

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOOROSI LEHLOENYA

PLAINTIFF

AND

THE MINISTER OF WORKS
THE ATTORNEY GENERAL

1ST DEFENDANT
2ND DEFENDANT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 5th day of February, 1996.

On the 16th June, 1995, plaintiff brought an action
against defendants in which he claimed:

- *1. Payment of M32,275.12 damages for touring
and repairs;

2. Payment of M12,424.00 damages for loss of
business;

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3. 18 per cent interest thereon;
4. Costs of suit;
5. Further or alternative relief."

Defendants in their plea deny or state that they have no knowledge of everything except the fact that a collision occurred between the motor vehicles A 5487 and Z 4712. The pre-trial conference that was held was not a genuine one, therefore it was not helpful. It was as if parties went through the appearance of holding a pre-trial conference in order to set the matter down. The matter eventually proceeded to trial on the 13th November, 1995.

Plaintiff's first witness P.W.1 was Makushene Phoofolo, who stated that at about 4 a.m. on the 29th January, 1993, he was (in the course of his employment) driving A 5487 a truck belonging to plaintiff. This truck was fully laden with bags of mealie-meal. After he had passed Masianokeng and left the main high-way from Maseru to Mafeteng, while he was travelling on the Maseru to Roma tarred road, he was involved in a collision involving A 5487 that he was driving and an excavator Z 4712.

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This collision occurred next to Mother and Son petrol filling station. The Mother and Son filling station was on his left-hand side as he was driving from Maseru in the direction of Roma. The loader of the excavator collided with the back of the truck P.W.1 was driving. The truck lost balance, the U bolt that was holding the diff was cut, the springs were broken, the propeller shaft came off, and the diff was thrown backwards. The truck lost balance, went to the other side in a field on the right hand side.

P.W.1 says when the collision occurred, he was driving on the correct side of the road (which means he was keeping left). The road at that point is a gentle curve bending from P.W.1's left to P.W.1's right. P.W.1 stopped and got down from the truck and went to the excavator that had also stopped. He found the driver of the excavator was not there. P.W.1 then reported the collision at about 5 a.m. to his employer, the owner of the truck A 5487.

P.W.1 and his employer went to the police station next to the Agricultural Bank. They, together with the police, went to the scene of the accident. When they got there, they found the driver of the excavator. When P.W.1

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asked him why he had run away, the driver of the excavator said he thought P.W.1 would attack him. That driver talked with the police. The police then took measurements and were shown where the collision took place. Some bags of mealie-meal were torn. The Court then adjourned so that an inspection *in loco* could take place.

On the 14th November, 1995, the Court resumed the hearing at the place where the collision occurred. The police map was extensively referred to and compared to the place where the accident took place. This map marked ML3 was annexed to plaintiff's further particulars, consequently it was available to all sides. It was agreed by all sides that (when a person was driving from Maseru to Roma) the road curved from left to right and Mother and Son Filling Station was on the left of the road. The police sketch ML3 was wrong in putting Mother and Son Garage on the right side of the road. The police map also wrongly showed the road as curving from right to left.

The Court observed that the accident took place between 260 and 300 paces from the Maseru to Mafeteng road on the tarred road from Roma to Maseru. There is a moderate slope on this Roma to Maseru road from this road to the junction from the Maseru-Mafeteng road for a

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distance about 200 paces. Then for about 60 paces to the point where P.W.1 showed us to be the point of impact the slope becomes very slight. The tarred road is between 8 and 9 paces wide. It has on the average 5 paces wide shoulders on both sides. The shoulder on the left is at places wider than 5 paces.

From the Roma to Maseru side, there is moderate slope for a considerable distance before the road gets to the bridge, the road curves and the slope increases a bit just before it gets to the bridge. The point of impact is 100 paces ;from the bridge. The bridge is about 5 to 8 paces long. The slope diminishes gradually from the bridge to the point of impact. Before the point from the Roma to Maseru side the of road, a very gentle steep begins.

