CIV/T/280/88

IN THE HIGH COURT OF LESOTHO

In the matter between:

KITSON KATISO MOKOKOANE **Plaintiff**

and

LESOTHO NATIONAL INSURANCE CO. **Defendant**

JUDGMENT

Delivered by the Honourable Chief Justice, Mr. Justice J.L. Kheola, on the 12th day of February, 1996

This is an action in which the plaintiff claims:

1. Payment of the sum of R41,027-00;
2. Interest thereon at the rate of 11% per annum from the 16th June, 1987 to date of payment;
3. Costs of suit;
4. Further and/or alternative relief.

It is common cause that on the 25th March, 1987 and on the Main South 1 Road between Ha Matala and Lithabaneng, near Makhoza's residence, in Maseru district, Lesotho, a collision occurred between a vehicle with Reg. No. A.0440 and a vehicle with Reg. No. X6644. At the relevant time the second mentioned vehicle was insured by the defendant in terms of the Motor Vehicle Insurance Order 18 of 1972. It belonged to the Government of Lesotho and was being driven by one Moses Sebatana.

The vehicle with Reg. No. A.0440 was being driven by the plaintiff in the course and scope of his employment as a taxi driver.

In his declaration the plaintiff alleges that the aforesaid collision was caused by the sole negligence of the driver of vehicle with Re. No. X6644.

He alleges that as a result of the aforesaid collision he (plaintiff) sustained bodily injuries, pain and suffering, medical expenses and damages and has suffered a total loss of R41,027-00 which is calculated as follows:

(a)	Medical and hospital expenses =	R27-00
(b)	Estimated future medical and hospital expenses =	750-00
(c)	Loss of earnings =	250-00
(d)	General damages for pain and suffering	=40,000-00
	TOTAL	**=41,027-00**

The plaintiff testified that at about 6.00 p.m. on the 25th March, 1987 he was driving a taxi with Reg. No.A.0440. He was travelling from Lithabaneng towards Maseru. He was accompanied by a taxi conductor but there were no passengers. He was driving at a speed of between 80 and 90 km. per hour. He saw a landrover ahead of him travelling in the opposite direction. When it was

about 50 to 70 paces away it suddenly crossed the white line and came to his (plaintiff's) correct side of the road. The plaintiff says that he blew the horn and at the same time drove his vehicle out of the road. The landrover also got off the road and came straight towards him. He swerved his vehicle to the right side getting back to the road and at the same time applying the brakes. The landrover also got back to the road. The plaintiff says that although he applied brakes he was unable to avoid a collision because the landrover was already too close to him. The collision occurred on the right side of the road, that is to say, on the landrover's correct side of the road.

The plaintiff says that there were no other vehicles on the road and denies that there was a half truck infront of him which he was overtaking when he collided with the landrover. As a result of the collision he sustained lacerations on the right upperarm, on the forearm and on the waist. He was admitted at Queen Elizabeth II Hospital for 3 or 4 days and paid R27-00 for medical expenses. About a week after the accident he went to Baragwanath Hospital for further treatment. He has lost all the receipts from Baragwanath Hospital.

Immediately after the accident he got out of his vehicle and confronted the driver of the landrover who appeared to be drunk and had the smell of liquor. There were tins of beer near the landrover which had overturned as a result of the collision.

Thabo Matlali is the taxi conductor who was accompanying the

plaintiff on the 25th March, 1987. His evidence is that as they were proceeding towards Maseru he saw a Government vehicle ahead of them travelling in the opposite direction. When it approached them it moved to their side of the road. The plaintiff swerved his vehicle to the left side of the road. The other vehicle also swerved to the left and came towards them. The plaintiff drove back into the road. The other vehicle also moved back into the road. The plaintiff applied his brakes but the two vehicles collided on the road i.e. on the correct side of the other vehicle. The Government vehicle overturned after the collision. He did not see any pedestrians on the left and right sides of the road. There were people at the bus stop ahead.

Trooper Ntsoane testified that on the 25th March, 1987 he attended the scene of accident in which two vehicles with Reg. Nos. A.0440 and X6644 were involved. When he arrived there both drivers had already left. He prepared a sketch plan (Marked Exhibit "B"). He found debris at the scene and fixed the point of impact.

The first defendant's witness was one Tsietsi Ts'eliso. He is a heavy duty driver employed at the Agricultural College. He lives at Lithabaneng next to Makhoza's residence. On the 25th March, 1987 and at about 5.00 p.m. or 6.00 p.m. he was returning from his friend's home which is on the other side of the Main South 1 Road. As he was about to cross the road he stopped and checked whether there was any traffic or not on the road. He saw a landrover with Government Reg. No. travelling from Maseru

direction towards Mafeteng. He also saw a half truck travelling from Maseru towards Mafeteng. He realised that those vehicles were already too close to allow him to cross the road. He waited on the side of the road. While he was waiting he saw the plaintiff's taxi coming in a very high speed and overtook the half truck. At that time the landrover was almost parallel with the half truck. The driver of the landrover flickered the headlights as a warning to the plaintiff. The latter's vehicle crossed the white centre line and collided with the landrover on its correct side of the road. The plaintiff's vehicle stopped on the road while the landrover overturned on the side of the road.

Under cross-examination D.W.1 said that the sketch plan made by the police (Exhibit "B") is correct. He admitted that it was unusual for a driver who is overtaking another driver to apply the brakes so that the wheels are locked and mark the tarmac.

When it was put to him that the driver of the landrover was drunk, he said he did not smell any liquor from him.

