Thwala J -

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 519/91

In the matter between:

HENDRIK MAREE — Plaintiff

and

CATHY FORTUNE — Defendant

CORAM: Hull, C.J.
FOR THE PLAINTIFF Mr. Flynn
FOR THE DEFENDANT Mr. Earnshaw

Judgment
(7/4/95)

The accident that has led to this court case happened almost six years ago. It occurred at half past seven on a Sunday evening on the N2 highway in Natal, a few kilometres south of La Mercy. The plaintiff, Mr. Maree, was driving south towards his home at Umhlanga Rocks, with his wife and his mother-in-law. They had just had dinner at the Sea Bell Restaurant in La Mercy with a neighbour, Mr. Schoeman, and his brother. The defendant, Mrs. Fortune, was following behind Mr. Maree. She was travelling with her sister-in-law, Mrs. Friedman. They were taking their own children and another child back to school in Durban, after a weekend in Swaziland. Mr. Schoeman and his brother, who had parted from the Marees at the restaurant, were also coming along the highway, behind Mrs. Fortune. Although it was July, it was a clear, dry night.

On a straight stretch of the road, Mrs. Fortune drove into the back of Mr. Maree's car.

Mr. Maree has followed Mrs. Fortune to Swaziland to sue for the costs of repairing his car. He began this action on 11th June 1991. She responded on 8th August in that year, disputing his claim and counterclaiming for the damage to her own car. Each says that the accident occurred because of the negligence of the other.

That much is common ground. At the trial, neither side put in real issue any of the facts that I have so far related.

There is nevertheless a direct conflict of evidence as to how the accident happened, and there is a dispute as to the extent of the damage sustained by Mr. Maree's car and the reasonableness of the costs of its repair. There was also an issue, though in the end it is irrelevant, as to the identity of the vehicle to which the counterclaim for damages relates.

Mr. Maree, who bears the initial onus of proof on a balance of probabilities on his own claim, says that he was third in a moving group of four cars. The driver of the leading vehicle began to behave erratically. He weaved from side to side, braking, and then stopped suddenly. The driver immediately in front of Mr. Maree stopped in time. Mr. Maree himself was just able to do so. Mrs. Fortune did not. She drove into the back of his car, shunting it forward into the car ahead of him. In the result, he suffered damage to the rear and front ends of his car.

Mrs. Fortune's case is that it happened quite differently. She says that Mr. Maree had already collided with the car in front of him, and that both of those cars had stopped, before she arrived. Mr. Maree was out of his car, on the left of the road, with other people. It was standing, inadequately lit, in the middle of the south-bound lane. She had been coming along the road a distance behind him. She came upon his stationary car suddenly and unexpectedly. She had no chance of seeing or avoiding it.

These events happened a long time ago. Three of the four eye-witnesses who gave evidence were involved in the collision between Mrs. Fortune's car and that of Mr. Maree. On the one side, two were neighbours who knew each other well enough to dine out together - on the other, two sisters-in-law.

The three who were in the collision are probably relying to an extent on their impressions as to what was happening. That may also be true to a lesser extent of the fourth person, Mr. Schoeman. It was shown at the trial that he did make one assumption which (if it were an independent conclusion) involved almost certainly an impression that he had formed as he came along behind the other cars. In any case, all four are at this point in time relying also on their powers of recollection as to what happened in 1989. Allowing for the fact that it was an incident that would have remained in their minds, and also that they may have recorded statements at the time (and, in the case of the two witnesses for the defence, did in fact do so), it is a short but instructive test for anyone to try to recall in detail an incident - even an unusual episode - that occurred well over five years ago. Because of their respective relationships, it can in my view be assumed safely too that they have talked between themselves, afterwards, about the mishap. None of them in fact tried to say otherwise. Had anyone done so, I would not have found that easy to believe. It would be a natural thing to do.

It cannot be said that any of them is, demonstrably, an independent onlooker. I am not implying at all that each one of them lacked candour, but it would be unrealistic not to take into account the possibility that in each case, their evidence may in some measure favour the witness' own side, subjectively.

For all of these reasons, I think that it is necessary to look with care at both versions.

