IN THE COURT OF APPEAL OF LESOTHO

CASE NO. C OF A (CIV)23/2008

In the matter between:

EVODIA TLABUSE **APPELLANT**

And

LESOTHO SCOUT ASSOCIATION **1ST RESPONDENT**

MOROKE MOROKE **2ND RESPONDENT**

CORAM: MELUNSKY, JA

SCOTT, JA

GAUNTLETT, JA

Motor vehicle collision – failure of plaintiff driver to testify – not established that collision caused by negligence of defendant

JUDGMENT

Heard: 8 October 2009

Delivered: 23 October 2009

GAUNTLETT, JA:

[1] This is an appeal against the dismissal by the High Court (Nomngcongo J) of a claim for damages arising from a collision on 6 April 2002. A Toyota Coaster minibus (with registration AN 694), owned and driven by the appellant, was travelling from Ha Matala in the direction of Maseru in the early evening. Each side of the road comprised two lanes. At Lithabaneng it stopped for a passenger to alight. Just after the minibus rejoined the traffic flow, a single–cab 4x4 (AH 712) and it collided, striking each other in the front. The minibus was irreparably damaged.

[2] The trial court dismissed the claim. In assessing the evidence, it found the appellant's eyewitness – a passenger in the minibus – on

his own account (seated or standing in the minibus in its second or further row of seats, next to its back passenger door on the left of the vehicle) "*not in the best position to observe what was happening on the road*". The court also found him evasive in his testimony. He also changed his evidence regarding the location of a damaged truck which was stationary near the collision site.

[3] Given these evidential difficulties, for the trial court the unexplained failure of the appellant himself to testify was decisive. This was particularly so in the light of the cumulative effect of the evidence of the two other witnesses who testified as to the collision. On the one hand, there was the second respondent, the driver of the single–cab. He is described by the trial court as "*firm*" in his account that immediately before the collision, the appellant had been trying to avoid a truck, and that the appellant was travelling at a great speed. Clearly the trial court formed a favourable view of the second respondent as a witness, and believed him.

[4] The only other witness on the merits was a police trooper, who attended on the scene a short while after the collision. A number of injured persons had to be assisted and removed from the minibus, and by then it was dark. Quite what he observed in these circumstances is open to doubt. In any event, his accident report and two rough sketches (while reversing the correct directions of travel of the two vehicles) is hardly decisive. He places both vehicles in their correct lanes, and the point of impact either right on the line separating the lanes or close to it, slightly on the appellant's side of the centre line. When asked for the basis for his several strong opinions, he repeatedly invoked common sense. On this slender basis he was able to advance the partisan opinion that the single–cab (and it alone) was driven at high speed, despite the fact that both vehicles were damaged in the same way. All in all, the trial court rejected his evidence as "*completely unconvincing*" and found for the respondents.

[5] On appeal, counsel for the appellant contended that the trial court erred in preferring the second respondent's evidence to that of the appellant. He argued that the evidence of the policeman, together

with the probabilities, should have "*left no doubt*" in the mind of the trial judge that, on the usual civil test, the collision occurred on the appellant's side of the road. This, he contended, was "*the only question to be determined*", and if answered in favour of the appellant, necessarily meant that the collision was attributable to the negligence of the second respondent. In this regard, he advanced three propositions: that the collision did not occur on a curve in the road (as the second respondent had testified) but on a straight section (as the appellant's passenger and the policeman contended); that no broken–down truck had been present (as the second respondent said) such as to oblige the appellant to swerve into his outer lane; and, most crucially, that the collision occurred in the appellant's inner lane of travel.

[6] This argument faces the following difficulties. Firstly, the trial judge was clearly unimpressed by the demeanour and manner of testifying by both witnesses for the appellant. He records his unfavourable impressions and the factual basis for them. The evidence supports his conclusions. This aspect was left unaddressed in the appellant's heads of argument, in criticizing the judgment. In oral argument

counsel correctly conceded that there was no particular basis open to him to challenge the trial court's credibility findings.

[7] Secondly, the criticism of the trial court for applying the well-known approach expounded in **Galante v Dickinson 1950 (2) SA 460 (A) at 465** is misconceived. The principle finds full application here. The appellant was not called as a witness, and no evidence was addressed to explain this, by virtue for instance of his absence, or injuries in the collision, or similar factors. As **Schreiner JA** said: "*In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisors are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination.*"

And further:

"*It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternate explanations of the cause of accident which are more or less equally open on the evidence that one which favours the plaintiff as opposed to the defendant*". (emphasis added).

[8] Thirdly, the contention that the trial judge erred in the three respects indicated in paragraph [5] above does not remedy this deficiency. The issue as to whether or not there was a curve in the road near the point of impact does not seem to me to be material to issues of fault and causation on the evidence of any of the witnesses. The issue as to the broken-down truck is also overstated. The second respondent was adamant in this regard, the appellant's witness conceded both that he was not seated in the front of the vehicle and that his full attention was understandably not devoted to the road ahead, while

the trooper's observations on the scene later – in the circumstances I have described, at night, with injured passengers being removed and what appears to have involved general confusion – are not compelling. It is not so, as counsel for the appellant sought to contend, that the second respondent in effect conceded that no truck impeded the single-cab's path. Lastly, as regards the point of impact, the rough sketches by the trooper of the scene depict this (on one variant) as on the middle line, or at best for the appellant was marginally on his side of the road. The attempt to bolster this by reference to broken glass and soil in the lane of the appellant's vehicle is also inconclusive: the sketch does not reflect this, no measurements were recorded from any fixed point relating to this, and by common experience the ultimate location of soil, glass and similar debris from vehicles involved in collisions are an uncertain indicator of the point of initial impact (see especially Cooper Motor Law (1987) vol. II 420 – 1). A later attempt by counsel to invoke the trooper's indication on the sketches that the point of impact was 13 paces from one side of the road but only 10 paces from the other, does not remove the problem. As counsel acknowledged, the court does not know whether the witness's pacing off of the distance is

more reliable than his clearly inexact marking on the two sketches. The courts have repeatedly warned that admissible opinion evidence must truly be of an expert nature, and then the court must itself be persuaded of its correctness. In the case of police evidence of this kind accurate measurements are essential (Guardian Royal Exchange Rhodesia v Jeti 1981 (2) SA 102 (ZAD) at 106 A – 107B).

[9] In these circumstances, the unexplained failure of the appellant to testify is indeed decisive, as the trial court held. It was not established that the collision was caused by the negligence of the second respondent.

[10] A few days before the hearing of the appeal the second respondent filed and served heads of argument, with an application for condonation. This was ultimately not opposed on behalf of the appellant. That application is allowed, but the second respondent is directed to pay the costs thereof. Further, in view of the extremely late filing of the second respondent's heads of argument, we think it equitable to make the costs order which follows.

[11] The following order is made:

"The appeal is dismissed with costs, save that

(a) the first and second respondents jointly and severally are directed to pay the costs related to the application for condonation; and

(b) the costs of the appeal shall exclude the costs related to the preparation and filing by the respondents of their heads of arguments".

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J.J. GAUNTLETT

Justice of Appeal

I agree

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L.S. MELUNSKY

Justice of Appeal

I agree

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D.G. SCOTT

Justice of Appeal

For the appellant: P.J. Loubser

(instructed by Webber Newdigate, Maseru)

For the respondent: R. Seperiti