

**IN THE HIGH COURT OF LESOTHO**

**In the Matter Between:-**

**GOVERNMENT OF THE REPUBLIC OF  
SOUTH AFRICA  
MINISTER OF PUBLIC WORKS**

**1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF**

**AND**

**RETS'ELISITSOE EDWIN TSEHLA  
LEHLAKI EZEKIEL KHETHENG**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

Coram : Hon N. Majara  
Date of hearing : 20<sup>th</sup> August 2013 – 17<sup>th</sup> June 2014  
Date of judgment : 13<sup>th</sup> August 2014

**Summary**

*Action for damages arising out of an accident at the Maseru port of entry – whether damaged property belongs to the plaintiffs – defendants' dispute of ownership general and not specifically challenging the fact – not necessary for the plaintiffs to bring documentary evidence to prove ownership in the absence of counter-claim thereof - conflicting and mutually destructive versions of the parties – Court to weigh up version of plaintiff against the general probabilities -*

*version of defendants highly improbable and rejected as entirely false – defendants liable for damages.*

## ANNOTATIONS

## BOOKS

1. Isaacs; Beck's Theory and Principles of Pleading in Civil Actions; Butterworths, 5<sup>th</sup> Edition
2. Herbstein & Van Winsen; The Civil Practice of the Superior Courts of South Africa

## CASES

1. Naidoo v Senti LAC (2007 – 2008) 161
2. Ebrahim v Excelsior Shopfitters and Furnishers 1946 TPD 226
3. Maseko v Attorney General LAC (1990-94) 13

[1] The plaintiffs herein instituted an action against the defendants in which they seek for payment of the amount of **M510, 717.00**, interest thereon a *tempore morae* and costs of suit the one paying the other to be absolved for damages to buildings situated at the **Maseru Bridge** port of entry, on the Republic of South Africa side.

[2] It is common cause that on or about the 10<sup>th</sup> December 2006, the building structures at the Maseru bridge were damaged by a vehicle bearing registration number **AW 0907** belonging to the 1<sup>st</sup> defendant and being driven by the 2<sup>nd</sup> defendant. The vehicle crashed into the buildings and caused damage to the light vehicle inspection facility, the steel structure for pedestrians, the storeroom,

fencing, a concrete bollard curbing and paving as well as the retaining wall and embankment.

[3] It is the case of the plaintiffs that the collision occurred as a result of the sole negligence of the 2<sup>nd</sup> defendant in one, or all the following respects; he drove too fast in the circumstances prevailing; he failed to keep a proper lookout; he failed to apply the brakes of the vehicle, alternatively timely, alternatively, effectively; he failed to avoid a collision when by the exercise of reasonable care he could and should have done so; he acted unreasonably and irrationally in the circumstances, he failed to drive with the necessary care, skill and diligence and failed to keep the vehicle under control or proper control; he drove the vehicle while it was un-roadworthy, alternatively while its breaks were faulty.

[4] The plaintiffs allege further that the 1<sup>st</sup> defendant was also negligent in that he allowed or alternatively instructed the 2<sup>nd</sup> defendant to drive the vehicle while it was un-roadworthy alternatively, while its brakes were faulty; and/or did not properly maintain the said vehicle.

[5] While the defendants do not dispute that the incident did occur on the stated date in their plea, they dispute the plaintiffs' claim and contend that they are not liable for the damages. They also dispute that the 1<sup>st</sup> defendant's vehicle was driven by the 2<sup>nd</sup> defendant at the material time and allege that it was being driven by hijackers. They also deny that they were negligent in all the suggested ways outlined in the plaintiffs' declaration. Secondly they dispute that the said buildings belong to the plaintiffs and contend that for that reason, the latter have no *locus standi* in this matter. They further dispute the quantum of damages and state that same has been exaggerated by the plaintiffs.

[6] I find it apposite to also mention at this stage that I earlier dismissed the defendants' special plea of lack of jurisdiction on the grounds that the accident happened on the South African side. My reasons in this regard appear more fully in the judgment that I handed down on the 3<sup>rd</sup> February 2011.

