

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/570/2018

In the matter between

MAHOOANA MOLUPE

PLAINTIFF

And

**LESOTHO NATIONAL GENERAL
INSURANCE CO. LTD**

DEFENDANT

Neutral Citation: Mahooana Molupe v Lesotho National General Insurance Co.
Ltd (CIV/T/570/2018) [2021] LSHC 121 (15 DECEMBER 2021)

JUDGMENT

CORAM:

MOKHESI J

DATE OF HEARING:

14 SEPTEMBER 2021

DATE OF JUDGMENT:

15 DECEMBER 2021

SUMMARY

DELICT: *A claim for funeral and hospital expenses incurred by the deceased's child consequent to her being killed in a motor vehicle accident- contributory negligence of the deceased not playing any role in this case as the plaintiff was innocent of any wrongdoing- Plaintiff awarded damages*

ANNOTATIONS

CASE LAW:

- *BEE v ROAD ACCIDENT FUND [2018] ZASCA 52: 2018 (4) SA 366*
- *HOLTZHAUZEN v ROODT 1997 (4) 766*
- *INTERNATIONAL SHIPPING Co (Pty) Ltd v BENTLEY 1990 (1) SA 680*
- *KLIENHANS v AFRICAN QUARANTEE and INDEMNITY 1959(2) SA 619*
- *KRUGER v COETZEE 1966 (2) SA 428 (A) 430 E*
- *MFOMADI and Anor v ROAD ACCIDENT FUND [2016] JOL 36438 (GNP)*
- *NATIONAL EMPLOYER GENERAL INSURANCE CO. Ltd v JAGERS 1984 (4) SA 432 (E) at 437*
- *ODENDAAL v ROAD ACCIDENT FUND 2002(3) SA (WLD) 70*
- *PILLAY v KRISHNA & ANOTHER 1946 AD*
- *POTGIETER v RONDALIA ASSURANCE CORP OF SA Ltd 1970(1) SA 705*
- *STAUTTER CHEMICAL Co v SAFSAN MARKETING and DISTRIBUTION Co. 1987(2) SA 331*

BOOKS:

- **J, J, Gauntlet SC** Corbett the Quantum of Damages in Bodily & Fatal Injury Cases VOL. 1 General Principles 4ed at 59

[1] **Introduction**

The plaintiff is claiming an amount of M60,875.00 for damages he suffered in respect of medical and funeral expenses following a motor vehicle accident involving a driver of a vehicle which was insured with the defendant and the plaintiff's mother. The deceased was aged 69 years at the time. The accident took place on the 30th July 2016 at dawn, when the deceased, who was a pedestrian at the time, was struck down by vehicle E6836 at or near Ha –Tšepo along the Main South One public road in the district of Maseru, as she was crossing the road.

[2] **Plaintiff's case**

The plaintiff did not give evidence, but instead his case was anchored on the testimony of four witnesses, viz, Dr Mojela (PW1), the plaintiff's two sisters, Woman Police Constable(W/P/C) Masupha. On the one hand the defendant's case was supported by the evidence of two witnesses, namely, Dr Makhothi and the insured driver.

[3] PW1, Dr Mojela testified that he is a qualified Medical Doctor and a Specialist Orthopaedics and Traumatology. He has thirty (30) years' experience in these fields. He testified that the documentation he reviewed revealed that on the 30 July 2016 the deceased was involved in a motor vehicle accident. She was taken to Queen 'Mamohato Memorial (QMM) Hospital immediately after the accident and was treated as an in-patient from that date until she was discharged on the 02nd September 2016. She was re-admitted after seven days of being discharged. Among the documents he reviewed include EXH. B, which is a two-page extract of the deceased's medical booklet; EXH. C post-mortem examination report; EXH. D, death

certificate. The witness testified that following the accident, he was engaged as a house-call doctor by the deceased's family.

