IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/458/2010**

In the Matter Between:-

LERATO NTABE **PLAINTIFF**

AND

MPHOSE MATETE **1ST DEFENDANT**

NAPO TŠEPE **2ND DEFENDANT**

JUDGMENT

CORAM : **MOKHESI J**

DATE OF HEARING : **01ST OCTOBER 2019**

DATE OF JUDGMENT : **14TH NOVEMBER 2019**

CASE SUMMARY: *Damages – for damage occasioned to the plaintiff's taxi as a result of the collision with the defendant's truck – costs of panel beating – Evidence – How loss of profit is to be approached- factors to be considered when dealing with loss of profit.*

ANNOTATIONS:

STATUTES: *High Court Rules*

CASES : *Frasers Lesotho Ltd v Hata-Butle (PTY) Ltd LAC (1995 – 1999) 698*

Orne-Gliemann v General Accident Fire & Life Assurance 1981 (1) SA 884

WBHO Construction (PTY) Ltd v Mphenetha LAC (2005 – 2006) 453

Per Mokhesi J

[1] Introduction

This is an action in terms of which the plaintiff is claiming damages against the defendants jointly and severally as follows:

1. Payment of Eighty one thousand Six hundred and seventeen Maloti twenty four lisente (M81,617.24) costs of repairs.

2. Payment of Twenty Eight Thousand Nine Hundred and Forty Nine Maloti Seventy Lisente (M28,949.70) loss of business.

3. Interest at the rate of 18.5% per annum *a tempore morae*:

4. Costs of suit.

This claim arises out of a collision between a Combi, Reg. no. E1777 which was driven by the plaintiff's driver (PW1) and a truck, Reg. no. AH836, which was driven by the defendant's driver (DW 2). This collision occurred at Ha-Tsolo, Maseru, in the morning around the hours 9.00 a.m and 10.00 a.m on the 05 May 2010. The two vehicles were travelling, prior to the collision, from the Masianokeng direction to Maseru City. The collision occurred at Ha- Tsolo in the Maseru district at the T-junction to the right. The combi was travelling in front of the truck as the two vehicles approached the T- junction.

[2] Evidence

PW 1 testified that his combi E1777 was in front while the truck AH836 was behind. According to Dw2 the distance between the two vehicles could accommodate two cars. When approaching the T-junction the PW 1 who was travelling alone in the vehicle, about twenty-five paces before the T-junction PW 1 saw the truck travelling behind him. He saw the said truck through the mirror, and as he was intent on turning to the right in order to take his combi for a wash, he indicated by switching on the right turn indicator on his combi and stopped a little and took a turn to the right. As he turned to the right, at the T-junction, the truck which was following him hit the taxi on the right side. The road where the collision occurred has two

lanes, the one going to Maseru town and the other going in the opposite direction. Mr Mariti testified that the collision occurred as he executed a turn to the right to the carwash in the opposite direction, meaning he had effectively left his lane unto the opposite lane from Maseru.

[3] He testified that the collision occurred because the driver of the truck had sought to overtake him at the T-junction despite the fact that the road signs did not allow him to do so. The damage to the vehicle was extensive. He testified that the impact of the collision rendered him unconscious to the extent that when he came round he found himself at Queen II Hospital. He was, however, discharged on the same day around 20hrs00. He testified that at that T-junction the only possible turn is to the right into the T-junction. To the left it is all pavement and therefore impossible to turn, nor is there a space to park the vehicle. Cross examination of pw1 did not shake him at all. In my opinion he performed well under what an ineffective cross-examination. I found him to be a credible and reliable witness.

[4] PW 2, No. 11598 P/C Tlolotlolo attended the scene of collision whereat he found the two vehicles. He took measurements of the scene of collision and reduced his findings into a sketch plan. His findings are recorded in LMPS 29 police form – Accident report form. He testified that, the point of impact which is represented by "X" on the LMPS 29, was in the middle of the lane leading from Thetsane/Maseru to Masianokeng (a direction opposite to the one the two vehicles involved in the collision were travelling), and that the point of impact was directly opposite the T-junction to the right. Even though the Dw2, seemed to want to question the position of the point of impact, the same issue was not raised with pw2 under cross examination. I am therefore, convinced that the point of impact was where pw2 said it was. He testified that at the T-junction the road signs make it clear that one cannot overtake, and this is buttressed by a white barrier line before one approaches the T-junction and immediately thereafter. The barrier line is broken at the junction to allow entry into the junction. He testified that it is impossible to turn to the left as there is guardrail on the opposite side of the T-Junction. I also found this witness to be credible and reliable. Cross examination left his testimony unscathed.

