

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV.CASE NO. 1279/91

In the matter between:

MINAH BOXALL(FORMERLY MRS NKAMBULE)

Plaintiff

and

SWAZILAND ROYAL INSURANCE CORPORATION

Defendant

C O R A M : DUNN J.
FOR THE PLAINTIFF : MR P.R. DUNSEITH
FOR THE DEFENDANT : MR H. CURRIE

JUDGMENT

9 October 1992

A collision took place sometime between 7.00 and 8.00p.m on 2nd February 1990 between a vehicle driven by Wilson Nkambule and one driven by Dario Da Cunha. Both Nkambule and Da Cunha were killed in the collision. The plaintiff is the mother of a minor child of whom Nkambule was the father. The defendant was the statutory insurer of the motor vehicle driven by Da Cunha. The plaintiff claims damages for loss of support, in the sum of E196,268.20.

By agreement, the court has at this stage only been called upon to decide on the question of liability. The plaintiff contends that the collision was due to the negligence of Da Cunha. The particulars of the alleged negligence being that Da Cunha -

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- (a) failed to keep a proper look out;
- (b) failed to drive on his correct side of the road at a time and place when he should and could have done so;
- (c) failed to keep his motor vehicle under proper control;
- (d) travelled at an excessive speed in the circumstances;
- (e) failed to apply his brakes timeously or at all;
- (f) failed to avoid the accident when by the exercise of proper and reasonable care he could and should have done so.

Negligence is denied by the defendant. The defence of sudden emergency is pleaded and further, in the alternative, that Nkambule was also negligent and that he had the last opportunity of avoiding the collision.

The evidence led on behalf of the plaintiff is fairly simple and straight forward and may be summarised as follows-

Nkambule was driving a light delivery motor vehicle towards Manzini in the evening of the 2nd February 1990. He had two passengers with him in the cab. Three passengers were seated at the back. As Nkambule approached Magevini flats, which are situated on the right hand side of the road as one faces Manzini, the traffic moving in the opposite direction started slowing down and the leading vehicle came to a stop. There was a vehicle parked off the road on the left hand side as one faces Mbabane. This vehicle had its hazard lights on. Three or four vehicles that were following the vehicle that came to a stop also slowed down and stopped. According to one of the passenger Nombulelo Dlamini, who was seated in the cab, a calf was lying in the road in front of the leading vehicle. Nombulelo then saw a red motor vehicle

which was travelling in the opposite direction pulling out of its lane and overtaking all the vehicles that were slowing down and those that had come to a stop. Nombulelo first saw the red car starting to overtake when it was about 100m from Nkambule's vehicle. In Nombulelo's estimation the red vehicle was travelling at about 100kph as it overtook the other vehicles. Upon passing the front vehicle which had stopped, the red vehicle then swerved to its left, to return to its correct lane. In doing so the vehicle hit into the calf which was in front of the parked motor vehicles. On hitting into the calf, the red vehicle swerved suddenly to its right and hit into the front of Nkambule's motor vehicle. The impact was more on the driver's side of Nkambule's motor vehicle. Nombulelo testified that she shouted to Nkambule when the red vehicle swerved onto their lane. Nkambule attempted to swerve to his left in order to avoid the collision.

The second passenger who was in Nkambule's vehicle, Doreen Hlatshwayo gave evidence similar to that given by Nombulelo. She saw the vehicle with the hazard lights, the three or four vehicles that stopped and the red vehicle that started overtaking. Doreen did not, however, see the calf. She saw the red car moving towards its lane after overtaking the vehicles and then suddenly swerve to its right hand side and colliding with Nkambule's vehicle.

Both Nombulelo and Doreen told the court that it was not very dark at the time of the accident. There was a clear sky and the vehicles had their lights on. Although these witnesses suggested in their evidence that it was not safe, in relation to Nkambule's vehicle, for the red car to have overtaken at the time it did they agreed under cross-examination that had the red vehicle not suddenly swerved to its right after overtaking, it could have continued into its lane without interfering with Nkambule's line of travel.

2498 Constable Gwebu who attended the scene of the accident told the court that he found the calf lying about 27 paces from where the cars had collided.

Ernest Gule, the driver of the vehicle that had its hazard lights on told the court that he had collided with the calf. He told the court that he pulled off the road and that the vehicles following him stopped as the calf was on the road. Shortly after the vehicles had stopped Gule noticed the red vehicle overtaking. He heard a noise of the red vehicle hitting into the calf. He then saw the red vehicle swerving to the right and colliding with Nkambule's motor vehicle.

Gule was certain in his evidence that the red vehicle was travelling over 100KPH when overtaking. He told the court that the calf was visible on the road from the lights of the motor vehicles. He also told the court that that his hazard lights must have been visible to other traffic because of the open area and straight stretch of the road where he had collided with the calf.

It was pleaded and argued on behalf of the defendant, that the driver of the red car was faced with a sudden emergency in the form of the calf lying in the roadway. This defence cannot, in my view, be sustained. A collision had taken place between Gule's vehicle and the calf in an open section of the road. Gule parked at the side of the road and put on his hazard lights. The vehicles that were following Gule slowed down and stopped. Vehicles that were further back also slowed down. Da Cunha, in the red vehicle, decided to overtake showing no interest whatsoever in ascertaining why the vehicles ahead had slowed down and stopped on their lane. The hazard lights were a clear indication of some mishap ahead. A reasonably careful driver would not have

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proceeded to overtake in the circumstances and if he did he would have proceeded in such a manner as would have enabled him to deal with whatever danger or emergency had arisen ahead of him. Such driver would have kept a proper look out and realised the danger that lay near the vehicle with the hazard lights. I find that Da Cunha was negligent in overtaking in the circumstances of this case. It was his negligence in overtaking in the manner he did and in disregarding the warnings of a mishap that caused him not to see the calf in the roadway. I reject the defence of sudden emergency and find that Da Cunha's negligence resulted in the collision.

It has been argued that Nkambule was also negligent and that he had the last opportunity of avoiding the collision. There is no evidence whatsoever, on record, to support these allegations. The plaintiff's witnesses were quite clear in their evidence of how Da Cunha's vehicle suddenly swerved to it's right and caused the collision. Nkambule attempted to swerve to his left but had no opportunity of avoiding Da Cunha's vehicle. Nkambule was in no way responsible for the collision.

I find, for the plaintiff, that Da Cunha's negligence was the sole cause of the collision in which Nkambule was killed.



B. DUNN

JUDGE