[4] The post-mortem report states that the deceased's death was due to chest injury with rib fracture pleuritis and pneumonia. The witness expressed his disquiet about the inadequacy of this report, as it did not deal with the fracture of left tibia and fibula. He testified that he also studied the deceased's medical history booklet and discovered that it was recorded that when the deceased was admitted at hospital on the day of the accident, she had multiple injuries and that on the 21 August 2016 an open reduction and internal fixation (ORIF) procedure was undertaken on her rib and fibula. On the 2nd September 2016 the deceased was discharged, and the medical doctor recorded that she was "clinically stable", however, she was given an antibiotic by the name of aprofloxacin. Dr Mojela testified that the fact that the deceased was prescribed such a strong antibiotic, was a strong indicator that the deceased could not have been stable as recorded in the booklet. He testified that this strong antibiotic prescription implied that there was some form of infection which needed to be treated, and therefore, the deceased could not have been stable as recorded.

[5] The witness testified that he had access to the defendant's medical expert Dr Makhothi, and that he agrees partly with it to the extent that she states that septicaemia is highly treatable infection with a course of antibiotics and antiseptics. He disagreed that the medical evidence was not be sufficient to conclusively indicate the cause of death Dr Makhothi had concluded that for the fact that the deceased had an underlying kidney disease may have contributed to the deceased's death. She therefore concluded that for this

reason she could not conclusively say that the deceased died as a result of the injuries she had sustained in the accident. Dr Mojela agreed that the deceased's underlying medical condition could have contributed to her death, this notwithstanding, he was convinced that the deceased died as a result of septicaemia. He testified that septicaemia was the cause of death as she had multiple injuries in the form of fracture of left tibia and fibula of the left leg and rib fracture which necessitated an insertion of ORIF. Her wounds became septic leading to septic shock. He was adamant that the deceased did not die a natural death as recorded in the Death Certificate.

[6] Under cross-examination, PW1 conceded that when patients are discharged from hospital it is only when the doctor would have been satisfied that they are in a condition to be so released. He further conceded that a patient with septicaemia would not be discharged until it was at its end stages. He also admitted that as an elderly person, the deceased could have been immunocompromised as result of kidney disease, hypertension and sugar diabetes. He conceded that he was not aware of the deceased's state of health prior to the accident. He could not dispute that the deceased had pre-existing kidney disease which may have played a role in her death.

[7] PW2, 'Mamohale Moshoeshe is the deceased's daughter. She had no knowledge of how the accident occurred, she however, confirmed that the deceased was hospitalized consequent to the accident and sustained multiple injuries she never recovered from. She testified that deceased had been living with diabetes for ten years and was managing it with a healthy lifestyle. She told the court that prior to the accident, the deceased was active and healthy. After the accident her life changed completely as a

caregiver nurse had to be engaged to do house-calls. She testified that plaintiff incurred funeral expenses such as buying a cow, four sheep, paid for the mortuary, coffin, catering and related services.

[8] PW3, Woman Police Constable (W/P/C) Masupha testified that on the day of the accident she received a report of the accident. She discovered that after taking the deceased to hospital, the driver of the insured vehicle had disappeared. She could not easily trace the driver as he left contact number which did not belong to him. It took her about a year to locate the driver of the vehicle. It was after she had arrested the driver that she took him to the scene of the accident to point out the point where the collision occurred. It is following this pointing out that she drew a sketch plan of the accident and transferred her findings onto LMPS 29 police form (Motor vehicle Accident report/map)

[9] Under cross-examination she acknowledged that she had no first-hand knowledge of how the accident occurred. She only attended the scene of accident a year later and did not have a first-hand account of the scene of accident soon after the accident.

[10] PW4, 'Maliteboho Lichaba, is the deceased's daughter. She testified that the plaintiff incurred expenses in the form of hospital bills and funeral expenses following the deceased's death. She testified that most of the expenses were incurred by the plaintiff. She testified that the copies of receipts marked "EXH. F" prove this fact. She testified that when the deceased was discharged from hospital she was in severe pain and was bed ridden until she passed away. Under cross-examination the witness struggled to identify who

made certain payments in respect of the receipts she tendered as evidence of the plaintiff's expenditure.

