IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/T/472/2018

In the matter between

MOLEMO BOROTHO **PLAINTIFF**

AND

NAPO SESIU **DEFENDENT**

JUDGMENT

CORAM : M. G. HLAELE J
HEARD : 7th June, 2022
DELIVERED : 17th June, 2022

Neutral Citation: Molemo Borotho v Napo Sesiu [2018] LSHC 128 CIV (17th June, 2022)

SUMMARY:

Default judgement-proof of loss required. Evidence not sufficient to prove the claim.

ANNOTATIONS:

Cases:

Ratsoane v Matona CIV/T/425/19) [2021] LSHC 13 (19th March 2021)

Goodwin Stable Trust v Duohex (Pty) Ltd and Another 1998 (4) SA 606 (C)

[1] This is an application for the granting of a default judgement presumably under *Rule 27 (3)* and *(5)* of the *High Court Rules 1981* which reads:

> *"27 (3)* whenever the Defendant is in default of entry of appearance or is barred from delivery of a plea, the Plaintiff may set the action down for application for judgment. When the Defendant is in default of entry of appearance no notice to him on the application for judgment shall be necessary but when he is barred from delivery of a plea not less than three days *notice shall be given to him* of the date of hearing of the application for judgment."

[2] According to the pleadings filed of court, the Plaintiff filed summons claiming damages arising from a motor vehicle collision between the parties herein. The Defendant filed his notice of Appearance to defend on the 15th August 2018. No subsequent pleading was filed by the Defendant

necessitating the Plaintiff to file a Notice to file plea dated 6th February 2019. Despite the notice to file plea, none was filed by the Defendant. As a result, the Plaintiff filed a request for default judgement. The court record also shows that an attempt was made to serve the Defendant with the notice of set down for the present hearing. The affidavit of Molikeng Leemela filed of record shows that despite the best effort engaged by the Plaintiff, it was impossible to locate and serve the Defendant. I am therefore satisfied that this matter is properly brought before the court for default judgement.

Rule 27 (5) provides:

> "Whenever the Plaintiff applies for judgment against Defendant in terms of *sub-rule (3)* herein, the court may grant judgment without hearing evidence where the claim is for a liquidated debt or a liquidated demand. In the case of any other claim the court shall hear evidence before granting judgment, and court may make such order as it seems fit."

It is under this rule that the Plaintiff called its witness to the stand to give oral evidence.

[3] The Plaintiff's witness was Thakane Nthulenyane. Under oath she stated that she was the driver but not an owner of a certain motor vehicle described as a VW POLO VIVO

registration number M0794. That on the fateful day she was driving along Roma road not far from the National University of Lesotho (NUL) entrance, closer to Liquor Roma. She was driving on the left lane, the lane she was legally supposed to drive on.

[4] The car that was driven by the Defendant came from the right lane to the left lane as a result of which a collision occurred between the two cars. Of the two cars, it was the Defendant who was driving on the right (correct) lane. To prove that the collision was caused solely by the Defendant the Plaintiff exhibited a map drawn by the police that indicated that the Defendant was driving on the wrong lane and as a result caused the accident.

[5] The witness continued to testify that as a result of the accident the car she was driving had to be towed by professional services. To this end, she exhibited a tax invoice that showed that the insurance company paid for the service. The tax invoice was marked Exhibit “B”.

[6] The witness then testified that she sought 2 invoices from two (2) different mechanics; this was to prove that the car was indeed in need of repairs as a result of the accident. The quotations were marked Exhibit “C1”and “C2” respectively.

[7] An assessor was engaged so as to certify the damage and assure the insurer of the damages incurred and their costs. The assessor's report was handed in as part of the evidence and was marked Exhibit "D".

[8] Having been satisfied that the car had been damaged and the costs have been assessed by an assessor, the insurance company who had insured the Plaintiff's motor vehicle paid for the damage caused by the Defendant to the Plaintiff's motor vehicle. According to the evidence handed in court by means of a document titled "payment requisition" the documentary evidence (Exhibit "E") suggests that a total amount of M31,042.26 was paid by Alliance Insurance Company Limited.

[9] In conclusion the witness testified that the car was repaired and was in working condition. That was the testimony of the Plaintiffs only witness. After this witness, the Plaintiff closed its case and called no more witnesses.

[10] Advocate Taka then submitted that the plaintiff had made out the case for payment of the amount claimed in the summons as appears in paragraph 7 of the Declaration. As a

result she submitted that the court should make an order for the prayers as they appear in the summons.

[11] I am satisfied that the Plaintiff has made out a case for the granting of the prayers sought. For this I rely on the conclusions in law made by Banyane J in the case of *Ratsoane v Matona*[1] wherein the relationship between the insurer and the insured was explained. The case clarified that the insurer can institute a claim in the name of the insured. Thus in this present case that Molemo Borotho is a Plaintiff in terms of the law. For this I rely also on the case of *Goodwin Stable Trust v Duohex (Pty) Ltd and Another*[2] where the court held that it is generally not permissible for a person to litigate in the name of another without disclosing that fact and the legal basis thereto. The underlying rationale is that such a non-disclosure undermines the integrity of the administration of justice as it is misleading. It was further held that subrogation is a 'special case' as it is only applied in insurance law. Because of its specialised application, litigants involved in insurance litigation will be aware of subrogation and ought not to be misled nor taken by surprise. This *dictum* provides authority for the proposition that subrogation needs not to be disclosed and, by implication, not be pleaded. Thus, the involvement of an insurer in a lawsuit is irrelevant as it

[1] CIV/T/425/19) [2021]LSHC 13 (19 March 2021);

[2] 1998 (4) SA 606 (C)

is *res inter alios acta.* All that needs to be pleaded and proved are those facts necessary to sustain a cause of action. Subrogation is not a necessary fact, but a collateral one, which does not have to be pleaded or proved.

[12] It is for this reason that I grant the order in favour of the Plaintiff as prayed with costs.

M. G. HLAELE

JUDGE

For Plaintiff : Adv. M. L. Taka

For Defendant : Mr. k. D. Mabulu