

IN THE HIGH COURT OF LESOTHO

**HELD AT MASERU
CIV/APN/424/2020**

CASE

NO

In the matter between:

`MAKATLEHO THAHE

PLAINTIFF

AND

**LESOTHO NATIONAL GENERAL
INSURANCE COMPANY LIMITED**

DEFENDANT

Neutral Citation: `Makatleho Thahe v Lesotho National General Insurance Company Limited [2023] LSHC 144 CIV(14 SEPTEMBER 2023)

CORAM: MOKHESI J

HEARD: Various dates since 31ST MAY 2022 to 30TH MAY 2023

DELIVERED: 14TH SEPTEMBER 2023

SUMMARY

Delict- *A claim for damages occasioned by negligent driving of the insured driver when the pedestrian was knocked down when she was about to complete crossing the road- The court apportioned blame 100% on the insured driver.*

ANNOTATIONS

Cases:

Lesotho

Lesotho National General Insurance Co. Ltd v Tsolo LAC (2013-2014) 195

South Africa

Kruger v Coetzee 1966 (2) SA 428 (A) 430

National Employers' General Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)

Protea Insurance Co. Ltd v Lamb 1971 (1) SA 530

Sandler v Wholesale Coal (Supplies Ltd 1941 AD 194

Namibia

Swakopmund Superspar v Soltec CC (160 of 2015) [2017] NAHCMD 115 (18 April 2017)

JUDGMENT

[1] Introduction

The plaintiff is claiming damages she incurred because of the injuries she sustained following a motor vehicle accident. She was a pedestrian. The driver insured with the defendant. She is claiming damages as follows:

- (a) Payment of the sum of M91,504.00 for loss of earnings, general damages for pain and suffering and loss of amenities of life.
- (b) Interest at the rate of 18.5% per annum, calculated 14 days from the date of judgment to the date of payment.

[2] Facts

On the 01 January 2018 at or around 01hours 32, the plaintiff was knocked down by a motor vehicle bearing registration letters and numbers MU 257. The plaintiff was taken to Makoanyane Military Hospital where it was discovered that she sustained a wound on the right knee, a wound on the upper right leg, bruises on the left shoulder, left knee trauma and two superficial wounds on the face. The wounds were sutured and dressed. She had to attend daily follow-ups for the wounds to be dressed, for three months. She was self-employed as a hawker.

[3] **Evidence adduced**

The plaintiff's case is based on the evidence of two witnesses, herself, and police officer Nyooko. PW1 was the plaintiff herself. She testified that she was aged 48 years, and that at the time of the accident she was self-employed as a hawker, selling cigarettes and sheep legs (otherwise known as 'trotters') a delicacy in this part of the world. She told the court that on 01 January 2018 between the hours 01hours 00 and 02 hours 00 she was standing outside and the left side of the public road of Ha-Leqele, from the Maseru direction. She was facing away from the road. When she turned around and she saw a motor vehicle with one headlight on the driver's side coming. The vehicle came straight to the side she was standing and knocked her down. She was hit on the forehead and was flung a distance. She sustained injuries on the forehead, on the shoulder and an open wound on the knee. She testified that the vehicle did not stop. The plaintiff went to Makoanyane Military Hospital where her wounds were dressed and stitched. She was taken to the hospital by people who were nearby. As it was already late, she was not admitted but told to come the following day to be seen by the doctor. On 14 March 2018, she could not bend, and her mobility was impaired. It was prescribed that she underwent physiotherapy. She had to

stop physiotherapy on the advice of the doctor because she was experiencing an unbearable pain. The physiotherapy greatly improved her mobility and was healing, even though she is still attending physiotherapy sessions.

[4] The plaintiff informed the court that before the accident she was self-employed as the hawker selling trotters and cigarettes. She handed in a handwritten document she referred to as the record of her earnings. She estimated that she was able to make M900.00 in three days from the sale of trotters, making around M2,700.00 per month. She told the court that she did not keep the records of cigarette sales because she bought them in South Africa. She instead submitted a document where she computed her earnings, and it was marked "Exhibit B". She told the court that she stopped her business because she was experiencing difficulties walking.