[11] The plaintiff's case was closed without calling the plaintiff as a witness and no reasons were advanced why that was so.

[12] **Defence case**

The first defence witness (DW1) was Dr A. L. Makhothi. She is a medical Doctor with an extensive experience in the field. She based her opinion solely on the documentary evidence relating to the deceased's medical history. One of those documents is "EXH. G" a certificate of death issued by QMM Hospital. In it was stated that the deceased had chronic kidney disease and high blood pressure. In sum her conclusion was that it is highly improbable that the plaintiff died as a result of the injuries she sustained in the accident. She maintained that septicaemia is a highly treatable infection, with a course of antibiotics and antiseptics. The deceased had chronic kidney disease which would have compromised her immunity, and for this reason the pre-existing kidney disease was most probably the cause of her death. She testified that the available medical evidence was insufficient to conclusively say what could have caused the deceased's death.

[13] Under cross-examination, despite insisting that there was no conclusive medical evidence to prove the cause of death, DW1 acknowledged that septicaemia could be one of the possible causes of the deceased's death.

[14] DW2, Mr Thabo Marie was driving the vehicle in question on the fateful day. He told the court that he was travelling in the left lane from Roma to

Maseru town at around 3hrs30 at dawn. It was misty and there was no traffic. When he approached the area of Ha-‘Nelese, travelling at a moderate speed an old woman was crossing road. He could not swerve to the right to avoid hitting her as there was an oncoming vehicle. As a result, he swerved to the left while stepping hard on his brakes because swerving further would have plunged his vehicle into donga. DW2 testified that the deceased was running across the road in front of the vehicle. He testified he collided with the deceased, and the latter fell in front of the vehicle. His vehicle had sustained damage to its right head lamp. With help of the fellow motorist, they took the deceased to hospital and left her there. He did not report the accident because on coming back to check on the deceased the following day, he was informed by the hospital staff there was no such a patient at hospital. He therefore formed an opinion that he might have struck an apparition, hence his decision not to report the accident. The witness disputed the point of impact as depicted by LMPS29. He said the accident happened not at the junction but after passing the junction to Moradi crushers.

[15] **The law**

Before I discuss the evidence adduced in this matter, it is apposite to state the applicable principles of the law. It is trite law that the plaintiff bears the burden of proving that the insured driver’s negligence is responsible for the deceased’s death (**Pillay v Krishna and Another 1946 AD 946** at 952 – 953). This onus must be discharged on the balance of probabilities not beyond a reasonable doubt. The court will accept the version of the plaintiff his case is more probable (**National Employers General Insurance Co. Ltd v Jagers 1984 (4) SA 432 (E)** at 437).

[16] This is essentially a claim by the deceased's estate (**J, J. Gauntlet SC Corbett The Quantum of Damages in Bodily and Fatal Injury Cases Vol. 1 General Principles 4 ed.** at 59); see also, **Potgieter v Rondalia Assurance Corp. of SA Ltd. 1970 (1) SA 705** at 710). The inevitable result is that the plaintiff is not suing as a co-wrongdoer, he is simply an innocent third party/plaintiff, and therefore, the principles of apportionment of damages to do find application in this case. Put differently, the deceased's contributory negligence does not play any role at all, in the final analysis. The plaintiff merely has to prove some negligence on the part of the defendant, what is commonly known as 1% degree of negligence (**Mfomadi and Another v Road Accident Fund [2016] JOL 36438 (GNP) para.32: (34221/06) [2012] ZAGPPHC 152 (3 August 2012)** at para. 32).

[17] The principles applicable in this case were aptly stated in **Odendaal v Road Accident Fund 2002 (3) SA (W.L.D.) 70** at 74D – G, where the court said:

“(a) The plaintiffs are ‘innocent third parties’ and, for them to succeed, they bear the onus of establishing on the balance of probabilities that Dlamini [insured driver] was guilty of some negligence which was causally connected to the collision and therefore to the damages suffered by them. No question of apportionment of fault or of damages arises here since there was no contributory negligence on their part.