By his own account, Mr. Maree himself came perilously close to colliding with the car directly in front of him - but did not do so. His wife then exclaimed " You were very l---" and then, a "split second" later, Mrs. Fortune drove into his car. Mr. Schoeman, following them, did say at first that Mr. Maree succeeded in stopping

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short of the car in front of him before Mrs. Fortune collided with him. Later, he acknowledged that in that respect he had been making an assumption. Both men said in very similar terms that, immediately after the accident, the four doors of the car ahead of Mr. Maree opened simultaneously and the occupants got out. I mention these points because the thought did occur to me during the trial that the plaintiff's version had a certain neatness about it and, in weighing the two competing versions, the way in which Mr. Maree collided with the car ahead of him and people came to be outside their cars are important matters.

Although Mrs. Fortune's car was damaged to the extent that it had to be towed away, Mr. Maree did not in fact remain at the scene. During his evidence in chief, Mr. Maree did not volunteer the fact that he and Mr. Schoeman knew each other and that the latter's presence was not coincidental. This was elicited during cross-examination.

However, I must add at once that Mr. Schoeman did explain that he told Mr. Maree and his wife and mother-in-law to go home because they were obviously in some shock, and that he himself remained at the scene of the accident for some time, giving assistance.

In any event, notwithstanding these observations, I am satisfied that the evidence for Mr. Maree is in all probability true, and I am obliged to say that I am also satisfied that the accounts given by Mrs. Fortune and her sister in law are in fact untrue.

In the way in which it was presented, there is one rather curious feature about the defence case. Mrs. Fortune's version is that Mr. Maree had already collided with the car ahead of him when she came upon him. His own witnesses (other than Mr. Schoeman) were cross-examined at length and in detail about the damage that he sustained on that night. However the cross-examination was at no point directed towards establishing the extent of the damage that Mr. Maree's car sustained in the independent, prior collision that he was said to have had with the car ahead of him. On Mrs. Fortune's version, that was an important issue. There was an obvious question, on her case, as to whether she had caused any of the damage to the

front of his car at all. On an informed view of the effects that a collision between cars can cause, there may also have been a question as to whether the damage to the rear of his vehicle was wholly unrelated to the alleged independent collision with the car in front of him.

But none of that was pursued. I do keep in mind that the first plank in Mrs. Fortune's case was that she was not to blame for any of the damage sustained by Mr. Maree's car. Nevertheless the allegation that he had already run into someone else's car was an obvious line of defence itself as far as some of his damage was concerned and, as I say, some time was spent on the issue of quantum.

On the whole of the evidence, I am satisfied that Mr. Maree and Mr. Schoeman were credible witnesses and that it is very probable that they have recounted the truth of the matter. In contrast - I regret having to say so - it was obvious that Mrs. Fortune and Mrs. Friedman were not being candid. In his cross-examination of Mrs. Fortune, Mr. Flynn demonstrated quickly and convincingly that she was adapting her answers as she went along, in order to contend with difficulties as they arose on her version of events. In doing so, she was contradicting her case as it had been put earlier and her own prior answers, and it was apparent that she was not being truthful.

One clear example of this was in the way in which she altered her story as to how Mr. Maree had left the accident scene, and as to how Mr. Schoeman came upon it. In her evidence in chief, she had said first that after the collision a person - (there is no doubt that she was referring to Mr. Maree) - came to her car to inquire if anyone had been hurt. She said that she asked him why he had not put his hazard lights on, and that he then returned to his car and drove off. She went on to say that she chased after him, and that a Land Rover had come and stopped after all the other cars had gone. She was at that point clearly referring to Mr. Schoeman, who was in a Suzuki 4 wheel drive vehicle.

When cross-examined about this, she repeated that Mr. Maree had driven off. In response to further questions, she said that Mr. Schoeman had told her sister-in-law that he knew Mr. Maree and that this was how

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the details about him has been provided afterwards - by Mrs. Friedman - to the police at Tongaat.

She repeated that Mr. Maree had already left. It was at that point that her account began to unravel. When Mr. Flynn inquired how Mr. Schoeman, coming along after Mr. Maree had allegedly departed, was able to provide several particulars (including the registration number and insurance details) of someone else's motor car - even that of a friend - she then said that Mr. Schoeman in his vehicle had in fact stopped Mr. Maree down the road, i.e. after the latter had driven off and some distance beyond the scene of the accident. This had never been put to Mr. Maree or to Mr. Schoeman in cross-examination. It was quite evident that Mrs. Fortune was improvising.

Mrs. Friedman agreed that Mr. Schoeman had given them details about Mr. Maree and his car (to that extent confirming his evidence), but she did not support Mrs. Fortune's account that he had given them to Mrs. Friedman herself. Moreover, she said that Mr. Schoeman had come along about 10 minutes after the accident. She also said that the other car - i.e. Mr. Maree's car - drove off after the accident, before she had got out of Mrs. Fortune's car.