[5] Under cross examination she conceded that she did not have receipts proving her sales, or any other document. She conceded that the calculations she made were future estimates.

[6] PW2, Police Constable Nyooko, testified that on the 01 January 2018 he received a report from the plaintiff's husband informing him that his wife was hit by a vehicle at Ha-Leqele. PW2 told the court that the insured driver did not report the accident. He went to Makoanyane Hospital where he

found PW1 unable to walk or speak. After the plaintiff was discharged from hospital they went to the scene of accident. At the scene of accident, PW1 told him about the vehicle's registration numbers and how the accident occurred. Because plaintiff did not know the owner of the vehicle PW2 went to Traffic Department to make a search and his search uncovered that it belonged to a lady by the names of Rahebe. He telephonically contacted Mrs Rahebe who informed him that the vehicle belonged to her husband Mr Selikane Rahebe (DW1). PC Nyooko had taken the plaintiff's statement earlier and other eyewitnesses and drew up a sketch plan of how the accident occurred. He transferred the plaintiff's version of events into an LMPS 29 police form. PW2 testified that the damage to the insured driver's vehicle was minor and was on the driver's left side mirror.

[7] Under cross-examination, he told the court that he attended the scene of accident on the 2 January with the plaintiff who pointed out where the accident occurred. He was questioned about his conclusion that the driver of the vehicle was over the legal limit of alcohol as appear on the LMPS 29. His answer was that it was a typographical error. It was put to PW2 that he did not tell the court that he went to the scene of accident with the insured driver. His answer was in the affirmative. For the first time the version of the defendant regarding how the accident happened was put to the witness:

It was put to the witness that when the vehicle of the insured driver was travelling along the said road at the time shown, he saw about two to three people crossing the road from the right hand side to the left hand side. He slowed his vehicle down to allow them to cross the road and to complete their crossing, and that for the unknown reason, the plaintiff stepped back into the insured driver's lane of travel, and because he was too close to her his vehicle collided with her. PW2's answer was that the insured driver told him this version of events. It emerged under cross examination that the insured driver was criminally charged and that an out-of-court settlement was made in terms of which the insured driver paid an amount of M8000.00 to the plaintiff as compensation.

[8] **Defence's Evidence**

The defendant called a single witness, being the insured driver, Mr Selikane Rahebe. He testified that in the early hours of 01 January 2018 he left his home at Ha-Leqele to accompany his visitor with whom he had celebrated New Year's Eve, to Ha-Motšoeneng. He was driving a black VW Polo bearing registration letters and numbers MU 257. After dropping off the visitor he returned to his home, and that while at Lehlakeng Stop at Lithabaneng, he saw a woman on the left side of the road. He was driving at the moderate speed. The woman appeared to be flagging him down for a

lift. He decreased his speed with the intention of giving the lady a lift, when suddenly he saw a man on the right side of the road reaching for his waist. He immediately thought that the man was reaching for a firearm, and he drove off fleeing for his life, driving at 80 km/hr.

[9] Approximately 150 metres along the same road and approaching Palong bus stop he saw three ladies cross the road. He reduced his speed to 50 km/hr. The ladies were crossing from the right to the left side of the road. At this bus stop on the right there is a public bar. As he approached thinking that the ladies had all cross, unexpectedly one of the ladies staggered backwards into the road and she reached the yellow line on the edge of the road. As he was very close to avoid hitting her, he swerved to the right and as a result knocked her down with the left mirror. He told the court that he fled because he was scared from the earlier incident.

[10] **Under cross examination**

Under cross examination the insured driver intimated that he drove at a speed of 80 km/hr in a 50 km/hr zone. When asked why he did not stop after the accident, DW1, stated that he was scared as he had earlier experienced a “hijacking” scare. When asked as to the speed he was driving when he was flagged down by a woman. His answer was that he was

travelling at 50 km/hr. He was questioned why he thought the man he saw was reaching for a gun when there were many people scattered around that place celebrating the New Year's Eve. His answer was that because he was driving at night, he feared being hijacked. A question was put to DW1 as to what speed he was driving when he saw the three women crossing the road. He told the court that he was driving at 50 km/hr and that he did not slow down because he thought they had completely crossed the road. He said he was caught by surprise when the last one staggered backwards into the road. He was asked to describe the place where the accident happened. He said on the right side of the road there is a public bar, and, on the left, there are shacks. He confirmed that the public bar was very busy that morning as there were people drinking.

