CIV/T/438/2008

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LESOTHO RED CROSS SOCIETY **Plaintiff**

And

THABANG MAFOJANE **1st Defendant**
TSEKISO HLOPE **2nd Defendant**

JUDGEMENT

Coram **: Hon. Monapathi J**

Date of Hearing **: 29th September 2011**

Date of Judgement **: 15th December 2011**

Summary

Credible evidence of Plaintiff's single witness who was driver of a vehicle at the material time suffices. Absence of a police witness, who had arrived after the incident at the scene, is not fatal to Plaintiff's case. Where negligence of Defendant is proved to have occured,it is not fatal to Plaintiff's case if collision happened "outside the road" if the negligence itself occurred in the road. Section 88 (1) (e) and Section 89 of the ***Road Traffic Act 1981*** *are accordingly not applicable to this case. The court did not consider a point raised during the merits which it has previously be rejected as an irregular special plea.*

CITED CASES:

Marematlou Freedom Party v Independent Electoral Commission and 54 Others. CIV/APN/116/2007 (unreported)

STATUTES:

Road Traffic Act 1981 section 88 (1) (e) and section 89. High Court Act 1978 section 6.

BOOKS

The Law of South African Insurance 4th Edition, 262

[1] The Plaintiff claimed an amount of M25,679.64 for damages from the Defendants, being for damage caused to its vehicle in a car accident, on 18th August 2006. This was to be proved on a balance of probabilities as Mr Laubscher for Plaintiff submitted.

[2] At the beginning of the hearing Mr Nthontho for First Defendant requested a postponement which was quite undeserved, in my view. I accordingly refused the postponement. In addition Counsel intimated that he would advance two objections which are referred to later in the judgement, which were neither pleaded nor in anyway intimated or noticed to Plaintiff. I was accordingly not persuaded to hear those objection. As fate would have it, those objections were later, after hearing of evidence, resuscitated as "points of law" of some kind. Those are stated later herein merely for the value of it.

[3] The Plaintiff began by presenting the evidence of its driver, Mr Masilo. The Plaintiff thereafter closed the case after its second witness. Defendant then closed his case. Plaintiff's witness testified that the car belonging to the First Defendant failed to heed a stop sign and crossed his lane of travel at a certain T Junction in the Stadium Area of Maseru. In an effort to avoid a collision, he

veered to his right but the First Defendant's vehicle, a taxi, then collided with him on the right hand side of the road on which he had been travelling. No policeman testified nor was there a police accident report.

[4] A point was taken by Defendant that in the absence of a police accident report, it was difficult for the court to know if at all, there was an accident "in the road" mentioned on the said date. Defendant seemingly felt that since the collision itself took place outside the verge of the road, the claim must fail because the accident did not taken place on the road. Most inexplicably reference was made, in that regard to ***Road Traffic Act 1981*** section 88 (1) (e) and section 89 (behavior in the case of accident and false accident report respectively).

[5] This issue of the point of impact was tied to the absence of a policeman to have given evidence. While this was desirable, in my view, it was not absolutely essential for proving negligence. In my opinion it cannot be always that a police officer has to testify.

[6] The primary question, in the instance would be whether or not, the negligence or negligent driving itself occurred in the road. If the answer was in the affirmative then, as in the present case, Plaintiff must be held to have successful proved the negligence as required in this claim.

[7] The Plaintiff's driver, furthermore, testified that he had the right of way whether there were no traffic signs on his road or not. He told the court that he

was travelling at about 50km per hour, and that the drive of the taxi simply did not stop at the T-Junction, thereby causing the collision between the two vehicles.

[8] Mr. Masilo testified that the First Defendant was the owner of the said taxi, and that the Second Defendant was driving the taxi in the course and scope of his employment with the First Defendant.

[9] The evidence of Mr Masilo was not shaken in cross- examination nor as aforesaid contradicted by evidence on the part of the Defendants. The First Defendant closed his case without presenting any evidence. It was noted that default judgement had already been granted against the Second Defendant.

[10] The Plaintiff's next witness was Mr. K. S. Man, a vehicle damage assessor. He testified that the reasonable and fair costs of repair amounted to the sum, of M22,526.00 plus VAT, which resulted in the claimed amount of M25,679.64. Although his evidence was attacked in cross-examination on the point of the difference of an amount or difference of M3,153.64. It was submitted that his explanation could not be doubted since there was no provision for VAT on the report from of Mr Man, which was handed in as exhibit "B". I agreed. Cross-examination by Counsel, however brilliant, it may be in some instances, is no substitute for credible evidence from witnesses or documents.

[11] I was persuaded, on the uncontroverted evidence before the court, therefore, that the Plaintiff's claim must succeed. There was no basis in law upon which a

court could find otherwise. The First Defendant probably realized this, and therefore he has raised two points in law in an effort to unsettle the claim on a technical basis. It is those objections I referred to earlier. Perhaps they should be stated. They were as follows.

[12] It was argued by the First Defendant that the amount claimed falls within the jurisdiction of the Magistrate's court. This argument was incorrect. In terms of the ***Subordinate Court (Amendment) Act of 1998*** the jurisdiction of the Magistrate's court does not exceed M25,000.00. The present claim of the Plaintiff definitely exceeds M25,000.00.

[13] It was argued by the First Defendant that the Plaintiff could not claim damages since it had already been compensated by its insurer. It has become established law that an insurer is entitled to enforce its rights of subrogation in the name of the insured. The insured is then regarded as the real Plaintiff, while the insurer is merely *dominus litis*. When judgement is given in favour of the insured, the insured must pay the money to the insurer. This is so because the insurer can insure that an action is brought against a third party and that the proceedings are properly conducted. The court was referred to a copy of Reinecke and others, ***General Principles of Insurance Law***, first edition page 285, in this regard.

[14] It was therefore correctly submitted that a proper case had been made out by the Plaintiff, and that an order should be granted as claimed in the summons.

[15] This claim succeeds with costs on the ordinary scale.

T. E. MONAPATHI

JUDGE

For Plaintiff	:	Mr Laubscher
For Defendant	:	Mr Nthontho