IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 25/2016**

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED **Appellant**

And

MOSALA LESAOANA **Respondent**

CORAM : LOUW A.J.A
CLEAVER A.J.A
MUSONDA AJA

HEARD : 20 OCTOBER 2016

DELIVERED : 28 OCTOBER 2016

SUMMARY

Collision of motor vehicle with pedestrian in the road –negligence of driver –

Excessive speed in the circumstances when overtaking stationary vehicle-Contributory negligence of pedestrian – failure to keep a proper lookout when entering road from behind stationary vehicle-Apportionment

JUDGMENT

CLEAVER AJA

[1] The respondent succeeded in an action for damages against the appellant in the High Court. His claim arose from bodily injuries, which he had suffered when as a pedestrian he was struck by a vehicle covered at the time by third party insurance with the appellant in terms of the Motor Vehicle Insurance Order No 26 of 1989 as amended.

[2] The respondent had initially claimed payment of M 121,509.00 as damages but prior to the hearing gave notice to amend the amount of his claim to M350,000.00. After the evidence for both parties had been heard, and only during the course of argument before the trial court, did counsel for the appellant for the first time object to the amendment on the basis that the amended pleadings had been served out of time. The objection was overruled and the trial judge gave judgment on the basis of the amended claim.

[3] The trial court awarded the respondent M230, 000.00 as general damages but having found that the respondent's negligence had also contributed to the accident directed that M30,000.00 be deducted from the award to take account of that negligence. In the result the respondent obtained judgment for payment of M200, 000.00. The deduction of M30, 000.00 from the award of M230, 000.00 meant

that in effect the court had found that the degree of negligence of the insured driver had been of the order of 87% and that of the respondent 13%

[4] On appeal before us two grounds of appeal are advanced, namely that the court had erred in

(1) allowing the amendment to the pleadings, and
(2) finding the degree of negligence on the part of the respondent to be only 13%, whereas it should have been much higher.

[5] In my view there is no merit in the first ground of appeal. The relevant provisions of the High Court Rules read as follows:

33 (1) Any party desiring to amend any pleading or document, other than an affidavit filed in connection with any proceeding, may give notice to all other parties to the proceeding of his intention so to amend.

(2) Such notice must state that unless objection in writing is made within fourteen days to the said amendment, the party giving the notice may amend the pleading or document accordingly.

(3) If no objection be so made, the party receiving such notice shall be deemed to have agreed to the amendment.

….

(5) Whenever the court has ordered an amendment or no objection has been made within the time specified in sub-rule (2), the party amending shall deliver the pleading or document as amended within the time specified in the court's order or within seven days of the expiry of the time prescribed in sub-rule (2) as the case may be.

[6] The respondent's notice of amendment was served on the appellant's attorneys on 8 December 2014 and elicited no objection. It is clear from the wording

of Rule 33(3) that once the appellant failed to object to the proposed amendment within the prescribed period, it was deemed to have agreed to the amendment. The amended pleadings should have been served within seven days after the expiry of the fourteen-day period allowed to the appellant within which to object to the amendment. They were not served timeously and were served and filed only on or about 4 March 2015 (the date stamp recording receipt is not clear) but in any event before the hearing which took place from 16 March 2015. No objection was raised by the appellant to the late service and filing and the matter proceeded to trial on the 16th of March. As already mentioned, it was only during the course of argument after all the evidence had been heard by the trial court, that appellant's counsel objected to the late service and filing of the amended pleadings.

[7] When asked whether the appellant had suffered any prejudice as a result of the late filing of the amended pleading, counsel's response was that the only prejudice was that the respondent had not complied with the provisions of Rule 33(5) of the rules of court. That does not constitute prejudice.

[8] The requirement that amended pleadings must be filed when the court orders an amendment or when no objection has been made to a proposed amendment is purely formal and procedural in nature. There is nothing in the rule to suggest that a failure to file the amended pleadings timeously will result in the deeming provision being removed. Having failed to object to the proposed amendment, the appellant knew what case he had to meet before the trial commenced. He elected not to object to the late filing of the amended pleadings, which the trial judge considered he ought to have done in good time if he had wished to take the point. In effect the trial judge condoned the late filing of the amended pleadings and I can find no fault with that decision.

[9] The respondent, as plaintiff in the court below, was the only one to testify in support of his claim. His evidence was that on the evening in question in was walking along the left hand side of a main road when he was struck from behind by a motor vehicle. He did not hear anything before he was hit and it is common cause that as a result of the impact he was rendered unconscious. His evidence is that he was walking about four paces to the left hand side of the tarred road when he was struck.

[10] It was the insured vehicle, a taxi, which struck the respondent. The owner and driver of the taxi testified, and we get a better picture of the conditions on the road that evening from his version. His evidence was that the accident occurred at approximately 8pm when it was already dark. He was travelling at about 50 to 55 kilometres per hour and had to contend with the headlights of oncoming traffic. When he reached a village a taxi travelling in front of him slowed down and came to a stop He accelerated in order to pass the stationary vehicle on its right and when he returned to the left hand lane after passing the taxi, his passenger screamed that there was someone in front of them in the road. He applied his brakes, swerved to the right in an attempt to avoid the pedestrian but was unable to do so. In cross-examination he confirmed that his speed at the time was between 50 and 55kph. He was adamant that the pedestrian was in the middle of the left hand lane when he struck him. It emerged from his evidence that the taxi that stopped in front of him did so near to a bus stop. Although the transcription of his evidence is not clear, it seems that he said that passengers alighted from of the taxi. He also conceded that it was possible that there were people walking around in the area.