[11] Issues to be determined.

- (i) Whether the insured driver negligently caused the accident.
- (ii) Whether the plaintiff contributed to the accident.
- (iii) Quantum of damages.

[12] The Law and Discussion

- (i) Whether the insured driver negligently caused the accident.**

In terms of Section 6(1) of the Motor Vehicle Insurance Order of 1989 the defendant is obliged to compensate third parties who sustain bodily injuries because of negligent driving of registered motor vehicles. The test for determining negligence is as stated in the famous case of **Kruger v Coetzee 1966 (2) SA 428 (A)** 430 E – F, where it is stated as follows:

“For purposes of liability, culpa arises if –

(a) A diligens paterfamilias in the position of the defendant –

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) Would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.”

[13] It is evident that the versions of both PW1 and DW1 are mutually destructive, in which case the approach as espoused in the **National Employers’ General Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E)** at 440 E – G should be followed:

“[W]here the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if

he satisfied the court on preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[14] Both the plaintiff and DW1 agree that the accident happened in the early hours of the 01 January 2018 at the place where there were people enjoying their drinks in celebration of the New Year's Eve. The insured driver has ten years' experience as a driver. The fact of the known presence of the public bar on the side of the road called for a more cautious approach from the insured driver especially as there may be unexpected pedestrian behaviour calling for a swift action to avoid accident. The plaintiff told the court that she was standing outside the road when DW1 hit her.

[15] Defendant's version that the plaintiff staggered back into the road when he was too close is an afterthought as it was never put to the plaintiff. This

version was put to PW2 for the 1st time when PW1 was not in a position to deny it. In my view, an attempt to discredit the version of the plaintiff when she was not given an opportunity to deal with the defendant's adverse version during cross-examination is an afterthought only meant strengthen the defence case. It was stated in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)** at para. 61:

“The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct...”

See also **Swakopmund Superspar v Soltec CC (160 of 2015) [2017] NAHCMD 115** (18 April 2017) at paras. [25]-[29]).

[16] The version of the insured driver that the plaintiff staggered back into the road, is an afterthought. Notwithstanding this, the plaintiff's version that she

was only standing outside the road is improbable. According to the LMPS 29 the accident occurred on the edge of the road. I find it probable that the plaintiff was facing away from the road because she was crossing, the vehicle hit her as she was about to complete her crossing, otherwise why would she be standing on the edge of road facing away instead of facing on the road to see oncoming transport?

- [17] On the driver's own version, when he was about 150 metres away, he saw three ladies crossing the road. He said he was travelling at a speed of 50 km/hr when one of the ladies staggered back into the road. I find the version of the driver probable that the ladies were crossing the road, but what I find improbable is the story that one of the pedestrians staggered backwards. I find it fanciful that the plaintiff would step backwards into the road in the face of an oncoming vehicle. The area in which he was travelling through had a lot of people as it has a public bar next to the road. The insured driver should have been more vigilant. At the time when he saw the ladies crossing, he should have lowered his speed to avoid any potential accidents, but he maintained the same speed. Although the speed limit in that area is 50 km/h, that is the maximum speed he is expected to drive at. He is not bound to maintain that speed even in situations where maintaining it would lead to accidents. He was aware that pedestrians were crossing the road, but he

maintained the same speed. I find it implausible that the last pedestrian staggered backwards onto the yellow line on the edge of the road. It shows, probably, that the last pedestrian had not fully crossed the road when he hit her, according to him. It is a built-up area with a well-known bar on the side of the road. Even on the fateful date the bar was full of patrons as people were celebrating New Year's Eve. Had he been vigilant and exercised due care and skill, as there was no oncoming traffic, he should have lowered his speed and driven further away from the edge of the road. He did not mention stepping on the brakes during examination in chief, but only cross examination. He had ample time to take these evasive actions as he saw the pedestrians when he was 150 metres away. The insured driver did not exercise due care and skill and as a result negligently caused the accident.