Both women insisted that Mr. Maree's car had been standing in the middle of the road, though Mrs. Friedman did not volunteer this initially. Both also said that Mrs. Fortune had her lights dipped because of the flow of north-bound traffic, and estimated their speed at between 70 and 80 kilometres per hour.

Mrs. Fortune said at first that she become aware of Mr. Maree's car when she was "5 or 6 metres" from it, and that it had no warning lights behind it. She had braked sharply, but had been unable to avoid the collision. On the whole of her evidence, she was saying that the car had its lights on in front (because she could see that) and that it had no lights on at the rear at all.

Mrs. Friedman gave a similar account except that she did say that she saw tail lights, as distinct from its brake lights. She also referred to its reflectors.

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Mrs. Fortune were also saying that it was difficult to see far ahead because of the glare of the lights of oncoming north-bound traffic.

Their evidence as to when they each saw the car ahead, and what happened after that, is not in my view consistent. The one (Mrs. Fortune) estimated that they were 5 or 6 metres from it and the other (Mrs. Friedman) 4 or 5 metres. Both thought that they were travelling at not less than 70 kilometres per hour and both said that Mrs. Fortune did attempt to brake. But these things do not sit together. At that speed, the collision would have occurred almost instantaneously. Mrs. Fortune would not have had time to react.

At a later point in her evidence, Mrs. Fortune did say that she could have been 10 metres away when she saw Mr. Maree's car. She did say too that she thought that perhaps two seconds passed between the moment when she saw it and the impact. If she did indeed see it at all before the collision, that is in my view a more likely estimate. It would mean that she was probably about 19 metres away from it. At that speed and taking into account reaction time however, she would still have been very unlikely to avoid the accident.

On her own evidence there is an obvious question as to why she did not see the other car until she was 6 metres from it, or even 19 metres from it. It was a clear night. The road was straight. There was nothing directly between her and Mr. Maree's car. It is apparent from the photographs that it was a light colour and had rear reflectors. Her head lamps were on. Although dipped, they would ordinarily provide enough light to see ahead for such distances.

Her own evidence itself gives rise in my judgment to a strong inference of fact either that she was not keeping a proper lookout on the road ahead of her or that she was travelling at a speed that was too fast in the prevailing conditions.

Her explanation is that Mr. Maree's car was unlit and that the lights of the oncoming cars limited her vision. But Mrs. Friedman herself acknowledged that Mr. Maree's car at least had tail lights. It was not suggested that the glare of oncoming lights was momentary. What both women were saying was that there was fairly heavy north-bound traffic.

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Mr. Maree's testimony was that he had his lights on, and that they were in good order. Mrs. Fortune said that she could see that his front lights were on. One might ask why the back lights would be off if that were so. There is also a question in my mind as to why, if Mr. Maree had an earlier collision as Mrs. Fortune claims, he would have got out of the car leaving it unlit on a busy highway - indeed with his wife and mother-in-law still inside it.

Mrs. Friedman's evidence that his tail lights were on, but that his brake lights were not, is in fact consistent with Mr. Maree's own account as to what happened - in other words that he braked, and then succeeded in stopping, and that the collision occurred just after that.

It is a duty of a motorist to keep a proper look out ahead when driving: (See, for example, Negligence in Delict, by Macinotsh and Scoble, Fifth Edition at page 304). He should not ordinarily travel at such a speed that he cannot stop within the visible distance ahead of him. If he cannot do so, that will (at least usually) give rise to a prima facie inference of fact that he is negligent: (See Manderson v. Century Insurance Company Ltd 1951 (1) SA 533 (A.D.)). If, he is affected by a flow of oncoming lights at night, so that he is unable to see where he is going clearly, he should reduce speed (see Kruger v. Ludick 1947 (3) SA 23 (A.D.))

If he is behind another moving vehicle, he should not follow it more closely than is reasonable and prudent, having regard inter alia to the speed of the other vehicle and the prevailing conditions. His own speed is of course also relevant.

I believe, as I have said, that Mr. Maree and Mr. Schoeman were telling the truth and that Mr. Maree's car was moving along the road, properly lit. From the fact that Mrs. Fortune did drive in to the back of his car, I do infer that she was not keeping a proper look out. I am not persuaded that the lights of the oncoming traffic impaired her vision, but if that were true, then she was driving too quickly in the prevailing conditions, i.e. to enable her to keep a proper watch. One other possibility is that she may have been following too closely behind Mr. Maree but there is no direct evidence

of that and I do not think that he needs to show it. She was behind him. She did drive into him. She said that she did not see him until it was too late. Apart from anything else, she could not have been keeping a proper look out. I would draw that inference even if his car had been standing in the road after an earlier independent collision, as she claimed, because I do not believe that his lights were off and no reason has been shown why she should not have seen him in due time, if she had been watching the way ahead attentively.

