CIV/T/167/08

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

MAMOTUMI SAULI **PLAINTIFF**

And

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED **DEFENDANT**

JUDGMENT

Coram : Hon. Majara J

Date of hearing : 16th October 2013

Date of judgment : 27th May 2014

Summary

Claim for damages arising out of injuries sustained from a collision of motor vehicle with pedestrian crossing the road – Duty to exercise care - Negligence of the driver – Contributory negligence of the pedestrian – Failure to keep a proper lookout – Pedestrian running across the road into path of approaching vehicle – apportionment of damages.

ANNOTATIONS

BOOKS

1. Cooper; Delictual Liability in Motor Law; Juta & Co. Ltd 1996
2. Cooper & Bamford: South African Motor Law Juta & Co, Ltd 1965

CASES

1. Minister of Defence V African Guarantee and Indemnity CO. Ltd 1943 AD 4
2. Thabo Jonas Mmekwa v Road Accident Fund (33275/09) (2012) ZAGPPHC 101 (13)
3. R v Meiring 1927 AD 41
4. Davies v Crossing 1935 WLD 19
5. Santam v Nkosi 1978 (2) SA 748
6. Lesotho National Insurance Co. Ltd v Noko Tsolo C of a (CIV) No. 28/2013 (unreported)
7. Beech v Setzkorn 1928 CPD 500

[1] The plaintiff in this case instituted an action against the defendant for damages she allegedly suffered when she was hit and knocked down by a vehicle insured by the defendant. The accident occurred on the 11th September 2006 in the area of Ha Seeiso, in the district of Mafeteng. This is common cause.

[2] At the commencement of the proceedings, the Court ruled on application that the merits of the matter should be separated from the quantum thereof and that evidence should be led on the issue of

liability with that of the quantum being stood over for later determination.

[3] It is the case of the plaintiff that on the day in question around 16:00 hours, she was knocked down by the vehicle of the insured driver while she was crossing a straight road at a bus stop. In terms of her evidence, as she was about to cross the road she noticed a bus approaching and indicating that it was going to stop at the bus stop.

[4] Further, that after the bus had stopped she checked the road for oncoming traffic by looking in the right direction and there being none she crossed the road. When she was in the middle of the road she heard a screech of brakes and noticed a vehicle coming from the same direction where the bus had come from. She does not remember anything thereafter.

[5] PW2 who is the sister in law of the plaintiff also took the stand and her testimony was with respect to the injuries sustained by the plaintiff when she was been hit by a car while she was in the middle of the road. That the plaintiff was hit by the insured vehicle referred to herein is common cause.

[6] The third witness to take the stand was the police officer that attended the scene of the accident and filled out the Motor Vehicle Accident Report which he handed in as evidence. He indicated that according to his observation the plaintiff was hit after at a spot past a T-junction thereat. He further told the Court that the distance

between the point of impact and the place where the insured driver came to a stop was seventy-six (76) paces which according to him showed that he was over-speeding.

[7] The witness confirmed the testimony of the plaintiff in most respects and added that the point of impact was more or less in the middle of the opposite lane i.e. of the direction the bus and the vehicle in question were travelling. It was his further evidence that according to his investigations, when the plaintiff crossed the road she had only seen the bus and not the motor vehicle that collided with her and that eyewitnesses told him that the insured driver was driving at an excessive speed. It is however worthy to note that none of the said eyewitnesses was called to come and testify so that their evidence remains inadmissible hearsay.

[8] After the close of the plaintiff's case the defendant called its only witness to take the stand, namely the driver of the insured vehicle. His testimony was that when he passed the stationery bus he was not speeding and was driving at approximately 55km/h. He added that when he got closer to the bus, he noticed the plaintiff crossing the road and he swerved his car to the right to try and avoid hitting her but could not because she was running. He confirmed the evidence that his vehicle collided with her in the middle of the opposite lane.

[7] He added that when his vehicle hit the plaintiff she hit the windscreen and fell on the bonnet and this obscured his vision

resulting in him going off the road and landing in a ditch where the vehicle rolled over. He confirmed the plaintiff's evidence that the road is straight at the point where the collision occurred. He denied that he was negligent in any manner.

[8] In her submissions the plaintiff's Counsel **Adv Lephatsa** stated that the accident occurred as a result of the sole negligence of the insured driver because he failed to exercise reasonable care and vigilance towards the plaintiff which he was obliged to do. She added that the insured driver failed to keep a proper lookout, to apply his brakes timely and drove without due care to other users of the road.