My attention was drawn to the fact that although the police sketch map puts the collision on the correct side of P.W.1, since the sketch map has got the curve wrong the collision was on defendant's correct side. Looking at the curve, that was correct. Both sides felt the police map favoured them despite its incorrectness.

I observed, and both parties agreed, that if either driver was driving too fast and had to cut the corner in

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order to control his vehicle, the accident could be on opposite drivers' correct side.

Only P.W.1 was at the place of the accident. First defendant's driver was not there. P.W.1 pointed at the point of impact. This was on P.W.1's correct side of the road. Defendant's Counsel showed that although that was more or less the place, it would be shown that P.W.1 had wrongly placed it on his correct side of the road; the collision had occurred on the driver of first defendant's correct side of the road.

Cross examined by defendant's Counsel, P.W.1 said he was with Tšepang, a labourer, who still works for plaintiff. There is a white line on the road and P.W.1 first saw the other vehicle when it was 150 to 120 paces away. Both vehicles had their lights on. At that stage, he could not see if the other vehicle was on its correct side of the road. The road was straight but it turned when it came near the other vehicle. P.W.1 says he does not know how fast the other vehicle was moving. He cannot gauge if it was fast. He was travelling at 40 kilometres per hour and he did not apply his brakes as there was nothing in front of him. He was on fourth gear. The vehicle was carrying about 8 tons.

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P.W.1 says he was looking in front of him, he did not see when the other vehicle crossed the white line into his portion of the road. P.W.1's vehicle stopped in the field and the other vehicle stopped on its correct side of the road. P.W.1 denies he ever swerved before the collision. P.W.1 says he does not know how the collision occurred because he did not expect it. He denied he cut the corners, P.W.1 says if he was driving on the incorrect side, there would have been a head-on collision. P.W.1 denies assaulting the driver of the other vehicle. In conclusion, P.W.1 denied he was at fault in any way.

The next witness (P.W.2) was plaintiff himself. Duly sworn, he stated that he carries on business as a transporter of goods for reward. On the day in question, his truck A 5487 was loaded with goods that were being taken to Semonkong. The truck left, for Semonkong very early in the morning. At about 8.30 a.m., he received a report that his vehicle had been involved in a collision between his vehicle and another vehicle at Masianokeng.

Plaintiff went to the police station where he was given a policeman who went with him to the scene of the accident. Plaintiff observed his diff, prop shaft and U bolt were damaged. He got the vehicle towed.

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Plaintiff says he was forced to hire another vehicle to take to Semonkong the goods he had contracted to deliver. He paid this sub-contractor M960.00. He paid the owner of the goods M480.00 for the damaged mealie-meal bags. Plaintiff sought three quotations for the panel-beating and the repair of his vehicle. The highest quotation from Superpower Motors was M36,125.16. The next quotation that was also high, has been misplaced. Plaintiff took his vehicle for repairs to S & P panel beaters who had quoted M30417.02. Plaintiff paid for the repairs in two instalments. The first payment was M21216-26 in proof of which plaintiff handed in Exhibit "3" dated 10/02/93. And the final payment was for M9200.00 - see Exhibit "4" dated 21/03/93 in support thereof.

Plaintiff stated that defendant had not paid the abovementioned sums despite demand.

At this stage, plaintiff and defendant agreed that the reasonable repairs of plaintiff's vehicle A 5487 were M30417.02 and those of defendant's vehicle Z 4712 were M5510.00. Plaintiff then stated that his vehicle was off the road and for this he claimed M12424.00. Plaintiff also claimed costs of suit and interest at 18% per annum.

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Under cross-examination, plaintiff stated that the M12424.00 is amount of money he should have made on this vehicle. The load was M960.00 a day. He showed his fuel costs. Plaintiff also gave the Court what major and minor services of the vehicle used to cost him. He stated he had just bought the vehicle from Mokuoane and was operating it under Mokuoane's permit which was non-transferrable. The vehicle is still registered under Mokuoane's name. He bought it for M60,000.00.