In driving in that manner, she was negligent and in the result Mr. Maree, to whom she owed a duty of care as another driver, sustained loss. It has not shown that he himself in any way contributed to the accident. I therefore find that she was solely liable for it.

As to the quantum of damages Mr. Maree is entitled to recover the necessary and reasonable costs of repairing his car, as long as these do not exceed its replacement value.

The parties were unable to agree before trial the amounts of their respective claims.

Mr. Maree testified that after the accident he obtained three quotations for the repair of the damage to his car. The car was repaired by Kangaroo Panel Beaters. He himself had to pay R750, being his excess under his insurance policy. He had said in his evidence in chief that the photographs which were produced as plaintiff's Exhibits 1 and 2 showed the damage to his car. He confirmed this in cross-examination. Those photographs are of the external appearance of the car after the accident. They show damage to its exterior body work. It was not put to Mr. Maree in cross-examination and there is no evidence before me that, independently of the accident, his vehicle had sustained damage to its shock absorbers or springs, or that those parts had worn in any way so as or to require replacement.

In order to pursue his claim in Swaziland, Mr. Maree had to bring from Natal Mr. Muller, who has been the workshop manager at Kangaroo Panel Beaters for ten years. He has had twenty-one years experience in his

trade. He is qualified as a panel beater (and as a spray painter), having first served his apprenticeship. I found him to be a good witness. He did not seek to say that he recalled Mr. Maree's car in specific detail, nearly six years on, from all of the other cars that Kangaroo Panel Beaters had dealt with. He did describe his method of working. He produced as Plaintiff's Exhibit 3 the quotation that he had himself prepared on inspecting Mr. Maree's car.

He also produced Plaintiff's Exhibit 4, which is a carbon copy of the original quotation. His evidence was that this had been amended by the insurer's assessor to adjust the quotation where suitable second hand or "pirate" parts could be used, as distinct from new parts. (He explained that "pirate" parts are car components that are made by manufacturers other than the one by whom the car is produced.) These adjustments had reduced the total amount of the quotation.

Mr. Muller also said that after he had inspected the car and prepared his quotation, further damage to its shock absorbers, springs and exhaust system had been observed. He was not saying that he had personally seen these things but he was saying that they had in fact been added to the costs of repair. He also said that the insurer's assessor had sanctioned them. He testified that it was not unusual to find, in repairing a vehicle that had been in an accident, that there was other damage apart from that noted in the initial quotation. The final bill also includes an item of E85 for wheel alignment that has not been contentious.

He said that, apart from the contribution from Mr. Maree, the repair costs came to R9029.02.

There is no evidence before me that Kangaroo Panel Beaters did anything more than to repair the damage sustained in the collision. There is no direct evidence at all that the shock absorbers, springs and exhaust system - the silencer - had to be replaced for any reason other than the accident. The only basis for such a suggestion is a view expressed by a service manager in an Mbabane garage who testified for the defence. There is evidence that the cost of the repairs, to Mr. Maree or his insurers (which comes to the same thing), included those items.

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Nevertheless, Mrs. Fortune saw fit not only to dispute the repair bill but also to require Mr. Maree to bring Mr. Muller to Swaziland to prove it. That was her right but as a matter of fact, in the event, it led to additional expenses both in arranging for him to come here and in the cost of the trial.

On her behalf, Mrs. Fortune called Mr. Marais, who has been the service manager of Leites Motors Limited in Mbabane for ten years. He himself is a trained motor mechanic and he also holds a diploma in road transportation.

He was shown the photographs of Mr. Maree's damaged car. On the strength of them, he expressed the opinion that the bonnet could have been repaired in 1989, by panel-beating, for no more than E250. Mr. Muller had insisted that the bonnet had to be replaced, and the cost claimed for that by Mr. Maree is E385.

Mr. Marais also said that from his own knowledge of car parts, he could not see how the springs or shock absorbers on Mr. Maree's car could have been damaged in a collision. He had never inspected the car itself. (The plaintiff's claim for these things is E394.)