(b) Thus any causal negligence on the part of Dlamini, whatever the degree thereof, in relation to the collision would render the defendant liable, as the insurer under the Road Accident Fund Act, for the full amount of the damages suffered by each of the plaintiffs.

(c) *The fact that the deceased may have been negligent and may even have had the 'last opportunity' of avoiding collision would not exonerate the defendant from liability if Dlamini was causally negligent.*

(d) *Cooper Motor Law 1st ed. Vol. 2 at 141 and cases cited therein suggests that, to determine whether conduct was a factual cause of the collision and therefore of the damages claimed, the conditio sine qua non test is applied. This term embraces*

'all things which have so far contributed to the result that without them it would not have occurred Accordingly, the test for factual causation is whether but for the defendant's conduct the alleged harm would not have occurred.'"

(see also: **Kleinhans v African Quarantee and Indemnity Co. Ltd 1959 (2) SA 619 (E) at 626 (627A)**)

[18] The test for determining whether the insured driver's conduct was the factual cause of the accident is that of a *diligence paterfamilias* in the position of the insured driver. If a *diligence paterfamilias* in the position of the insured driver would have foreseen the reasonable possibility of his conduct injuring another and causing him patrimonial loss, and would have taken reasonable steps to guard against such occurrence, but the insured driver failed to act so as to prevent harm/loss from resulting then he is responsible (**Kruger v Coetzee 1966 (2) SA 428 (A) 430E**).

[19] This case is characterised by paucity of evidence on what exactly transpired that led to the collision between the insured driver's car and the deceased. Reliance will only be placed on the testimony of the insured driver and the

surrounding circumstances. It is the insured driver's evidence that (DW2) collision occurred at around 3:30 a.m. and that it was misty. It was during the month of July. It is common knowledge that in July it is quite dark around the time the accident occurred. When the plaintiff commenced his testimony he said there was no traffic, but it is clear that there was traffic, as he states when he approached the scene of collision there was an on-coming vehicle, in front of which and whose lane of travel the deceased was crossing, into his lane of travel. The deceased was crossing from the right to the left lane. He said he only saw the deceased while the latter was on the white line in the middle of the road. Even based only on his own version, the insured driver's story leaves a lot to be desired. He did not say that he was blinded by the lights of approaching vehicle, if that was the case he would have said so. On his own version the approaching vehicle was so nearer that the only option available to avoid hitting the deceased was to either knock her down or risk falling into a nearby donga.

[20] The collision occurred on an open stretch of tarred road. The question which needs to be answered is why the insured driver only saw the deceased so late that he even had to abruptly apply the brakes? If he was not blinded by the lights of oncoming car, he should have been able to see the pedestrian, crossing from the right lane to his lane. I am of the view that the insured driver only saw the pedestrian on the last moment when she appeared in front of his vehicle because he was travelling at an excessive speed and did not keep a proper look out. If the insured driver had kept a proper look out, he would have spotted the pedestrian earlier and regulated his speed accordingly. It is as if he was surprised by the presence of the pedestrian on the white line in the middle of the road. Given that it was

misty and dark coupled with the fact that the road passes next to build up area, a prudent driver ought to have reasonably foreseen the possibility of the presence of an animal or pedestrian in the road, and would have reduced his speed accordingly so that should any of these obstructions be present in his lane of travel he would be able to avoid collision. A reasonable driver driving in misty conditions, on the road which passes next built up area should have reasonably foreseen the pedestrian crossing the road. I find that the insured driver displayed some negligence, and his negligence is causally responsible for the collision. It does not matter that it was 3:30 a.m. If the insured driver was on the road at time there is no cogent reason not to expect the presence of a pedestrian in the road at the same time, especially where the road passes next to a build-up area.