D.W.2 Moses Sebatana was the driver of X6644. On the day in question he was driving towards Mazenod. He saw the plaintiff's vehicle when it was about one hundred metres ahead of him. He says that there was a half truck travelling infront of the plaintiff's vehicle. At that distance they were travelling on their correct side of the road. When they were about thirty metres ahead of him the plaintiff's vehicle started

to overtake the half truck. D.W.2 says that he flickered the headlights with a hope that the plaintiff's vehicle would return to its correct side of the road. That did not happen until the two vehicles collided on his (D.W.2's) correct side of the road. By then he had slowed down but did not apply the brakes nor did he hoot.

D.W.2 says that he was unable to swerve to the far left because there were pedestrians walking along the road. He was unable to swerve to the right because of the half truck that was on his right. He denies that he had been drinking before the collision occurred. There were no empty beer cans in or near his overturned vehicle after the collision. He says that even if he had braked the collision would not have been avoided because the plaintiff's vehicle was already too close when it overtook the half truck.

The law is that where a motor vehicle drove on to the incorrect side of the road and collided with an approaching vehicle it has been held res ipsa loquitur because the only reasonable inference was that the defendant's driving on to the incorrect side of the road at an inopportune moment was due to his failure to exercise proper care. Proof that a vehicle was on its incorrect side of the road at the time of the collision (it is held) is prima facie proof of the driver's negligence. (Motor Law by W.E. Cooper, Vol. II at p. 100)

In Mizen v. Ries 1914 E.D.L. 511 the facts were as follows:

"While the plaintiff was proceeding along the proper side of a street on a bicycle at some eight or ten miles per hour, the defendant's motor-car driver, driving at about the same speed, turned out of a square into the street, sounding his hooter, on the wrong side of the road, confronting the bicycle at a distance of only 9 yards, and a collision took place, in which the cyclist was injured. There was an ox-wagon at the corner on the same side of the street as the cyclist, which obstructed the cyclist's view of the car, and another cyclist close to him. The Court was not satisfied that the cyclist was riding without keeping a proper look-out, and considered that the collision was under the circumstances inevitable. ***Held,*** that the negligence of the defendant's driver was the proximate cause of the collision, and the defendant was liable in damages."

In the present case the following facts are common cause:

(a) At the time of the collision the plaintiff's vehicle was travelling on its incorrect side of the road;

(b) The vehicle insured by the defendant was travelling on its correct side of the road;

(c) The road was straight and the two drivers saw each other's vehicle from a distance of between seventy metres and one hundred metres;

(d) The driver of the vehicle insured by the defendant neither applied his brakes nor hooted when he saw the plaintiff's vehicle cross the white centre line into his correct side of the road from a distance of about thirty metre ahead of him.

There are certain disputed issues on which I must give my decision basing myself on the evidence given by the parties. One of such issues is whether or not for a distance of about seventy metres before the collision the vehicle insured by the defendant was out of control and swerved on to the wrong side of the road, that plaintiff swerved to the extreme left outside the road when

he saw defendant's vehicle, that the latter kept on coming straight towards the plaintiff's vehicle; seeing this the plaintiff swerved back into the road; the defendant's vehicle also swerved back into the road where the collision occurred.

D.W.2 has denied that his vehicle was ever out of control. His version is corroborated by D.W.1 who was an independent witness. I say he was an independent witness because he did not know D.W.2 and had no personal relationship with D.W.2 except that he worked for the same employer with him. He had a good opportunity to observe the movements of the vehicles involved in the accident because he was actually waiting for them to pass to enable him to cross the road. He had no actual bias against the plaintiff to make him give unfavourable evidence against him. In fact he often used the plaintiff's taxi as a fare-paying passenger. His evidence is that the plaintiff's vehicle "appeared travelling in a very high speed" and when it came to the half truck it attempted to overtake it and then collided with the landrover on its correct side of the road. This witness gave his evidence well and appeared to be a reliable person who withstood cross-examination very well.

The submission by the plaintiff's attorney was that a driver who is overtaking cannot apply his brakes in the manner the plaintiff did. I think there is one possible explanation why he did that. He was driving at a very high speed and failed to keep a proper look out of the vehicles ahead of him. He saw the half truck too late and applied his brakes in order to avoid crashing

into its back. At the same time he attempted to overtake it because the speed at which he was travelling would not have allowed him to stop before he crashed into its back. As he crossed into his incorrect side of the road he saw defendant's vehicle right infront of his vehicle. He hanged on to the brakes until the collision occurred.

The brake marks of the plaintiff's vehicle extend for a distance of thirty-seven paces (see Exhibit "B"). This tends to confirm the evidence of D.W.2 who says that he was about thirty metres from the plaintiff's vehicle when it suddenly started overtaking the half truck. It was an sudden emergency created by the plaintiff. The defendant's driver was unable to swerve to the far left outside the road because there were some pedestrians on the side of the road. He flickered his headlights as a warning to the plaintiff. He also slowed down but did not apply his brakes. As he was travelling at a speed of about 80 kilometres per hour it seems to me that his breaking would not have enabled him to avoid the collision.

I have said that by overtaking at that time and driving on the incorrect side of the road the plaintiff created a sudden emergency for the defendant's driver. In Union Government v. Buur, 1914 A.D. 273 AT P. 286 Innes J.A. said:

> "Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their

position."

In Boughey v. Bredell, 1904 T.S. 394 at p. 403 Innes, C.J. said:

> "A man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger. That which appears the best way to a court examining the matter afterwards at leisure and with full knowledge is not necessarily obvious even to a prudent and skilful man on a sudden alarm."

In the present case the defendant's driver was not the cause of the sudden emergency. It was the plaintiff who has to blame.

I have formed the opinion that the plaintiff has failed to discharge the onus placed on him that the driver of the vehicle insured by the defendant was negligent.

In the result the plaintiff's claim is dismissed with costs.

J.L. Kheola

CHIEF JUSTICE
12th February, 1996