[5] PW 3, Mr. Lerato Ntabe testified as the owner of the taxi. In the immediate aftermath of the collision, he took it upon himself to secure quotations for the repair of the vehicle, as the first defendant had agreed to repair his vehicles. Two quotations were secured. The two panel beating quotations were as follows: E and S Plastic Repairs, M85,850.07; T.M Panel and Paint, M81,617.24; Ultimately, PW 3 took the vehicle for panel beating at T.M Panel and Paint, and prove of payment of the said amount was provided to the court. He paid the amount in instalments. The first payment was made the on 14th May 2010, in the amount of M35,000.00; the second payment was made on the 07th June 2010, in the amount of M26,617.00, and the last payment was made on the 20th July 2010, in the amount of M20,000.00. He testified that the repairs to the vehicle were only completed on the 21st July 2010. PW 3 told the court the vehicle was used for carrying fare-paying passengers on the route between Ha-Tsolo and Maseru town. He testified that the person who was driving the taxi at the material time was his employee. At the time the vehicle was released from the panel beaters it had been out of business for seventy eight (78) days, and that for the time the vehicle was out of business he had suffered loss of income in the amount of twenty eight thousand nine hundred and forty nine Maloti seventy Lisente (M28,949.70). To prove loss of profit, PW 3 produced a record of daily takings in respect of vehicle E 1777. He recorded daily takings and expenditure for this taxi (such as for repairs) separately. He arrived at the amount he is claiming by taking the average amount of daily takings for the month of April, being the month immediately preceding the month on which the collision occurred. The average daily takings for the month of April was M371.00, and he multiplied it with seventy eight days he was out of business while the vehicle was undergoing repair. Pw2's cross examination was mostly aimed at impeaching his bookkeeping method, but he came out unshaken.

[6] DW 1 Mr. Mphosi Matete, testified that on the fateful day he attended the scene of collision. He confirmed as the LMPS 29 shows that the collision happened at the T-junction to the right, and that DW 2 was his employee at the time of the collision. Other than this, the rest of Mr. Matete's evidence is hearsay, and the less said about it the better. As a witness, he was extremely poor. He evaded questions and argued with the cross-examiner. In general he was a poor witness.

[7] DW 2 Mr. Napo Tśepe was the driver of the truck which collided with a combi on the fateful day. He testified that he was following the taxi and that when they got to a T-junction, the taxi which was in front had parked aside the road to the left to off-load a passenger. He testified that the taxi had parked beyond a yellow line as it off-loaded the passenger, and that it was at that point that he attempted to pass it when it made a sudden U-turn to the opposite side. He testified that the taxi had parked after it had gone beyond the T-junction. He testified that as the taxi had executed a U-turn to the right without indicating, and that, that is when the collision happened as he attempted to pass. He said the distance between the two vehicles as they were travelling could accommodate two cars. There was no vehicle in between. Under cross-examination, DW 2 capitulated terribly. He even seemed to disavow the defence he pleaded in his plea. To highlight this, the following exchange between and Adv. Phafane merits reproduction;

> "Q: You accept though that where you overtook was at the T-junction to the right?
>
> A: I accept
>
> Q: If that is so it is totally unacceptable to do so?
>
> A: It is unacceptable to overtake at the T-junction
>
> Q: A court had seen a map and it has seen that there is a barrier line at the place you overtook?
>
> A: It is there
>
> Q: In your own pleadings you specifically said you were overtaking and you had a right to overtake, do you want to change what you said in your plea?
>
> A: They are not my instructions my lord
>
> Q: It was put to the taxi driver on your behalf that it had stopped in the middle when you overtook, what do you say to that?
>
> A: Those are not my instructions"

I found Dw2 not to be a credible witness.

[8] This vacillation by Dw2 in not sticking to his pleaded defence does not characterize only his testimony, it also characterized the way the defence counsel conducted this trial. She kept on shifting defence goalposts as she went along. Three contradictory defences were advanced and put to pw1: the defence as articulated in the defendants' plea is as follows:

> "On the other hand, it was plaintiff who failed to keep a proper lookout in as much as he switched to the right side while defendant was already on the right line (overtaking). He also did not disregard the signs on the road and/or other road users."(sic)

However, in cross-examination the defence counsel changed tune and advanced the defence that as DW 2 was driving along the said road, he realized that there was a combi that had parked in the middle of the lane he was travelling in. To shine light on this troubling feature of the defence' conduct of this trial, it is important to reproduce the exchange between the defendants' counsel and PW 1:

> "Q: And along while he was continuing the 2nd defendant realized that there is a combi that had parked in the middle of the left lane from Masianokeng to Maseru?
>
> A: There was no vehicle in the road
>
> Q: And this combi that had stopped was driven by you?
>
> Q: My instructions are to tell you that the 2nd defendant overtook as you were moving towards the far end of the left side of the road?
>
> Q: My instructions are that you then immediately tried to make a U-turn to the T-junction?
>
> A: It is not so
>
> Q: And you did this without any indication?
>
> A: I was indicating because I realized that he was following me"

[9] This shifting of goal posts in terms of not sticking to the defence pleaded in the plea is to be deplored, as it is in violation of the rules of this court. Rule 20(4) require every pleading to" contain a clear and concise statement of facts upon which the pleader relied for his claim, defence or answer to any pleading…." This Rule must be read with Rule 22(3) which has the same purport, in terms of requiring the defendant in his plea to "clearly and concisely state all material facts on which he relies." The requirement in terms of these rules serves two purposes, a) they are designed to ensure that an adversary comes to court knowing exactly which case to meet ; b) these rules are designed to make it easy for the court to delineate issues to be adjudicated upon. It is wrong for a party to plead (and in this case) a particular defence in his plea and to canvass a totally different case during trial *(**Frasers Lesotho Ltd v Hata-Butle (PTY) Ltd LAC (1995 – 1999) 698, 702 A – D)*.