[7] At the start of these proceedings, the Court granted the application that was moved by **Mr. Loubser** on behalf of the plaintiffs that the issue of liability be heard separately from that of the quantum of the claim and the evidence was led on the merits on liability only.

[8] To prove their case, the plaintiffs called two witnesses to the stand. PW1 Warrant Officer Solomon testified that on the stated day he attended the scene and upon arrival thereat found that the truck had collided with the buildings as stated. Upon inspection, he found three (3) dead bodies that were buried under piles of fruits and vegetables and another seriously injured person who was removed from behind the steering wheel of the truck. While he could not identify this person he later established during his investigations that it was the 2<sup>nd</sup> defendant herein.

[9] The witness also told this Court that he took the defendants' statements and to this end he handed in a sworn statement of the 2<sup>nd</sup> defendant. I should also mention that having filed their joint plea, the 2<sup>nd</sup> defendant has allegedly since gone AWOL and **Mr. Nteso** who appeared on behalf of the 1<sup>st</sup> defendant informed the Court that he had since withdrawn as the legal representative of the 2<sup>nd</sup> defendant because all efforts to locate him to get further instructions had come to naught. The 2<sup>nd</sup> defendant has thus not attended these proceedings at all.

[10] **Mr. Nteso** also objected to the handing in of the 2<sup>nd</sup> defendant's sworn statement on the grounds that it is inadmissible in terms of the law but the Court overruled his objection for reasons that appear more fully in the record and admitted it and marked exhibit "A". Per its contents, the 2<sup>nd</sup> defendant stated that on the day in question, he had telephonically informed the 1<sup>st</sup> defendant that there was a problem with the truck's brakes system but the latter told him to drive on to Maseru and the problem would be looked into.

[11] PW1 also testified that when he was taking down their statements, he was never told about the alleged hijacking of the truck by either of the defendants and he disputed this suggestion during cross-examination. He also disputed the suggestion that upon his arrival at the scene a dead body had already been removed from behind the steering wheel or that there had been three other people in the truck at the time of the accident that were rescued alive. He told the Court that he determined the identity of the three dead bodies that he found buried under piles of fruits and vegetables as being those of two Zimbabwean women and one Mosotho male.

[12] In terms of PW2 Warrant Officer Moalusi's testimony, he also attended the scene at the border post and observed three dead bodies lying amongst fruits and vegetables, one of which was that of a male. He disputed the suggestion in cross-examination that there was another dead body that was removed from behind the steering wheel aside from the 2<sup>nd</sup> defendant who was still alive. It was his further evidence that no-one but a pathologist is permitted to remove the body of a dead person at the scene and that at the time he arrived at the scene the pathologist had not yet arrived. He added that paramedics only take the injured to hospital. PW2 also told the Court that from his observation of the three dead bodies, one was

female and two were male. He however admitted that he did not verify the fact of their gender.

[13] The third witness for the plaintiffs was Mr. Jacobus Le Roux, the instructing Attorney in this matter. He told the Court that he acts for the State in South Africa in civil matters. His evidence was brief and to the effect that the damaged buildings, the subject-matter herein are as a matter of fact the property of the Government of South Africa.

[14] At the close of the plaintiffs' case, **Mr. Nteso** moved an application that the 1<sup>st</sup> defendant be absolved from the instance. I dismissed the application for reasons that are contained in the Court's file. He then called the 1<sup>st</sup> defendant as the only witness for the defence to the stand. His testimony was to the effect that the truck in question belongs to him. On the day of the incident he was from Bloemfontein where he had just bought vegetables for his business. The vegetables were ferried in the truck which was being driven by the 2<sup>nd</sup> defendant. He parted ways with the 1<sup>st</sup> defendant in Thaba Nchu and hurried to the border post to process the documents for the items.