[18] **Contributory Negligence**

The defendant pleaded contributory negligence on the part of the plaintiff, in the alternative. But based on the above discussion I find that the defendant is solely responsible for causing the accident as he did not exercise care and skill to avoid colliding with the pedestrians. He saw the pedestrians crossing the road when he was about 150 metres away, but he did not lower the speed nor stir his vehicle further from the edge of road to avoid colliding with the

plaintiff (**Lesotho National General Insurance Co. Ltd v Tsolo LAC (2013-2014)** 195 at 201C-D)).

[19] **Quantum of damages**

The plaintiff is claiming damages for loss of earning and general damages for pain, suffering and loss of amenities of life.

[20] (i) **Loss of earnings**

This is a claim for special damages, and therefore, it is incumbent on the plaintiff to prove what her income would have been but for the injuries. (**Sandler v Wholesale Coal (Supplies Ltd 1941 AD 194)**). In the present matter the plaintiff alleged that she suffered loss of earnings as the result of injuries she sustained from the accident as she could no longer sell the trotters and cigarettes as she used to due to mobility problems. She was unable to walk normally and had to undergo medical follow-ups. She told the court that she only sold trotters over the weekend from Friday to Saturday as they were loved by people who drank alcohol over the weekend. She said she made M900.00 profit each weekend from selling these trotters. She prepared a breakdown of her earnings which suggests that she was unable to sell for eight (8) months. This breakdown suggests that she would have made M14,304.00 for the eight months she was rendered unproductive.

[21] In respect of cigarettes she suggests that she would have made an amount of thirty-seven thousand and two hundred Maloti. She is therefore, claiming a combined sum of fifty-five Thousand, Five Hundred Four Maloti for trotters, cigarettes, and transport to Gauteng where she alleges, she buys the cigarettes. However, the common feature of all these claims is that the plaintiff has failed to provide documentary proof of her earnings. No receipts were provided, other than her mere say – so that she would have made the claimed amount. In my view the plaintiff has failed to proof this head of her claim.

[22] (ii) **Claim for pain, suffering and loss of amenities of life.**

Under this head, the plaintiff is claiming an amount of M40,000.00. As a result of the accident the plaintiff sustained wounds on the shoulders, forehead and had further sustained an open wound on the knee. She told the court that she had to endure excruciating pain on the left leg because of the accident. She had to go attend dressing sessions on the wound on the left leg. There was a stage where she could not bend or bath and had to go back to the doctor, who recommended that she attend physiotherapy sessions. She attended the sessions for some time, but due to pains she experienced, the doctor directed that she stopped attending physiotherapy sessions. She

told the court that she resumed her physiotherapy sessions in 2021. She testified that she struggles to bend and is further unable to lift heavy objects as she used to.

[23] It is trite that the assessment of damages lies in the discretion of the court to award a fair and adequate compensation as the circumstances of each dictate (**Protea Insurance Co. Ltd v Lamb 1971 (1) SA 530**). The extent of injuries, nature, and their permanence and the impact they have had on the life of the plaintiff are some of the factors to be considered in the assessment of damages. In determining fairness of the award, both the plaintiff and the defendant should receive due consideration. It is common cause that the insured driver paid the plaintiff an amount of M8000.00 as compensation before the magistrate court. The amount, in my view, should be deducted from the award to be ultimately made as to disregard it will amount to the plaintiff being doubly compensated. I would allow the amount of M40,000 claimed under this head, less M8,000.00 she already received as compensation from the insured driver.

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

(a) The claim for loss of earnings is dismissed.

(b) The claim for General damages succeeds in the amount of M32,000.00
(Thirty-Two Thousand Maloti) plus costs of suit.

MOKHESI J

For the Plaintiff: Adv. U.J Motsohi from Mofolo, Tau-Thabane & Co.

**For the Defendant: Variously, Ms Taka and Ms Moerane from Webber
Newdigate Attorneys**