CIV/T/310/2010

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MALEFETSANE TS'IU Plaintiff

And

NTHANE BROTHERS (PTY) LTD Defendant

JUDGEMENT

Coram : Hon. Acting Chief Justice T. E. Monapathi

Date of Hearing : 19th August, 2014

Date of Judgement: 19th August, 2014

SUMMARY

CITED CASES

STATUTES

BOOKS

[1] The Plaintiff issued out summons before the court claiming damages for loss of income in the total sum of M298,000.00. This followed a collision that occurred at Thaba-Phats'oa between his vehicle and a vehicle belonging to the Defendant resulting from the negligence of the Defendant's driver. It is common cause that the Defendant replaced the Plaintiff's vehicle in July 2009 when the collision occurred on 25 June 2008.

[2] The Plaintiff tendered the evidence of three witnesses and then closed its case. The Defendant now applies for absolution from the instance. It is convenient to summarise the evidence of the Plaintiff before dealing with the

legal principles concerning absolution from the instance with a view to showing that this application is not well taken.

[3] The Plaintiff testified as the first witness on his own behalf. His evidence is that the Defendant's vehicle collided with his vehicle on 25th June 2008. Following the accident the Defendant replaced his vehicle in July 2009. The Plaintiff testified that he used his vehicle for hire to the government of Lesotho. He testified that it was hired to the Roads Department when the accident occurred and was due to alternate to Lesotho Highlands Development Authority (LHDA). He testified that his vehicle and others were hired by Avis Fleet Services to government departments in the Thaba-Tseka district.

[4] It was suggested to the Plaintiff under cross-examination that he refused a "brand new" vehicle but he denied this. He indicated that the Plaintiff made an offer of a vehicle in July 2009 which he accepted despite the fact that it was a 1994 model when his vehicle was a 1998model. It was then suggested that there were no documents to show that his vehicle would be hired by LHDA and he conceded this but maintained his position that indeed the vehicle would be hired by LHDA, but that the vehicle was damaged before working at LHDA.

[5] The Plaintiff's Counsel then said to the Plaintiff. "Defendant will show that had you accepted the new vehicle offered there would have been no loss." The Plaintiff responded by indicating that other than the vehicle he was offered and which he accepted the Defendant never offered him anything before July 2009. He testified that the Defendant is liable for damages because he did not replace his vehicle in time.

[7] The next witness to testify was Mr. Libe Moshoeshoe. This witness testified that he works at Avis Fleet Services as Administrative Clerk. He

testified that he works in the Rental Department. The Plaintiff is their client because he used to lease out his vehicle to the government departments as and when the need arose. He testified that Avis Fleet Services kept a register of privately owned vehicles for purposes of hire. Whenever there was a need a government department would cause a requisition or order to be issued to them specifying the kind of vehicle they required to hire. Avis would then contact the relevant private owner to release their vehicle to them. After the engagement the owner would submit a claim to them. There was no written agreement between the owner and Avis.

[8] He stated clearly that he remembers that in June 2008 the Plaintiff's vehicle worked in roads department at Thaba-Tseka Roads Camp. The Plaintiff's vehicle was hired as and when the need arose depending on the needs of the government.

[9] The last witness to testify was Mr. Daniel Matela. He testified that he worked with Avis as mechanic or technician. The witness testified that he previously worked for Imperial and that he joined Avis on 1st August 2008. He indicated that he knows the Plaintiff as a person who hired out his vehicle to the government through Avis. He testified whenever there was a need to hire vehicle she and his co-employees would receive a call to identify such vehicles. They would then be told the kind f vehicle the government department wanted to use. They would then contact the owner of the identified vehicle to release it to them for hire. They would test such vehicles and thereafter take commencing mileage. After engagement they wold then, either personally or through the assistance of security guards, verify the closing mileage of the vehicles for purposes of verifying the claims of the owners. He testified that there were only two vehicles of the description of the Plaintiff's vehicle, namely 4x4 single cab.

[10] It is submitted that this welter of vehicle has not been challenging in material respects or at all. The Defendant has not denied that the Plaintiff's vehicle was not hired by Avis in the Roads Department when the accident occurred. The Defendant has not denied that the vehicle would alternate to LHDA after a stint of three (3) months with the Roads Department. The only contention of the Defendant is that the Plaintiff did not present any documents to show this point. It is submitted that the Defendant would never deny this fact and has not suggested that it would call evidence to contradict this evidence. The evidence of three witnesses that the Plaintiff's vehicle was hired at the time of the accident is not challenged. It is therefore submitted that the Defendant's application for absolution from the instance is misconceived with respect. It is convenient to discuss principles relating to absolution form the instance.

[11] In terms of Rule 41(6) of the High Court Rules of 1980 (as amended) the Defendant is entitled to apply for absolution from the instance and may address the court in support of the application. The Plaintiff is entitled to reply to the application. Legal authority is settled that when an application for absolution form the instance is made the question is always, whether there is evidence upon which a reasonable person might find for the Plaintiff. The main question to be determined is whether at the close of Plaintiff's case it can be said that the Plaintiff has made a *prima facie* case for the relief sought. In the Gascoyne's case the Court said:

> "*At the close of the case for the Plaintiff, therefore the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the Plaintiff? And if the Defendant does not call any evidence, but close his case immediately, the question for the court would then be. Is there such evidence upon which the court ought to give judgment in favour of the Plaintiff?*

In the same way the court indicated in the case of ***Claude Neon Lights SA LTD v Daniel*** that:

> *When absolution from the instance is sought at the close of the Plaintiff's case, the test to be applied is not whether the evidence led by the Plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, would or might (Not should, nor ought to) find for the Plaintiff.*

[12] In the premises it is submitted that the application for absolution form the instance is not well taken and ought to be dismissed with costs such costs to be costs in cause. The Plaintiff has established prima facie case that his vehicle was leased to the Roads Department at the time the accident occurred. At least this crucial evidence was not denied by the Defendant. It follows that on the basis of this evidence alone the court applying its mind reasonably to the evidence led by the Plaintiff might find that the Plaintiff has proved that he suffered damages in the amount claimed. This is so especially because the rates that were applicable to vehicles of this type are not disputed.