[15] When he called the 2<sup>nd</sup> defendant on his cellular phone the latter told him he was about to arrive at the border post and added that he had been kidnapped. It was also his testimony that a while later he heard a noise sounding like that caused by a collision and he saw people running towards the Lesotho side of the border and they reported that a truck bearing vegetables had overturned. He hurried to the scene and noticed that the truck had fallen down below.

[16] When he reached it he found four people inside and two appeared to be injured. He noticed that the 2<sup>nd</sup> defendant was trapped on the passenger side and there was an unknown man in the driver's seat whose head was stuck in the steering wheel. The strange man was eventually pulled out after several attempts and his upper body, skull and parts of his brain remained on the steering wheel. It took about three (3) hours to pull out the 2<sup>nd</sup> defendant with tyre levers.

[17] The 1<sup>st</sup> defendant also testified that at the time the strange man was pulled out of the truck, a green bag containing a cell phone and a copy of his passport fell out and they were handed over to the police. The 2<sup>nd</sup> defendant was admitted in a hospital for about a month. Further that after the accident he gave two statements to the police and the first one was more detailed than the 2<sup>nd</sup> one and included reports about the items that he saw fall out of the green bag at the scene. The police informed him that the purpose for the 2<sup>nd</sup> one, exhibit "**B**" was for them to close the case.

[18] It was his further evidence that at the time, his truck was roadworthy as it had recently been serviced and had been so declared. He also directed the Court's attention to annexure "**RT 1**" to the pleadings, a Certificate of Fitness filed of record. The witness stuck to his version regarding the alleged kidnapping under cross-examination and testified that at the time the 2<sup>nd</sup> defendant informed him about it on the phone he did not take him seriously as he was one to joke around a lot. With regard to the contents of exhibit "**A**", i.e. the 2<sup>nd</sup> defendant's statement, he replied that the latter was not mentally stable at the time he gave it hence his not having mentioned the hijacking.

[19] Against this backdrop, the issues for my determination are whether the buildings in question belonged to the plaintiffs giving rise to their *locus standi* to institute this claim and secondly, whether the defendants are liable for the damage to the buildings.

[20] In connection with the first issue, it is my opinion that the evidence of the plaintiff that the buildings belong to the Government of South Africa was not successfully challenged. The submission that their evidence was wanting in this regard because they did not bring any documentary proof cannot be accepted firstly because, the defendant's denial was general and he did not suggest to whom the buildings could otherwise legitimately belong. In this regard it is a trite principle of law that:-

*“... a general denial does not operate to deny a plaintiff's capacity to sue and such capacity will taken to be admitted if it has not been specifically challenged.”<sup>1</sup>*

[21] In my opinion, the phrase specifically challenged must be taken to mean that aside from denying an alleged fact in his plea, the defendant must also apprise the plaintiff of the facts he means to put in issue. Coming back to the present case, the defendants had to go a step further and pleaded the facts upon which they relied in their denial that the buildings are owned by the plaintiffs. It is my view that ownership is not the question for determination herein but is only peripheral. Thus, documentary evidence would be necessary if there were two conflicting claims of ownership of the buildings and this is not the case herein. To this end, the authorities that the defendants seek to rely on in support of their submission have no application to this case.

---

<sup>1</sup> Isaacs; Beck's Theory and Principles of Pleading in Civil Actions; Butterworths, 5<sup>th</sup> Edition; p 71

[22] Over and above this, it is a notorious fact of which I take judicial notice that, services such as issuance of travel visas, declaration and clearance of imported goods at ports of entry etc, are governmental services that are normally delivered at State owned premises in any given jurisdiction. Thus any suggestion to the contrary such as herein shifted the onus on to the defendants to prove to whom the buildings in question belonged if not to the Government of South Africa. It is my finding that they failed to discharge it.

[23] I might also add that considering the nature of the plaintiffs' case, the defendants' denial that they own the buildings was improper, totally unnecessary and thus frivolous and vexatious for which it should be mulcted with an adverse costs order.<sup>2</sup> I did warn Counsel for the defendants of this possible eventuality but he persisted along this line nonetheless, unfortunately to his client's detriment.