[10] DW 2 admitted in cross-examination, although he at some point wanted to change the tune, that he overtook at the T-junction, where solid barrier lines clearly prohibited him from overtaking. About twenty five paces before the junction, pw1 indicated by switching the right-turn indicator of the combi to show that he was going to turn right into the T-junction. DW 2 was aware that he was at an intersection to the right when he executed the overtaking move, and therefore he was clearly negligent. He would have been negligent even if the driver ahead would have executed a right turn at the intersection without warning. It has been held that even without a prior signal by the driver in front, of his intended right-hand turn, the fact that it is at the intersection, the driver behind should have been warned of such attendant possibility under the circumstances *(**Orne-Gliemann v General Accident Fire & Life Assurance 1981 (1) SA 884, 887 D – G).*** In view of what I said above I am of the view that the plaintiff discharged his onus of proving on the balance of probabilities that the 2nd defendant is guilty of negligence driving and is the sole cause of the collision. This conclusion leads me inevitably to say the defendants have failed to discharge the onus of proving contributory on the part of PW 1.

[11] Quantum of damages

Having reached the above conclusion I now turn to consider the issue of quantum. It is the plaintiff's case as a result of the collision he incurred panel beating expenses in the amount of eighty one thousand six hundred and seventeen Maloti twenty four Lisente (M81,617.24). He further claims an amount of twenty eight thousand nine hundred and forty nine Maloti seventy Lisente (M28, 949.70) for loss of profit.

a) **Costs of panel beating**

The plaintiff produced prove of the actual amounts paid for panel beating work which was done on his vehicle. The said payments were done in instalments and every time he paid, an amount would be written on the invoice, and the balance remaining accordingly reflected. The authenticity of this document was not questioned, and I consider that the plaintiff has proved an amount of M81, 617.24.

b) Loss of profits.

The plaintiff testified that his vehicle was with the panel beaters for seventy eight days (78) during which time it was out of business. The vehicle was used as a taxi for conveying fare-paying passengers on the route between Ha-Tsolo and Maseru city. Guidance on how to approach this matter was provided in ***WBHO Construction (PTY) Ltd v Mphenetha LAC (2005 – 2006) 453, pp. 458 – 460 (WBHO)***. In order to determine loss of profit two inquiries have to be undertaken; a) the daily or monthly profit that this taxi would have made had it not been damaged; b) the period over which the loss should be worked out. In the ***WBHO*** case it was stated the best approach to this matters (of loss of profit) is to deduct expenses connected to the vehicle, and what is left is the vehicle's profit for the period.

In the present case the plaintiff had a recorded daily takings for the vehicle and amounts he spend for repairs where needed and petrol expenses for each day; for example on 11th January 2010, the vehicle was involved in an accident in Johannesburg where he incurred expenses in buying the door for

M2150.00, corner bumpers for M102.00, and grill and lens for M231.00; repaired leather for M200.00; bought tail lamp for M84.00; repair leather for M200.00; bought the starter for M120.00, and labour costs for all this work was M2500.00. On the month of April (a month preceding the month when the vehicle was involved in the collision) he had to repair the door for M170.00 and brakes for M410.00. So the plaintiff ran a fairly transparent system of bookkeeping in respect of the vehicle the subject matter of this litigation. What the plaintiff did was to take an average for the month of April profit which is M371.00, and multiplied it with 78 days the vehicle was out of business. Applying reasonableness, fairness and justice to this case (***WBHO*** ibid at 460 I) I consider that the amount claimed is fair and justified.

c) Award of Interest:

In the ***WBHO*** case above, it was decreed that in the absence of legislation regulating the award of interest, interest should run from the date of judgment and that the amount of interest should "fixed at the approximate average of the serving rate provided by the Central Bank over the relevant period, with a minimum of 6%" (ibid at p. 461 para. 19). In *casu* the plaintiff has claimed interest at the rate of 18% per annum a *tempore morae*. I am of the view that this rate is unjustified, and I accordingly award 6% per annum.

[12] In the result the following order is made:

a) The defendants to pay an amount of eighty one thousand six hundred and seventeen Maloti twenty four Lisente (M81,617.24) for costs of repairs, jointly and severally, the one paying the other to be absolved.

b) The defendants to pay an amount of twenty eight thousand nine hundred and forty nine Maloti seventy lisente (M28, 949.70) for loss of profit, jointly and severally, the one paying the other to be absolved.

c) Interest at the rate of 6% per annum a *tempore morae* from the date of judgment.

d) The costs of suit.

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MOKHESI J

FOR THE PLAINTIFF : ADV. PHAFANE K.C INSTRUCTED BY T. MOTOOANE & CO. ATTORNEYS

FOR THE DEFENDANTS : ADV. PHEKO INSTRUCTED BY T. MAIEANE ATTORNEYS