[9] She contended further that the driver failed dismally to avoid the accident as he ought to have taken necessary measures to avoid it. She submitted that as a result the Court should hold him liable. Counsel added that it is not probable that the driver could not have avoided the accident if he was indeed travelling at the speed of 55km/hour as he alleges otherwise, he could have managed to stop immediately when faced with an emergency. Further that this is strengthened by the fact that after the collision, he failed to control the vehicle to the extent that it fell into a ditch/donga.

[10] On the other hand, the defendants' Counsel **Adv. Loubser** made the contention that the plaintiff was the cause of her own misfortune because she did not properly look out for oncoming traffic before she could cross the road. He added that the evidence of the plaintiff that she did look but did not see any vehicles approaching cannot be true

because it is common cause that the road thereat is straight and she was knocked down by the vehicle some 5 to 7 paces into the road, which means that she crossed when the vehicle was already very close to the bus.

[11] It was Counsel's submission that the only conclusion to be drawn from the evidence is that the plaintiff did not look properly before crossing the road. It was his further contention that the plaintiff's evidence that the driver was over-speeding came as an afterthought because if it was true the police officer would have mentioned it in his report.

[12] He added that over-speeding is not the only assumption that can be made on the distance of the 76 paces that the insured driver stopped at from the point of impact because he could not slam on his brakes since the action could have thrown the plaintiff off the bonnet which would have probably caused more injuries to her. It was his submission that the collision was unavoidable in the circumstances and he prayed that the insured driver be exonerated from all liability.

[13] I find it apposite to mention at this stage that Counsel referred the Court to several authorities in support of their respective submissions all of which I found to be very helpful.

The Law

[14] It is now well-established that in determining negligence, the applicable test is the objective one i.e. how would a reasonable person have acted under the conditions prevailing at the time of the accident,

as experienced by the driver whose conduct is being scrutinised. See in this regard the case of **Minister of Defence V African Guarantee and Indemnity CO. Ltd.** [1]

[15] There is a standard of care and skill that is expected of a driver which also depends on the typical circumstances of each individual case. Thus in order for the Court to carry out this judicial analysis the following factors must be considered among others;

(a) Whether the insured driver adhered to his ongoing obligation to keep a proper lookout in all circumstances;

(b) Whether the insured driver kept a reasonable speed (within the range of his vision) immediately before the collision;

(c) The visibility of the plaintiff;

(d) Whether the insured driver and the plaintiff each met the duty to anticipate a reasonable apparent risk and took appropriate precautions to avoid it.[2]

[16] It is also worthy at this stage to point out that pedestrians have the same rights to use public roads as do drivers of vehicles. At the same time each is under a duty to exercise that right in a reasonable manner as not to cause harm to others. The duty of the driver and a pedestrian are co-relative and it is essential for a party alleging

[1] 1943 AD 4 at 15
[2] Thabo Jonas Mmekwa v Road Accident Fund (2012) SA

negligence on the part of the driver to prove timely visibility of the pedestrian.[3]

[17] Thus, as I have already mentioned, a person will only be held to have been negligent if he is found to have failed to exercise care and skill which would be observed by a reasonable man in order to prevent harm to others as a result of his acts or omissions.[4]

[18] Coming back to the facts in the present case, the question is whether both the plaintiff and the driver had each excised the duty of skill and care required of them by the law. The evidence presented before this Court has shown that the driver overtook the bus at a bus stop as it had indicated that it was about to stop. In this regard, the driver cannot be faulted. However, the next question is whether at the time, he also took precautions against foreseeable harm, i.e. that a pedestrian could appear suddenly in front of the stationery bus into the road.

[19] In this regard, it cannot be argued that where a driver sees a pedestrian exposing himself to the risk of being knocked down, he should take all reasonable steps to avoid him/her.[5] If the driver had kept a proper look out, he would have given the plaintiff a proper warning of his vehicle approaching. The most usual method of doing so was to give an audible warning such as of sounding the hooter. There is nothing in the evidence to suggest he did that.