In cross-examination, Mr. Marais confirmed that he was basing his opinion on the photographs, which do not show the springs, the shock absorbers, or the underside of the bonnet. He agreed that a bonnet might have to be replaced if it had sustained structural damage. He explained that the bonnet of a car such as that of Mr. Maree has cross-braces under it, and he said that if they were damaged that could amount to structural damage.

In answer to a question that I put to him, Mr. Marais disclaimed any expertise in the dynamics - perhaps more accurately, the physics - of motor collisions. What he was saying in that respect was that he had no expertise in the physical effects that the force of a collision may produce on a motor car or its parts.

In opposing the amount of damages, the defence also sought to attach significance to the fact that the plaintiff's witnesses, and in particular Mr. Maree himself, had acknowledged that the photographs

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that are Plaintiff's Exhibits 1 and 2 show the damage that was sustained. The point that the defence was seeking to make was that the photographs do not demonstrate structural damage to the bonnet or damage to the shock absorbers, springs or silencer.

But, with due respect I do not consider that it is correct that in answering the questions that were put to them about the photographs, the witnesses were saying that they showed definitively the extent of the damage. What they were saying was that the photographs showed how the car looked (i.e. from the outside) after the collision.

Any suggestion that the replacement of the shock absorbers, the springs, and the silencer had nothing to do with the accident is entirely speculative.

There is in my judgment no merit in Mrs. Fortune's opposition on the issue of the cost of the repairs. Mr. Maree has proved that he incurred damages of E9779.02 in consequence of the accident, and that those costs were necessary and reasonable. It has not been suggested that they exceeded the cost of replacing the car. There is no evidence that the repairs were unnecessary or unreasonable. Mr. Muller did agree in cross-examination that it would have been possible, in Natal, to obtain second hand and pirate parts at a lower cost that was also reasonable. This does not take Mrs. Fortune's case further, however. Mr. Muller also said that the costs actually charged were themselves nevertheless necessary and reasonable. Mr. Maree has proved his damages, and is entitled to recover them in full.

Finally, there is the question of the costs of this action. As I have indicated, it is always open to a defending party to require a plaintiff to prove his case. One corollary, however, is that if he succeeds, the costs will usually follow the event. In the ordinary course, the order for costs is that the unsuccessful party should pay a contribution on a party and party basis, in accordance with the tariff set out in the Fourth Schedule to the rules of this court, towards the actual expenses of the successful litigant.

It is not an inflexible rule. The court has a discretion. Where a party clearly has the right of it on his side, it may sometimes be

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appropriate to order that he should be compensated more adequately for his actual expenses. Where that is appropriate, I think that it is important that the law should vindicate the efficacy of its own process by insisting upon it, in justice to a plaintiff who clearly has merit on his side, and also to require a defendant to bear the consequences of a line of defence that clearly has no merit. They probably come to the same thing.

Mr. Flynn does not seek anything other than party and party costs (which is in my view right), but he does ask for two things. One is that I should make an order that Mrs. Fortune should pay the expenses incurred by Mr. Maree in bringing the South African witnesses to Swaziland to pursue his claim against her here. The other is that I should direct under rule 68(2) that, in taxing Mr. Maree's costs, the Registrar is not to be limited by the tariff in the Fourth Schedule.

These were competing claims for amounts of less than E1C,000 each. As far as the amount of Mr. Maree's damages is concerned, as distinct from the issue of liability,what it came down to was a dispute over E1100. There was never any real doubt that Mr. Maree sustained the greater part of the damage that he claimed for. The trial took more than 2 days and the part of it that was concerned with his loss occupied some time. Mr. Maree came to Swaziland to follow Mrs. Fortune in respect of an accident that happened in Natal. He also had to go to the expense of bringing Mr. Schoeman and Mr. Muller to Swaziland. In the circumstances, I think that it is right to make the first of the orders sought and to allow Mr. Maree some extra measure of ccntribution towards his legal costs.

I therefore give judgment for Mr. Maree in the sum of E9779.02 with interest at 9 per cent per annum from the date of issue of the summons, namely 11th June 1991. The counterclaim is dismissed. He is entitled to his costs. These are to be determined on the ordinary party and party scale, but they are to include the actual and reasonable travelling and accommodation expenses incurred by Mr. Maree in coming to Swaziland, and bringing Mr. Schoeman and Mr. Muller to

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give evidence. Moreover, in respect of the last days costs in the proceedings, I direct under rule 68(2) that the Registrar is not to be bound by the schedule in taxing such costs.

D. Hull

DAVID HULL
CHIEF JUSTICE