IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) No.33/ 2011

In the matter between:

COMMANDER LDF	1ST APPELLANT
MINISTRY OF DEFENCE FORCE	2ND APPELLANT
THE ATTORNEY GENERAL	3RD APPELLANT

AND

MOTLATSI MAGAGA	RESPONDENT

CORAM: SMALBERGER J A
SCOTT J A
HOWIE J A

HEARD : 16 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Claim for damages to motor vehicle – proof required – damages not established – damages awarded for emotional shock – case for such damages not made out – order of High Court altered to one of absolution from the instance.

JUDGMENT

SMALBERGER, JA

[1] The respondent (as plaintiff) instituted action in the High Court against the appellants (as defendants) for damages in the sum of M250 225.33 plus interest and costs. His action arose out of an incident that occurred on the night of 23 June 2007 when the Corolla sedan vehicle ("the Corolla"), belonging to, and being driven by, him was shot at by members of the Lesotho Defence Force and severely damaged by gunshot fire. For convenience I shall refer to the parties as in the court a quo.

[2] The trial proceeded before Peete J. Although initially denied, the defendants conceded liability in the course of the trial leaving only the quantum of the plaintiff's damages in issue. At the conclusion of the trial the

learned trial judge awarded the plaintiff M98 000.00 in respect of the damage to the Corolla, as well as an amount of M25 000.00 for "mental shock and suffering", together with interest at 18.5% from date of judgment, and costs of suit. The defendants duly noted an appeal against the amount of damages awarded to the plaintiff; the plaintiff in turn cross-appealed against interest only being awarded from the date of judgment.

[3] The law is clear with regard to how damages to a vehicle are to be assessed in a matter such as the present. The normal and appropriate method of doing so would be to calculate the difference between the market value of the vehicle concerned before it was damaged, and the market value thereafter. Failing agreement, the before and after value of the vehicle

would have to be properly established by admissible evidence. Another appropriate method, and one frequently applied, is to take as the measure of damages the reasonable cost of restoring the vehicle to its original (pre-damaged) condition. However, the cost of repairs as a method to establish damages would not be appropriate if such cost would clearly be in excess of the diminution in value of the vehicle. By way of illustration, if a vehicle with a value of M50 000.00 is damaged, and the reasonable cost of repairs would amount to M100 000.00, the larger amount can clearly not be recovered as damages. (See ERASMUS v DAVIS 1969 (2) SA (AD) 1 at, inter alia, 9 A-D; 17 F-H; 18 C-E, a case consistently followed in South Africa, and see also MARGARET KHAPHWIYO v MAPITSO KHOJANE 1995-1996 LLR-LB 299 at 302.)

[4] As proof of the plaintiff's damages in respect of the Corolla the plaintiff's counsel handed in quotations from three different panel beaters/repairers. The quotations were for M100 255, M98 724 and M95 628 respectively. That for M100 255 from Lesotho Nissan was supported by a witness statement from Mr. Anand Jugar, the service manager of Lesotho Nissan, whose statement was admitted by consent. Although the witness did not specifically state that the quotation represented the reasonable cost of repairs to the Corolla, one can infer in favour of the plaintiff that to have been the case. The other quotations were not confirmed by evidence. The trial judge resorted to the simple expedient of taking the average of the three quotations (which in any event was impermissible) and awarded the plaintiff an amount of M98 000 in respect of damage to the Corolla. In that he erred.

[5] The plaintiff testified that he had bought the Corolla (a 2004 model) for M90 000 at the beginning of 2007. The vehicle was damaged some six months later when (subject to evidence indicating the contrary) its value would probably have been less than at the time of purchase. No evidence was led as to its market value immediately before the incident, or of its residual value after the incident. The fact that it was capable of repair would suggest that it must have had a reasonable residual value. Quite clearly the amount awarded to the plaintiff substantially exceeded the diminution in value of the Corolla. In the circumstances he was not entitled to damages in the amount awarded to him. Nor is it possible to determine on the evidence what damages he actually suffered. It follows that the plaintiff failed to prove his loss consequent upon the damage to the Corolla. This

is an unfortunate result in a matter that should have been capable of easy proof in the court a quo. It is inexplicable that the necessary evidence was not led, or encouraged by the judge a quo in the interests of doing justice between the parties.

[6] Unfortunately for the plaintiff he can also not succeed in his claim for damages for "mental shock and suffering", or "emotional shock" or "nervous shock", as it is more commonly referred to. One of the requirements for such a claim to succeed is that the claimant must be shown to have suffered some identifiable psychiatric injury or illness as a consequence of the event giving rise to his claim (see OFFICER COMMANDING ROMA POLICE AND OTHERS v JOSIASE ROBOTSE KHOETE AND ANOTHER C of A (CIV) 70/2011, judgment delivered

on 27 April 2012, at para [13], and authorities there cited). Damages are not recoverable for insignificant nervous shock of short duration which has no substantial effect on the health of the person concerned. Being shot at would undoubtedly have been an unpleasant and distressing experience for the plaintiff, but it would have been of relatively short duration, and there is no evidence that he suffered any consequential psychiatric injury or illness. By his own admission he did not even feel the need to consult a doctor. He therefore failed to make out a case for damages for nervous shock.

[7] In the circumstances the appropriate order in the court below should have been one of absolution from the instance. The appeal therefore succeeds. It is to be hoped that the parties will arrive at a settlement of

this matter, more particularly one that will not burden an innocent and deserving plaintiff unduly with costs.

[8] The conclusion to which I have come renders it unnecessary to consider the cross-appeal. In any event there is no merit in the cross-appeal. The trial judge was correct in only awarding damages from the date of judgment.

[9] The following order is made:

1. The appeal is allowed with costs.
2. The judgment of the court a quo is set aside and the following order is substituted in its stead:

   "The defendants are absolved from the instance with costs".

3. The cross-appeal is dismissed with costs.

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
JUSTICE OFAPPEAL

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

For Appellants : Adv R. Motsieloa

For Respondents : Mr. K.D. Mabulu