Answering further questions, plaintiff stated that his vehicle was carrying 8 tons when it was involved in a collision. Plaintiff says he spoke to defendant's driver's superior who stated that their driver who drove Z 4712, had just been involved in another collision. These superiors of the driver of Z 4712 were so convinced that this driver was in the wrong that they told plaintiff that his repairs and damages would be paid. They even gave plaintiff a document containing their report to government about this collision. In that report they blamed their driver despite the fact that that driver was protesting his innocence.

An affidavit of Johannes Mokuoane to the effect that he had sold the vehicle A 5487 was handed in as evidence.

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Defendant did not object to its admission.

Plaintiff then closed his case.

Defendants only called one witness Tšolo Nthako, the driver of the excavator Z 4712. Duly sworn, he stated that on the 29th January, 1993, between 6 and 7 a.m. on a rather clear day, he was driving the excavator to Maseru. He was driving with his lights on. He was alone when he collided with an 8 ton truck near Mother and son filling station. He was from Thaba- Bosiu and was going to park the vehicle at his place of employment at P.V.P.S. Maseru.

Tšolo Nthako states when the collision occurred, he was driving on his correct side of the road. The truck was already on his side of the road. In other words, the truck had left its correct side of the road. He was at the time two feet from the white line that divided his side of the road and that of the truck.

He (Tšolo Nthako) noticed that the whole truck was on his side of the road when it was 35 paces from him. When he realised that the truck was on its incorrect side of the road, he tried to reduce speed by removing his foot from the accelerator. The driver of the truck also saw

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him and swerved to his left to avoid a collision. The front part of the truck went to his left but the right side of the truck was left on his side of the road. It would seem the small front wheel did not go to the left. He states this is his opinion, the reason being that he was concentrating on the emergency.

Tšolo Nthako says at that stage the right outer wheel at the back of the truck hit the side of the cutter of his excavator. The truck has two wheels at the back on each side. He tried to serve to his left but the cutter which is in front and is slightly broader than the excavator was hit by the truck. The cutter is part of the loader which is pushed in order to load. The back has its own loader and cutter which is for making trenches.

When the collision occurred, the truck had its U bolt cut, the propeller shaft came off and the diff shifted to the back. The truck rested on grass on the field. He stopped because he was already in the gravel. He stopped outside the road. The collision occurred because the right of the truck was on his side of the road. He went out of the excavator to ask and see what had happened to the truck. The people from the truck hit him with a stick on the head. He was consequently forced to flee for his

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life.

Tšolo Nthako (the driver of the excavator) says he does not know if the combination of factor such as the curve of the road, the speed of the truck and the load on the truck caused the truck to move to his side of the road. Although he is not familiar with trucks, he estimates the speed of the truck to have been 80 kilometres per hour. The driver of the truck is the one who was at fault. There was no damage on the excavator except that the bucket (loader) of Z 4712, which he was driving, was slightly bent.

Cross-examined, Tšolo Nthako said the maximum speed of the excavator is 30 kilometres per hour. Driving at 25 kilometres per hour cannot be considered an excessive speed because the maximum speed is low. Even driving at the maximum speed has no effect on the ability of a driver to control the excavator. The weight of the loader (shovel) has no effect on the driver's ability to control the excavator because it is light. Although he is not sure, at least four men would be required to lift the loader, but this is done by machines these days.

Cross-examined further, Tšolo Nthako said he does not

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know if driving at high speed affects the driver's ability to control a vehicle. He believes speed would not affect his ability to control that machine. He agreed speed would affect that vehicle's capability of turning at curves. A curve is dangerous at high speeds. At high speed he could move to the wrong lane at a curve, lose balance and overturn. The road surface is even, it sloped a little bit.

He does not know the exact width of the excavator. It could be as wide as a van. The wheels at the front are narrow and small while those at the back are much bigger and broader.