[21] **Causation**

I turn to consider whether the insured driver's negligent conduct caused the deceased's death. In order to determine whether there is a causal link between the insured driver's negligent driving and the injuries which led to the deceased's death, the inquiry follows a two-step test formulated by Corbett C.J, in **International Shipping Co. (Pty) Ltd v Bentley 1990 (1) SA 680 (A)** at 700E – I,1 as follows:

“The first factual one and relates to the question as to whether defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test; which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test, one must make a hypothetical inquiry as to what probably would have happened but for the

wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical cause of lawful conduct and the posing of the question as to whether upon such a hypothetical plaintiff's loss would have ensued or not. If it would in any event have ensued, the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss suffered, does not necessarily result in legal liability. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[22] In the present matter, as already said, it is doubtless that the collision occurred between the motor vehicle which was driven by the insured driver and the deceased. It is uncontroverted that, although aged 69 years at the time of collision, the deceased was relatively healthy. She had sugar diabetes but had managed it for a long time through dietary adjustments. The collision occurred on the 30 July 2016. The deceased was hospitalised from 30 July 2016 until her discharge on the 02 September 2016. The extent of injuries she sustained is undisputed: She sustained chest injuries; had a fracture of tibia and fibula and had ORIF inserted in her left leg and ribs: she suffered knee dislocation. According to PW2, 'Mamohale Moshoeshe who is the deceased's daughter, the severity of these injuries rendered the deceased to be bed-ridden even after being discharged from hospital with the result that the deceased's children made the decision to hire a nurse to provide home care services. Dr Mojela was also engaged to do house calls,

and so he had a first-hand knowledge of the extent of the deceased's injuries. Barely two weeks after her discharge, the deceased was re-admitted to QMM Hospital in critical condition and she passed away on the 20 September 2016.

[23] The extent the deceased's injuries are common cause, what has been determined at this stage is what caused her death. Dr Mojela is of the opinion that the deceased was killed by wounds secondary to the motor vehicle accident while Dr Makhothi, testifying for the defendant, is of the opinion that (based on documented medical record) the deceased could not have died as a result of septicaemia as that infection is highly treatable with antibiotics and antiseptics. Since the deceased had chronic kidney disease, that could have been the most probable cause of death. In short, the deceased's co-morbidities most probably resulted in her death. She opined further that there is paucity of evidence to conclusively conclude what could have caused the deceased's death. For his part, Dr Mojela agrees in part with Dr Makhothi that the deceased's chronic illness could have been an important factor, but he was steadfast in his opinion that, the kidney illness, notwithstanding, the deceased died due to septicaemia. It will be observed that though partly in agreement, the two medical specialists disagree as to the most probable cause of the deceased's death. In this situation the court is enjoined to determine the factual basis of each opinion and must also have regard to the cogency of each reasoning process (**Bee v Road Accident Fund (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA)** at para 73). One of the principles applicable to experts' evidence (relevant to the present purpose) is that:

“Fourth, the facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. If the expert has observed them, then the expert must testify as to their existence:

‘The duty of the expert is to furnish the judge with the necessary scientific criteria for testing the accuracy of the expert’s conclusions as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.’” (Holtzhausen v Roodt 1997 (4) SA 766 at 772 I – J).

[24] In her evidence, for the defence, Dr Makhothi was adamant that since the deceased had a chronic kidney disease and was immuno-compromised, she was probably killed by it, not septicaemia. Dr. Makhothi based her opinion only on documentary evidence supplied to her by defence counsel. On the one hand Dr Mojela, for the plaintiff, apart from reviewing documentary evidence like his counterpart, he was personally involved in the care of the deceased as he was the house-call doctor for her after she was discharged from hospital. He had a first-hand knowledge of the extent of the deceased’s injuries. While both experts are in agreement partly that co-morbidities may have been a factor in the deceased’s death, in my view the opinion of Dr Mojela’s opinion is the one to be preferred, that the most probable cause of the deceased’s death is septicaemia secondary to injuries sustained in a motor vehicle accident. Dr Mojela’s views, as already said, in addition to reviewing documentary evidence, are based on personal knowledge of the deceased’s injuries, which are undisputed. This first-hand experience of the extent of deceased’s injuries by Dr Mojela is an advantage which Dr Makhothi did not have when she formed her opinion. As a sign of the

