

IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

**C of A (CIV) 08/2022
CIV/T/570/2018**

In the matter between -

**MAHOANA MOLUPE
APPELLANT**

and

**LESOTHO NATIONAL GENERAL
INSURANCE CO LTD
RESPONDENT**

CORAM: P T DAMASEB, AJA
P MUSONDA, AJA
J VAN DER WESTHUIZEN, AJA

HEARD: 14 APRIL 2022

DELIVERED: 13 MAY 2022

Summary

An appeal against the part of a judgment dealing with the quantum of damages, cannot be properly heard without a fully transcribed record of the proceedings before the lower court.

This is especially so because the appellant relies on oral evidence, not reflected in the record. The appeal is struck off the record.

JUDGMENT

J VAN DER WESTHUIZEN, AJA:

Introduction

[1] This is an appeal against a part of a judgment delivered by Mokhesi J in the High Court on 15 December 2021. It revolves around the amount of damages for funeral and medical expenses, awarded to the appellant, for expenses suffered because of his late mother's injuries and death after a road traffic accident. Lamentably, the matter reached this Court almost six years after the events that had set these proceedings in motion.

[2] As a pedestrian the appellant's mother was hit by a vehicle, insured by the respondent, on 30 July 2016. She was injured and hospitalized. On 20 September 2016 she passed away. The appellant took care of her medical expenses, as well as funeral costs.

The High Court

[3] The appellant sued the respondent in the High Court for damages totaling M60 875.50, consisting of funeral expenses of M55 556.00 and medical and hospital expenses of M5 319.80, plus costs. The respondent opposed the claim.

[4] The appellant did not give evidence, as he was abroad. This is mentioned in the High Court judgment. No negative inference

seems to have been drawn by the court. Four witnesses testified for the appellant, including his two sisters. The respondent also called witnesses.

[5] The court dealt in detail with causation and the other elements of delictual liability. On the merits it found in favour of the plaintiff, now the appellant in this Court.

[6] Regarding the quantum, receipts were presented as evidence. These are listed in a document entitled "Exhibit F" in the record of proceedings. The total at the bottom of this list of receipts is M66 134.05.

[7] The High Court awarded only M33 957.10 to the appellant. The basis of the calculation and order was that the judge did not accept all the receipts submitted as evidence. In the court's judgment this is explained: Amounts of M2 800.00 for a gravestone and M24 813.00 as per a receipt dated 4 September 2016 were disallowed, because "(a)ll these receipts do not show who paid the said amounts and therefore, it was not proved that it was the Plaintiff who incurred them".

[8] The same applied to receipts dated 15 September 2016 for M300.00 and 18 September 2016 for M2 784.00. In the judgment it is stated: "Both receipts depict the amounts having been paid for 'admission', but do not show where the said 'admission' took place. These amounts were disallowed by the High Court.

[9] From the judgment it does not seem that the learned judge took any oral evidence into account. Apparently only the receipts were relied on.

[10] The appellant appealed to this Court against only that part of the judgment dealing with the quantum, more specifically rejecting some of the receipts.

Condonation

[11] The appellant noted the appeal two weeks late and asked for condonation, explaining some of the reasons for the delay; and asked for condonation. From the respondent's side, this is but a minor part of the appellant's problem, which is dealt with below.

Submissions before this Court

[12] The respondent's main point is its strong objection against the fact that no transcribed record of the proceedings in the High Court had been placed before this Court. Neither does this comply with Rule 5(15) of the Rules of this Court, nor does the certification of the record satisfy Rule 7(2).

[13] According to the respondent's counsel, there is simply no appeal before this Court. A cross-appeal was, according to counsel, contemplated by the respondent, but this was not noted because there was no proper appeal before this Court, to meet with a cross-appeal. Counsel for the respondent cited a considerable amount of authority to support his submissions in this regard and to illustrate the importance of a fully transcribed record of proceedings.

[14] On behalf of the appellant it was submitted that the record was indeed properly before this Court, because the relevant

parts were included. Furthermore, if the respondent wished to object, it should have raised a point of law.

[15] The appellant's main contention is that there is no material difference between some of the invoices that the High Court accepted and those rejected by the court. With reference to the oral evidence given and supporting documentation it is clear that the appellant was indeed the one who incurred the expenses and that the High Court erred in not accepting those receipts. Some invoices were rejected because they did not bear the appellant's name, even though the deceased's name appeared on them.

[16] On behalf of the respondent it was argued that there is no record of the oral evidence before this Court. Thus, oral evidence cannot be relied on.

[17] Counsel for the appellant also pointed out that all the original invoices had been submitted to the respondent when the claim was submitted. The respondent did not reject or investigate the claims, as it was entitled to do within 60 days, in terms of section 6(1)(b) of the Motor Vehicle Insurance Order 26 of 29, as amended. In reaction to this point, counsel for the respondent pointed out that the wording of section 6(1)(b) contains no reference to a period of 60 days,

[18] The respondent made only copies of the receipts available for the trial. Some of these are unclear. This applied especially to the stamps on the back which support the appellant's claim. The High Court therefor rejected some of these receipts. This is, according to the appellant.

[19] According to the appellant, these invoices were sufficiently clear in any event to be accepted by the High Court. No other invoices, or invoices referring to anyone other than the deceased or her son, the appellant, that could cause confusion, were before the High Court.