He rang his superior and told them of the previous collision. The previous day, he had been involved in another accident and had collided with passenger vehicle. He had been ordered to get the excavator back to P.V.P.S. Maseru the previous day, but the police finished at about 7 p.m., consequently he got to Maseru the following day because the sun had set. His superiors were wrong to file a report that he was responsible for the collision with the truck. They had agreed with him that the driver of the truck was at fault, he does not know when, how, and why they changed their minds and decided to put the blame

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on him.

He says he did not step on the brakes because he was in motion and had only swerved to save the truck. The driver of the truck was too near when he tried to swerve, the driver of the truck was still moving also. When he saw it before the collision, it was 35 paces from him. He had already crossed the bridge when he noticed the vehicle it was approaching the curve. He says he cannot estimate the distance because of the curve, but when he first saw the truck he was 60 paces from the bridge.

When he was 10 to 15 paces from the truck, he noticed that its driver attempted to swerve to the left to avoid a collision. He hooted but soon dropped it as he noticed the truck was too near. The police came to the scene. The point of impact was shown to them, it was still visible because of the soil from the shovel. The tyre marks were not visible. The two drivers did not agree on the point of impact. The police map does not correctly reflect the place.

The point of impact is two paces from the centre of the road. He denied he drove into the truck. He insisted 25 kilometres per hour is not, in the circumstances, a

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high speed and that it could have affected his ability to control the excavator.

Under re-examination Tšolo Nthako stated that he made a written report to his employers. His superiors had gone alone to the scene of the accident. He could not negotiate a corner at 30 kilometres an hour but 25 kilometres per hour was an appropriate speed to negotiate a gentle curve. Even 30 kilometres per hour would still be an appropriate speed to take a gentle curve such as that one.

Defendants closed their case.

Having heard evidence on both sides, I listened to addresses. At the outset, plaintiff's Counsel did not press his damage of M12424.00 for loss of business. I was left with the claim of M32275.12 for "touring" and repairs. No evidence was brought in respect of "touring". No evidence was brought to support the claim of towing although we are told the vehicle was towed. I am therefore left with evidence for repairs, interest and costs. I can only add that this Court has over the years been awarding interest at 18% per annum although interest charged by financial institutions has been over 20% over the years.

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Defendant has not led formal evidence on the counter-claim nor was contributory negligence argued clearly. It was assumed the Court will make these findings as a matter of course. On this occasion, I shall make the finding that defendant assumes I should make if he has proved his claim. The quantum for repairs by either side is admitted and does not have to be proved. As this admission was made belatedly, in awarding costs, I shall allow costs to follow the event in respect of a successful party.

This case now revolves on credibility. Either side could have caused this collision. If there has been contributory negligence by either side, this also depends on evidence. It is (so to speak) a question of credibility.

I note that the immediate superiors of defendant's driver were not of the standing to bind first defendant in admitting fault. They made their own report to their superiors in the Ministry of Works who would then reach a decision. Defendants have quite legitimately assessed the facts and decided to contest this action. What is only disturbing is that plaintiff was not informed of this decision before he issued summons.

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It seems to me unfair and illogical for the collision that occurred the previous day to be the basis of a presumption that defendant's driver drove negligently and is responsible for the collision that is the subject of this action. I indicated that I reject this insinuation. Defendant's driver will be taken as if he had no other collision with another motor vehicle twelve hours before that one. Even if I accept he had this collision, I consider that irrelevant.

The tarred road is about 8 paces in width. To some people it might be 9 paces depending on the person's strides. Plaintiff's driver showed the point of impact to be half apace from the centre of the road. Defendant's driver in his evidence-in-chief said the collision occurred two feet from the centre of the road. Under cross examination he said the collision occurred two paces from the centre of the road. Each of the drivers claims the collision took place when he was on his correct side of the road.

Plaintiff's driver says he was driving at 40 kilometres per hour. This is far from being the maximum speed of his vehicle. He had been driving down a moderate slope. A slope increases the speed of a vehicle.

