

IN THE HIGH COURT OF LESOTHO**HELD AT MASERU****CIV/T/437/18**

In the matter between

TSOEU THULO MAHLAKENG**PLAINTIFF****And****BASE (PTY) LTD****DEFENDANT****JUDGEMENT****CORAM: BANYANE AJ****HEARD: 27/08/19****DELIVERED: 10/09/19****SUMMARY**

Claim for pecuniary loss arising from deprivation of property-plaintiff bears the duty to specifically and explicitly prove such damages even where the action is unopposed-no evidence, documentary or otherwise adduced as proof that the expenses claimed were indeed incurred-claim dismissed.

ANNOTATIONS

Books

RG Mckerron, the Law of Delict, seventh Edition, Juta & co, Capetown

Cited cases

Pillay V Khrishna 1946 AD 946

Botsane V Commissioner of Police C of A (CIV) No.3 of 2011

Mohlahli V Ramakatane CIV/APN/207/86).

Monate V Mefane C of A (CIV) No.19 of 2017(para 24)

Introduction

[1] The plaintiff instituted an action for damages in the amount **M 41 650.00** arising out of deprivation of his vehicle which was damaged due to negligence and fault of an employee of the defendant, a fuel filling station. The amount was allegedly incurred by the plaintiff in hiring alternative transport during the deprivation period.

[2] The defendant was served with the summons on the 27th June 2018, but did not enter his notice of appearance to defend. The applicant consequently proceeded to seek default judgement as sanctioned by **Rule 27(3)** of the **High Court Rules 1980**.

Factual background

[3] The facts that led to the institution of this action are quite straightforward. They can be summarized thus; the plaintiff was the one of the defendant's customers on the 26th March 2019 to fill fuel in his motor

vehicle. The petrol attendant filled the plaintiff's vehicle with petrol instead of Diesel and this was revealed when plaintiff about to pay for services rendered. The garage's employees immediately endeavoured to drain the petrol out of the tank. In the process of drainage, fire erupted from one of the vehicle parts, thereby causing damage to some parts such as the battery. It was extinguished by a security officer at a nearby Auto teller machine (ATM). The damage rendered the vehicle immobile and the plaintiff had to leave it there.

[4] The manager of the filling station arranged transport to take him home. Subsequently the vehicle was sent for assessment in order to ascertain the exact damage. This was done at the cost of the defendant. The vehicle stayed in the possession of the "assessors" and was only released to the plaintiff on the 16th May 2018, a period of one month and two weeks after the incident. The applicant testified further that during the period of deprivation of his car by the garage, he had to resort to alternative transport to cater for his daily transport needs. He accordingly hired same and incurred the costs as claimed in the summons. It is the plaintiff's case further that he incurred the said expense as a result of the negligence of the defendant's employee during the course of the defendant's business and this renders the defendant liable to pay the amount claimed.

Analysis

[5] The plaintiff's claim is not for damages on his vehicle but loss consequential to the damage thereto. I will not therefore delve into the correctness or otherwise of the plaintiff's version in contrast to the defendant's on the question of extent and nature of damage on the vehicle. These divergent views can be distilled from the correspondence between the parties, which the plaintiff handed in as part of his evidence. Suffice is to say that the plaintiff's averments as regards the deprivation of his vehicle

are unquestionable. This too is deduced from the correspondence I just referred to.

[6] The nature of the plaintiff's claim is undoubtedly for special damages he allegedly incurred as a result of the defendant's wrongful act. I therefore turn to the legal principles applicable in an action such as this.

[7] In order to establish liability in an action for recovery of patrimonial loss sustained, the plaintiff must prove the following;

- a) A wrongful act on the part of the defendant
- b) Pecuniary loss suffered as the result of the act
- c) Fault on the part of the defendant,

(see RG McKerron; The Law of delict, 7th edition, p13)

[8] I deem convenient to first deal with the 1st and 3rd requirements. In this regard, the plaintiff did set out facts on which he relied for the allegation that; **a)** the petrol attendant's act of filling unsuitable fuel for his vehicle was wrongful and **b)** that it was due to fault on his part that the plaintiff's vehicle was damaged and rendered immobile; consequently that he was deprived of same from 26th March 2018 to 16th May 2018 when it was released to him, albeit, according to him, it was not in a good condition and needed repairs. He substantiated the two through production of Exhibit A, a letter from the garage's manager to him stating their position about the damage, and exhibit B, in terms of which he signed for release of the vehicle with a new battery (replaced at the defendant's cost) on the 16th May 2018.

[9] While it is undisputable that the plaintiff's vehicle was taken away from him for a period of about two months, the next and only inquiry should be whether he incurred the loss claimed as a result of the deprivation.

[10] In an attempt to justify the third requirement for liability, namely, pecuniary loss, the plaintiff relied solely on his *ipse dixit* in this regard. He simply testified that he hired an alternative vehicle during the deprivation period and incurred cost in the amount claimed. There is however no proof whatsoever that indeed he hired an alternative transport as alleged. He made no effort to give details necessary to prove his claim. These would include; Where did he hire this "transport"/vehicle; from an individual or fleet services or did he hire cabs on daily basis? At what rate/s was he charged, on daily, weekly or monthly basis? In other words, how much did he incur per day/week/month?

[11] Worst still he did not shed any light as to how and on what basis did he calculate the sum claimed, nor did he tell the Court whether or not any documentary proof is available to substantiate his claim.

[12] Now the Law is settled in our Jurisdiction on the question of burden of proof. Our Courts have consistently followed the *locus classicus* on the burden of proof in *Pillay v Krishna and Another* 1946 AD 946 at 951-952 where Davis AJA said:

'The first principle in regard to the burden of proof is thus stated in the Corpus Juris ...If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.... But there is a third rule, which Voet states in the next section as follows: "He who asserts, proves..."'

See **Botsane V Commissioner of Police C of A (CIV) No. 23 of 2011**

[13] It becomes abundantly clear in terms of the principles set out above that the applicant ought to prove his alleged entitlement to the amount claimed. The standard of proof being that of the balance of probabilities in civil cases. This burden does not, in my view, become any lesser in unopposed proceedings.

[14] As regards the nature of proof required in claims such as the present, there is an array of case law to the effect that, where pecuniary loss for a specified sum of money is sought, it has to be substantially and precisely proved (**Mohlali V Ramakatane CIV/APN/207/86**). **Monate V Mefane C of A (CIV) No.19 of 2017(para 24)**

[15] This means in my view that in order to succeed, the plaintiff had to adduce proof, whether documentary (maybe in the form of receipts or anything) or otherwise that such costs were incurred. In the absence of proof, his say so does not suffice to sustain the claim in the amount **M 41 650**, nor any lesser amount.

Conclusion

[16] In my assessment of the plaintiff's evidence, I have not been able to find any shred of evidence which points to the alleged expense. In other words, there is no proof whatsoever that the plaintiff suffered the pecuniary loss claimed and his claim ought to fail.

In the result, the following order is made

Plaintiff's claim is dismissed.

P. BANYANE
JUDGE (Acting)

For Plaintiff: Advocate Makhakhane

For Defendant: No Appearance