had at least two other vehicles. There may have been more but we will assume, in the appellant's favour, that she had three vehicles in all, including the Toyota minibus E1290. On this assumption, it would be more reasonable to allocate M20000 of the

M58 984 – say M2 200 per month – to the major expenses for the damaged bus. The respondent's actual net loss would therefore amount to some M8300 per month. This is, of course, not an exact figure. It is the best assessment, which appears to me to be reasonable, based on the facts at my disposal.

[13] The second, and perhaps more difficult, question is determine for how long or over what period the loss of income should be assessed. In the declaration the respondent claimed payment of a daily amount from the date of the collision to the date of repair of the motor vehicle. The learned trial judge awarded damages at the rate of M367 per day from the date of the collision to 21 July 2004 – a period of 22 months – but did not explain how she arrived at this.

[14] Mr Doorjan suggested that it would take about five or six weeks to carry out all the work recorded in his quotation. He added, however, that impact could have caused other damaged of which he was unaware and if so, that the period would have to be extended. In this, regard he mentioned "the electrics", wheel alignments, fluid pipes and air pipes which could have been damaged. Other factors that would have to be taken into account would include the availability a tow truck to tow the vehicle to Durban, the availability of the parts require and the capacity at the firms which were to do carry at the repairs. All that one car say with relative assurance is that, given the best circumstances, the necessary work could have been completed some months after November 2002. However, circumstances were far from ideal. This was due to the respondent's penurious position. The bank

had refused to advance her money to pay for the repairs and she had no reserves to enable her to do so.

[15] Shortly before the collision the respondent had purchased a truck for M70000 which she intended to have converted into a bus for use in her business. It took her until January 2004 to pay for this vehicle and this debt contributed towards her inability to pay for the damaged minibus E1290.

[16] It was submitted by Mr Loubser that in the circumstances of this case the respondent could and should have disposed of the new vehicle in order to make provision for payment of the cost of repairs. We were referred to a judgment of Mpati J in Adel Builders v Thompson 1999 (1) SA 680 (SECLD) at 688 A-F which appears to support the proposition that a party may be required to mitigate his damages by disposing of assets that are not essential for his business or livelihood in order to pay for repairs. It is not necessary for me to decide whether this is a correct exposition of the law and I refrain from doing so. The onus of proving that the respondent could and should have taken steps to mitigate her damages rests on the appellant. The respondent must establish too, that the steps which are proposed are reasonable and such that a prudent businessman would take. Furthermore, and in deciding whether a plaintiff is under a duty to mitigate, the court will not be astute to come to the aid of a wrongdoer (see Jayber (Pty) Ltd v Miller and others 1980 (4) 280 (w) at 282 F-H). Although Adel Builders (supra) was confirmed on appeal (2000 (4) SA 1027 (SCA)), that decision related to other aspects of the case and the Court was not

concerned with whether Mpati J was correct in his approach to the question of mitigation.

[17] In the present appeal the facts are completely different. The respondent had acquired the new vehicle for use in her business. In the fullness of time it would have been converted into a bus and would have given her a further source of income. Whatever the position may be in respect of other assets, if would be unreasonable to expect the respondent to have sold an asset which she had acquired for the purposes of her business. This is not to say that the respondent is entitled to claim damages for loss of profits from the appellant until she eventually has the damaged vehicle repaired. This would be grossly unfair to the appellant. All that this Court can do is to allow the plaintiff a reasonable time to repair her damaged vehicle and to award her damages for loss of profits for such period. The learned judge a quo's assessment seems to me to be excessive, having regard to the facts mentioned earlier and taking into account the respondent's impecuniosity and applying reasonabless, fairness and justice to the facts of the case (cf Smit v Abrahams 1994 (4) SA 1 (A)).

[18] Mr Loubser submitted that a reasonable period to allow for the repairs to minibus E1290 would be six months while Mr Mohau, very commendably, felt that he was unable to support the over-generous award of the trial judge. He suggested a period of between 6 and 12 months. I agree with this, and on this basis the respondent's claim for loss of profit can reasonably be assessed over 9 to 10 months at R80000.

[19] Mr Loubser's challenge to the award of interest was fully justified. In the absence of the legislation, which is clearly needed in this respect, interest should run from the date of the judgment and the amount should be fixed at the approximate average of the servicing rate provided by the Central Bank over the relevant period with a minimum of 6% (see Commissioner of Police and Another v Ntlots'eu, C of A 12 of 2004).

[20] Finally there is the question of costs. The respondent has succeeded in considerably reducing the appellant's claim for loss of profits. On the other hand it failed to in its attempt to reduce her claim for repairs, save to a very small extent. Moreover, the respondent conceded the merits only some six weeks before the hearing. The record consisted largely of evidence relating to the merits most of which could easily have been avoided had the merits been conceded much earlier. It would be appropriate therefore if no order was made in respect of the costs of appeal, an order which neither counsel could seriously oppose.

[21] It is ordered:

1. The order of the court a quo is set aside and is replaced with the following:

"(a) Judgment in favour of the plaintiff in the sum of

M167555.42

(b) Interest thereon from date of judgment to date of payment at the approximate average of the serving rates provided by the Central Bank over the relevant period with a minimum of 6%.

(c) Costs of suit."

2. There will be no order as to the costs of the appeal.

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L.S MELUNSKY

JUDGE OF APPEAL

I agree

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J.H. STEYN

PRESIDENT OF THE

COURT OF APPEAL

I agree

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C. PLEWMAN

JUDGE OF APPEAL

For the Appellant : **Mr P.J. Loubser**

For the Respondent: **K.K. Mohau**