advantage he had, Dr Mojela was able to spot the inadequacy of the post-mortem report where the extent of the deceased's injuries were recorded. He was able to spot that the said post-mortem report focused only on thoracic cavity without mentioning the fractures on the left tibia and fibula. The undisputed evidence is that the deceased had sustained extensive injuries which had rendered her immobile, bed-ridden and in need of home-based care. Prior to the accident she was fully functional and had gone about her daily businesses without any problems. I also found Dr Mojela's opinion that given the type of medication the deceased was given on her discharge, she could not have been stable as suggested in the medical booklet (she was prescribed strong antibiotic implied that there was some form of infection which needed treatment had set in), to be logical. This hypothesis is rendered probable by the fact that barely seven days after her discharge, the deceased was re-admitted because her health was deteriorating, and she died shortly thereafter. In my view the deceased died of septicaemia secondary to injuries sustained in a motor vehicle accident. But for the insured driver's negligence the deceased would not have died of septicaemia. The defendant is therefore, liable for the damages occasioned by the insured driver's negligent conduct.

[25] **Quantum of Damages:**

The plaintiff is claiming M5,319.50 for medical and hospital expenses, and M55,556 for funeral expenses.

(i) **Medical and hospital expenses**

The plaintiff succeeded in proving medical and hospital expenses, judging from receipts from Queen 'Mamohato Memorial Hospital

dated 02nd, 17th 20th and 21st September 2016 in the sum of M1,106.00 and a receipt in the amount of M483.50 from the pathologist. The amount to be allowed under this head is M1,589.50.

(ii) **Funeral Expenses**

This court was presented with a number of receipts dated 3rd, 5th and 6th October which came from Maseru Cash and Carry for the sum of M1,667.60 and a receipt from Mr Pali Letšolo from whom the plaintiff bought a cow and four sheep at an amount of M11,200.00, and an invoice from Sunshine Catering for an amount of M19,500.00. In the result, the amount allowed under this head is M32,367.60.

[26] Apart from these expenses, the plaintiff's witnesses tendered certain receipts which are said to be in relation to the funeral, such as M2800.00 for gravestone and a receipt from Lesotho Funeral Services dated 04th September 2016 for M24,183.00. All these receipts do not show who paid the said amounts and therefore, it was not proved that it was the plaintiff who incurred them. They were accordingly not considered by the court. This is applicable to the two receipts dated 15th September 2016 and 18 September 2016 in the amounts of M300.00 and M2,748.00 respectively. Both receipts depict the amounts having been paid for 'admission' but do not show where the said 'admission' took place. These amounts were therefore disallowed.

[27] **Costs**

At the close of arguments, Mrs Lephatsa for the plaintiff, made, an application from the bar requesting that should the plaintiff succeed in his

claim, the court should order that the qualifying fees of Dr Mojela be paid as well. Ms Taka resisted this approach on the ground that such a prayer should have been included in the Declaration and Summons. In my view the position advocated for by Ms. Taka is untenable, in terms of Rule 56 Fifth Schedule para. E6, on taxation, the qualifying fees of a witness are not allowed unless there is an order of court and, although not provided in the rules, and where parties have consented to such fees (**Stauffer Chemical Co. v Safsan Marketing and Distribution Co. 1987 (2) SA 331** at 355 B – C). The Court will only grant witness qualifying fees where it is satisfied that the expenses incurred were reasonably necessary (**Stauffer Chemical** case *ibid*). On the facts of this case, I am satisfied that Dr Mojela’s qualifying fees were reasonably necessary.

[28] In the result the following Order is made:

- (a) The defendant must pay the plaintiff, the sum of M33,957.10 for medical and funeral expenses.
- (b) The defendant must pay the qualifying fees of Dr Mojela.
- (c) The defendant must pay interest at the rate of 8.5 % per annum, calculated 14 days from the date of Judgment to the date of final payment.
- (d) The defendant must pay costs of suit.

MOKHESI J

For the Plaintiff: MRS LEPHATSA from Lephatsa Attorneys

For the Defendant: MS TAKA from Webber Newdigate Attorneys