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It has to be borne in mind that the defendant's vehicle had just gone down a slope that is fairly steep just before it went into the bridge. If it was travelling at 25 kilometres an hour, it must have increased its speed a bit. I am surprised that defendant did not reduce his speed when he negotiated the turn just before he got into the bridge. Under cross-examination, defendant's driver first said the maximum speed would not affect his ability to control his vehicle. Later he had to concede that the maximum speed would affect his ability to control that vehicle at curves. He had initially given the impression that as the speed of the excavator is low, driving at the maximum speed would have no effect.

Plaintiff's driver had seen the excavator when it was about 120 paces from him. Defendant's driver says when he first saw the plaintiff's truck, he was 60 paces from the bridge. He was asked how far plaintiff's truck could have been when he first saw it, he stated he could not make an estimate because of the curve. When he saw it before the collision on his side of the road, it was 35 paces from him. The inspection *in loco* reveals that the collision took place about 100 paces from the bridge. If my arithmetic is correct, defendant's driver first saw plaintiff's truck when it was about 40 paces from him.

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Mr. *Molyneaux* for the defendant says according to his notes, defendant's driver said he first saw plaintiff's vehicle when it was 60 paces from him. Even if his notes were correct, it does seem defendant's driver was not concentrating on the road.

Plaintiff's driver says he was travelling at 40 kilometres per hour. He had been travelling doing a moderate slope for about 200 metres but for about 60 paces before impact when he got to a gentle slope which also had a gentle curve. The possibility that his vehicle was travelling at more than 40 kilometres per hour exists. There is also a possibility that he might have cut a corner. He says he did not. The probability that he did not cut the corner is enhanced by the fact that he had seen oncoming traffic for some time. As plaintiff's driver saw defendant's vehicle when he was 120 paces from him, he could be able to see he does not encroach on the road on the side of defendant's vehicle.

As far as speeds go, 40 or 50 kilometres per hour is not a high speed for the truck. For an excavator with a maximum speed of 30 kilometres per hour, 25 kilometres per hour or more is a relatively high speed.

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Defendant's driver says plaintiff's vehicle was 35 paces from him and was on his side of the road, and that it took avoiding action. Plaintiff's driver says he never took any avoiding action and he was travelling on an even speed on his side of the road. According to evidence before me, defendant's driver first saw plaintiff's vehicle when it was 40 to 60 paces from him. In other words, he saw it when it was relatively near him, although there was nothing to obscure his view.

I have already said defendant's driver from his own evidence leads me to the inference that he was not concentrating on the road. A driver is expected to keep a proper look-out. Failing to do so amounts to driving negligently. If defendant's driver had seen plaintiff's vehicle on his side of the road at a distance of 35 paces, he could have easily avoided a collision because there is a gravelled shoulder of the road about 5 paces wide. The fact that defendant's driver did not is an indication that he did not see plaintiff's vehicle at such a distance on his side. He claimed the shoulder of the road was narrow that is not true. The width of his vehicle was about 3 paces.

I saw and heard both drivers. I retained a bit of

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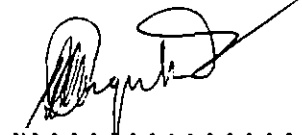
scepticism about demeanour because sometimes an intelligent witness can be impressive. Even so, the demeanour of plaintiff's driver and his evidence generally left me with a favourable impression that he was telling the truth.

Defendant's driver tried to talk himself out of difficult situation without much success. He did not hesitate to make recklessly untrue statements such as that a vehicle (such as an excavator) at maximum speed could be easily controlled. He had to modify that assertion. Mr. *Molyneaux* for defendants suggested that plaintiff's driver's demeanour was unsatisfactory. Having seen that witness I do not agree.

Having believed plaintiff's driver, I give judgment in favour of plaintiff in the following terms:-

- (a) First defendant is ordered to pay plaintiff the sum of M30417.02 the reasonable cost of repairs of plaintiff's vehicle A 5487.
- (b) Interest at 18% as from March 1993.
- (c) Costs of suit.

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W.C.M. MAQUTU
JUDGE