[11] A police report and sketch of the accident scene was introduced as evidence, but not much store can be placed on it. To start with it was compiled on the morning after the night on which the accident had occurred. The policeman who compiled the report identified the point of impact solely with the aid of the driver of the insured vehicle. Because of the time lapse after the accident evidence which the police officer

located near to the road, cannot be regarded as conclusive in confirming the point of impact as pointed out by the driver.

[12] It is common cause that the respondent suffered serious injuries in the accident: his elbows were injured, his shin was fractured, his bladder ruptured, his kidneys were affected and he sustained a wound to his abdomen. In addition to having his arms and leg in plaster for some considerable time, he had a metal rod inserted in his arm He received constant treatment for some two years. While previously he could do many jobs, including the ploughing of his fields, he can no longer do those jobs, his hands are “no good” and he sees himself as a useless man. That evidence was not challenged.

[13] The judge a quo found that the point of impact was, as the insured driver had testified, in the middle of the left hand side of the road. There was no reason to reject the evidence of the driver that a taxi had come to a stop in front of him. The respondent was of no help in describing the scene that night. He says there were no approaching vehicles, he was not at a village and makes no mention of a bus stop. Having regard to the fact that he lost consciousness immediately after being struck down, it is possible that this may have affected his memory.

[14] In my view the trial judge was correct in accepting the driver’s version as to how the accident occurred and where the point of impact was. If respondent had been walking four paces off the road, as he had testified, it is unlikely that the taxi, which had just overtaken a stationary vehicle, would have travelled off the road so as to collide with him where he said he was walking. However, I am of the view that the trial judge over-emphasized the degree of negligence that he attributed to the insured driver. He correctly found that at a scene such as that in which the driver found himself, the presence of oncoming cars in a built up area and the likelihood of pedestrians crossing the road near to a bus stop behoved him to exercise extreme care, particularly when

overtaking a stationary vehicle in those conditions. Clearly, the speed at which the driver was travelling was excessive having regard to the prevailing conditions. On the other hand I believe that the learned judge underemphasized the negligence of the respondent. For the accident to have occurred where it was found to have happened the respondent had entered a fairly busy road from behind a stationary vehicle without having regard to the possibility of the stationary vehicle being passed by overtaking traffic. By failing to keep a proper look out in the prevailing conditions the degree of negligence to be attributed to her must be considerable. Having regard to the circumstances I am of the view that it would be fair and just to apportion the negligence of the parties giving rise to the accident equally between the two parties. The alteration to the apportionment of negligence that I propose would be of sufficient magnitude for the award to be altered on appeal.

[15] In my view there is no basis on which to interfere with the assessment of the quantum of the respondent's damages in the sum of M230, 000:00 by the trial court. The judge lamented the fact the High Courts lacked guidance in the form of scientifically oriented jurisprudence in the assessment of the quantum of damages, but nonetheless, did as best he could in the circumstance to arrive at a suitable award.

[16] There is no need to apportion the costs as the judge a quo did. The respondent succeeded with his claim in the court below and is entitled to his costs in that court. In this court both parties achieved a measure of success. The appellant succeeded in having the damages award reduced from M200, 000:00 to M115, 000:00. On the other hand, the appellant had submitted that since the amendment of the amount claimed ought not to have been allowed, the damages award should have amounted to only M36, 452:00. In as much as the appellant 's submissions did not find favour with us, the respondent has also achieved a measure of success. Accordingly, I am of the view that each party should pay its own costs of the appeal.

[17] In Xing Long Enterprise (PTY) LTD)[1] this court explained that the principle governing *mora* interest in Lesotho is that the rate of interest to which a judgment creditor may be entitled is determined by reference to market conditions prevailing in respect of offers on interest on funds invested with commercial banks in Lesotho. At the time when judgment was delivered by the court below the *mora* interest rate was 6.75% and this will be reflected in the order made by this court.

In the circumstances I would issue the following order-

1.The appeal succeeds and each party must bear its own costs of the appeal.

2. The order of the High Court is replaced with the following order-

1. The Defendant is ordered to pay to the plaintiff the amount of M115, 000.00 for medical expenses and general damages consisting of pain and suffering and loss of amenities of life.
2. The defendant is to pay the Plaintiff's costs of suit.
3. Interest on the amount of M115,000.00 shall run at the rate of 6.75% p.a. from the date of judgment.

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R. B CLEAVER

ACTING JUSTICE OF APPEAL

[1] [2016] LSCA (28 April 2016) at para 10 and 11

I agree

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W.J. LOUW

ACTING JUSTICE OF APPEAL

I agree

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DR P.MUSONDA

ACTING JUSTICE OF APPEAL

Counsel for the appellant : P.J. Loubser

Counsel for the respondent : L.M.A. Lephatsa