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[3] Cooper; Delictual Liability in Motor Law; Juta & Co. Ltd 1996
[4] R v Meiring 1927 AD 41 at 46
[5] Davies v Crossing 1935 WLD 19

[20] Secondly, it is the duty of a driver that wants to undertake another vehicle to satisfy himself that it is safe to do so in order to prevent a motor vehicle accident due to negligence. And in carrying this duty, one of the things he must observe is whether there are pedestrians crossing the road ahead. This includes unseen pedestrians whose presence he reasonably should have foreseen or anticipated. [6]

[21] Considering the evidence before me, I am of the view that the defendant did not take sufficient steps that a reasonable careful man should have for the following reasons; a motor vehicle is a potentially dangerous machine and unless kept under proper control by the driver it can cause serious physical injury to a pedestrian;[7] the standard of care and diligence required of a driver is not only towards a pedestrian he sees, or ought to have reasonably foreseen, but is the same towards unseen pedestrians; the insured driver herein was approaching a bus stop; his lookout for likely pedestrians was obstructed by the stationery bus which required him to drive at a reasonable speed and to sound a proper warning of his approaching vehicle and there is no evidence that he did so.

[22] On the other hand, like a driver, a pedestrian has the duty to obey the rules of the road and where he intends to cross the road he should keep a proper lookout and acquaint himself with the vicinity and scan the road to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety and take appropriate

[6] Santam v Nkosi 1978 (2) SA 748
[7] Beech v Setzkorn 1928 CPD 500 at 504

precautions to avoid the accident and only cross the road at an opportune moment.

[23] This duty becomes higher where he steps into the street next to some object like another vehicle that obstructs his view because in such a situation, anything can happen. In the present case the plaintiff averred in her statement at par 2 thereof that she looked on the right side of the road after the bus had come to a stop and then crossed the road.

[24] She added that when she was in the middle of the next lane, she heard the sound of the brakes of a motor vehicle and saw the a motor vehicle, E 4297 moving towards her at high speed and she does not know what happened after. It is therefore my view that this evidence indicates that the plaintiff only noticed the vehicle when she heard the noise of the brakes because before she could cross the road, she failed to take a proper look out of the incoming traffic hence she failed to see the insured vehicle at a straight part of the road and only saw it too late when she was already in middle of road, a classical example of the maxim *res ipsa loquitor*.

[25] Therefore, in the light of the evidence that has been placed before this Court, it is my opinion that both the insured driver and the defendant were negligent, the one for his failure to observe his duty to exercise reasonable care and keep a proper lookout otherwise he could have avoided the collision and the other for her obvious failure to properly ensure that the road was indeed clear before she could

cross it as her vision was also obscured by the bus that had just stopped at the bus stop.

[26] The driver would have been excused from liability if he himself in no way contributed to the accident. Furthermore if the driver was travelling within the prescribed speed as he claimed, I do not think he could have failed to control the vehicle to the extent that when he swerved it fell into a ditch and rolled over. This is another indication of a degree of negligence on his part.

[27] It is thus my finding that both parties contributed to the accident. This being the case, justice and fairness dictate that I apportion damages appropriately and in doing so I have to take into account the degree of fault of each party and the greater the degree of fault, the higher the damages.

[28] In this regard, it is salutary to take note of the comments of the Court in **Lesotho National Insurance Co. Ltd v Noko Tsolo** [8] whose facts are by and large on all fours with those *in casu, viz*;-

> *"On the version of the collision correctly accepted by the Court a quo the plaintiff was undoubtedly partly at fault in relation to the collision: she ran into and across the road at an inopportune moment, into the path of the approaching vehicle, and apparently without seeing it at all, she did so from a concealed position behind or between stationery taxis.*
>
> *...which she did not even see because her lookout was inadequate. The driver's negligence on the other hand, consisted only of driving at a speed somewhat excessive in*

[8] C of A 9CIV) No. 38/2013 (unreported) par 14-16

the prevailing conditions and circumstances. I would assess the respective degrees of blameworthiness of the plaintiff and the driver at 40% to 60% in favour of the driver."

[28] I have already shown that the present facts similarly reveal that even if the plaintiff did lookout, it was inadequate hence her having crossed the road when the insured vehicle was clearly approaching.

[29] Given these circumstances, I find no reason to deviate from the reasoning of the Court of Appeal in the **Noko case** in its apportionment of the degree of blameworthiness as quoted above and I am inclined to adopt the same formula and similarly apportion the degrees of blameworthiness at 40% to 60% in favour of the driver. I accordingly so find.

N. MAJARA
JUDGE

For the plaintiff : Ms Lephatsa

For the defendant : Mr. Loubser