[24] I now proceed to deal with the issue whether or not the defendants are liable for the damages to the buildings and structures in question. In this connection the two parties have given conflicting versions which I find to be mutually destructive. It is an established principle of law that in such circumstances, the Court has to weigh up and test the allegations of the plaintiffs against the general probabilities.<sup>3</sup> It is thus salutary to refer to the comments of the Court in the decision in **Naidoo v Senti**<sup>4</sup>, in which it instructively stated thus:-

*“Where the onus rests on the plaintiff as in the present case and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken*

---

<sup>2</sup> Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd 1946 TPD p226

<sup>3</sup> Maseko v Attorney General LAC (1990 – 94) p13

<sup>4</sup> LAC (2007 – 2008) 161 @ 164

*and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favor the plaintiff's case anymore than they do the defendants' the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."*

[25] *In casu*, it is common cause that it is the truck belonging to the 1<sup>st</sup> defendant that collided with the plaintiffs' buildings and other structures. The only point of departure is with respect to who was driving the truck at the material time. The plaintiffs' evidence is that it was the 2<sup>nd</sup> defendant, i.e. the 1<sup>st</sup> defendant's driver. The 1<sup>st</sup> defendant's version is that the truck was being driven by a hijacker(s) and was not under his control and/or that of the 2<sup>nd</sup> defendant.

[26] When I weigh up the plaintiffs' version against the following probabilities per the defendant's version; at the material time the truck was driven by a hijacker(s); they allowed the 2<sup>nd</sup> defendant to answer his phone and convey this fact and the one that they were approaching the border post to the 1<sup>st</sup> defendant; they indeed proceeded to the border post which is not only the busiest between the two countries, but is teeming with police officers and other officials; the police or some other person decided to remove the body of the hijacker despite the fact that he had caused that kind of carnage for no apparent reason; there are no further details concerning the alleged dead driver except the names the defendants gave without informing the Court how and where they came across same.

[27] In addition, the defendants did not bring any independent evidence by anyone who actually knows the alleged hijacker and what eventually happened to him yet they know his names; only three dead bodies were found at the scene and all happened to be buried amongst fruits and vegetables and were obviously not passengers per exhibit “C”; there is no information and/or evidence on the other alleged passengers (hijackers) who managed to disappear into thin air after such horrific an accident and at such a busy port of entry which was obviously swarming with police; the police decided to close the case yet despite this, decided to only reveal the evidence that implicates the defendants herein instead of the actual culprit; the vehicle was allegedly cleared as roadworthy per annexure “RT1” which was coincidentally so faint that it was practically blank and thus worthless as I was unable to make out which vehicle it was issued for, what make and model it was, what were the engine and chassis numbers as well as other identifying details.

[28] Further, the contents of exhibit “A” i.e. the 2<sup>nd</sup> defendant’s sworn statement that he had just telephonically reported to the 1<sup>st</sup> defendant that the truck’s brakes were faulty but was told to drive on to Maseru where the problem would be attended to; the 2<sup>nd</sup> defendant has coincidentally disappeared and could not come before the Court so that his evidence could be tested, all lead me to conclude that the plaintiff’s version is not only the more probable but that the defendants’ version is so highly improbable, fanciful and was as a matter of fact concocted way after the incident that it is absolutely false and falls to be rejected in its entirety as I hereby do.

[29] It therefore also stands to reasons that for the very same reasons, the plaintiffs’ evidence has established that the truck’s brake system was indeed faulty

i.e. per the contents of both exhibits “A” and “B” respectively. I accordingly find that the plaintiffs have successfully proven their case on a preponderance of probabilities and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are liable for the damage to the plaintiffs’ property. In the light of the fact that the Court is yet to hear evidence on the issue of quantum, I also order that costs will be in the cause.

**N. MAJARA**  
**JUDGE**

For the plaintiffs	:	Mr. Loubser
For the 1 <sup>st</sup> defendant	:	Mr. Nteso
For the 2 <sup>nd</sup> defendant	:	No appearance