[20] Appellant's counsel emphasized a number of examples. The receipt for a grave steel fence to the amount of M2 800.00 does not show the name of the appellant. The High Court rejected this claim. However, it does indicate that the fence was for the grave of the deceased, Mathabo Molupe, the mother of the appellant. (This expense seems to be what the High Court's judgment refers to as for a gravestone, as indicated in paragraph [7] above.)

[21] Regarding the amount of M24 183.00, also referred to in the judgment as indicated in paragraph [7], the applicant pointed out that the appellant's sister, 'Maliteboho Molupe Lichaba testified that Lesotho Funeral Services usually use the deceased's name on receipts.

[22] Other receipts, that show only the deceased's name, but not the name of the appellant, were accepted by the High Court.

[23] Receipts for M300.00, M300.00 and M2748.00 for medical expenses incurred by the deceased at Ha Pita (Villa) Clinic were also rejected by the High Court because it was not clear that they had been issued for treatment of the deceased. The deceased's daughter testified that her mother had been treated by the Clinic.

[24] As to the receipts of 15 and 18 September 2016 that were not considered by the High Court on the basis that they were for admission but did not display where the admission had taken place, the deceased's daughter and appellant's sister, Mamohale Moshoeshoe testified that the Clinic normally just wrote "admission" on receipts, that her mother had indeed been treated there after the accident and that the appellant had footed the bill.

[25] Appellant's counsel furthermore stated that the High Court had said nothing about receipt no 28447 for M128.00. It furthermore omitted a receipt of M40.00, dated 29 December 2016, which was perhaps an oversight.

Analysis

[26] The core issue is related to the onus of proof. Did the appellant prove, on a balance of probabilities, that he had incurred the expenses he claimed, to the amount of M60 875.50; or did he only prove the amount awarded by the High Court, namely M33 957.10?

[27] The main question is whether the High Court erred in rejecting some invoices. This is linked to the question whether there is a material difference between some of the invoices accepted by the court and those rejected.

[28] However, can this Court answer these questions, given the record before it? The necessity and importance of a proper record in criminal as well as civil appeals have been emphasized by this Court. (See eg *R v Tsosane LAC (1995 - 99) 635; 1999-2000 LLB- LB 78 (CA)*, quoted from *Sarele v R (C of*

A) (CRI) 2 of 2015) (2018) LSCA 26 (7/12/2018) at para [47]; Barolong Molise and Another v Zion Christian Church C of A (CIV) No 57/2016 LC/APN/47/2013 a [17].) at para [17]) .

[29] From the above it is clear that counsel for the appellant relied heavily on oral evidence to persuade this Court that the High Court had erred in rejecting some receipts. That evidence has not been transcribed and presented to this Court. One does not know, for example, whether the witnesses were cross-examined and how they responded to questions during cross-examination.

[30] In its distinction between the receipts that were accepted and those rejected the High Court did not refer to the evidence presented by witnesses on quantum. It relied only on the documentation. In view of the appellant's submissions that there is no difference between some of the allowed and disallowed receipts, it is tempting to attempt to determine the appeal on the basis of the documentation only, together with the High Court's reasoning.

[31] Is this possible with regard to all the disputed claims though? And, is it permissible for a court to rely exclusively on documentation submitted by witnesses who did not produce the documents without the testimony of the authors of the documents? According to the respondent, it is not.

[32] One troubling aspect deserves mentioning. In his main address during oral argument counsel for the appellant attached great significance to a letter from Lesotho Funeral Services "to whom it may concern". In it the service provider

admitted to an earlier mistake. It stated that payment for the relevant services had indeed been made by Mahooana Molupe, the appellant. This letter thus seems to support strongly the appellant's case, in view of the High Court's misgivings. However, as pointed out by respondent's counsel, it is dated 3 February 2022, well after the High Court's judgment of 15 December 2021. It was never before the High Court! In his reply counsel for the appellant admitted to this.

[33] Naturally, the letter may not be used at all in an appeal against the High Court's judgment. It cannot serve to illustrate any error by the judge, because he never saw it. In fact, it did not even exist at the time of the judgment, let alone the trial.

[34] Why did counsel deem it necessary or useful to include this letter in the record of the proceedings before the High Court? This conduct of the appellant's counsel seems to amount to an attempt to mislead this Court. It is not clear whether his conduct was mala fide or resulted from over-enthusiasm and a lack of experience. It is highly unacceptable though. The contents of the letter are not taken into account by this Court.

[35] Much sympathy as one may have with the appellant with regard to receipts that the High Court rejected, it would not be proper for this Court to set aside the judgment of that court based on the record before us.

Conclusion

[36] The appeal cannot succeed. What is to happen with it though? And to costs? According to the written heads of

argument submitted on behalf of the respondent, it must “be dismissed and struck from the roll with costs.” As mentioned above, respondent’s counsel also argued that there was no appeal before this Court. Orally he asked that the appeal be dismissed with costs.

[37] Can an appeal that is not even before a court, that therefore does not exist, be dismissed by that court? Can an appeal that has been struck off still be dismissed? Or, to follow the order of the respondent’s written heads, can an appeal be dismissed as well as struck off?

[38] It would be appropriate that this appeal, based on a fatally flawed record, be struck off the roll. Thus, it will remain alive. It could be brought to court again, with a proper record; and a cross-appeal could be launched.

[39] A cost order against the appellant, who appealed for an amount of approximately M30 000.00 for medical and funeral expenses of a deceased mother would be a sad pity. However, it seems to be inevitable in this case

Order

[40] This matter is struck off the roll, with costs.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV TS MOHASOA

FOR THE RESPONDENT: ADV TR CRONJÉ