

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.3490-1/97

In the matter between:

CHARLES DLAMINI APPLICANT

CHARLES DLAMINI APPLICANT

AGNES DLAMINI APPLICANT

PHILLIP NDUNGANE APPLICANT

VUSI NDUNGANE APPLICANT

VS

MOTOR VEHICLE ACCIDENT FUND RESPONDENT

CORAM : MATSEBUJA J

FOR THE APPLICANTS :

FOR THE RESPONDENT :

JUDGEMENT

21/10/98

Initially, in this matter, there were two separate summons issued against the same defendant i.e. Motor Vehicle Accident Fund. In one summon the plaintiffs were the following:

Case No.3490/97:- Phillip Ndungane 1st Plaintiff

Vusi Ndungane 2nd Plaintiff

Under Case No.3491/97:- Charles Dlamini 1st Plaintiff

Charles Dlamini 2nd Plaintiff

Agnes Dlamini 3rd Plaintiff

VS

Motor Vehicle Accident Fund

Second Plaintiff in Case No.3491/97 is cited in his capacity as the father and legal guardian of two minor children Wandi Mathokoza Dlamini and Thabo Pius Dlamini. At the commencement of the hearing the two counsel indicated to the Court that the two actions were being consolidated as one and that the Court would be asked to decide in

the first instance the merits in the consolidated matters and that the question of quantum would either be agreed upon between the two counsel or be decided upon by the court at a future hearing.

Even though there was no express agreement between the parties but for convenience sake the defendant and not the plaintiffs led its evidence first. The defendant's witnesses had come from outside of the Kingdom of Swaziland and it was convenient to dispose of their evidence first.

Jimson Baloyi was called as the first witness. Before dealing with the evidence, it may be appropriate at this stage to refer to the minutes of a pretrial conference held on 13th May 1998 which was attended to by Mr. Thembela Simelane for the plaintiffs and Mr. Harold H. Currie for the defendant. The following agreements which are relevant for the purposes of this judgement are the following:

1. Defendant confirms admissions made in the defendant's plea.
 2. Question of negligence remains an issue.
 3. Defendant persists in its denial contained in defendant's plea.
 4. Parties agree that the question of merits be decided in the first instance leaving over the question of quantum either to be agreed upon or to be decided upon by the Court at a future hearing.
- (a) Defendant had denied in its plea that it was the insurer of the said motor vehicle alleged or at all.
- (b) Defendant denied that the said collision was caused solely by the negligence of the said Jim Sello Baloyi in any of the alleged respects or at all.
- (c) Defendant pleads that the motor vehicle TTC821T driven by the said Jim Sello Baloyi had a sudden brake failure and that faced with a sudden emergency the said Jim Sello Baloyi lost control over the motor vehicle which he was driving with the result that the collision took place.
- (d) The defendant further pleads that the sudden brake failure was completely unforeseen and was not due to any negligence on the part of the said Jim Sello Baloyi.

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From the pleadings by the defendant and the evidence led at the hearing by the defendant it is clear that it has raised the defence of, "sudden emergency". The evidence of the plaintiffs and that of the defendant is to a greater extent common cause, except what the defendant says he did once he found himself in this sudden emergency situation, that is being denied by the plaintiffs. The plaintiffs deny having observed any of the acts defendant claims to have performed e.g. sounding a hooter, putting on his truck's lights and switching on his hazard lights, trying to swerve towards what defendant calls a mountain which the Court saw at a later stage when an inspection in loco was conducted that it was in fact a bank.

The plethora of authorities to which reference has been made in argument by the two counsel were very helpful and invaluable, the Court is indebted to the two counsel for their contribution.

All the authorities cited and the decided cases to which this Court has been referred, leave a sufficient leeway for this court to apply its mind to the particular merits of this particular case and on that basis decide the case. The matter is summed up by Innes J in *Union Government MINISTER OF RAILWAYS AND HARBOURS VS BUUR* 1914 AD @276 where the learned Judge of the Court of Appeal said the following:-

"Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their position."

See the LAW OF DELICT (BOBERG) VOL. 1 AQUILIAN LIABILITY at page 335 Similarly in the MOTOR LAW (COOPER) VOL.1 at page 521 under the heading "SUDDEN EMERGENCY", the learned author states the following:-

"A driver who 'finds himself in a position of eminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger."

Of course what has been said above is subject to the particular circumstance of each case. The general principle is that normally the onus rests upon the party who asserts the affirmative in substance and upon the party who would be unsuccessful if no evidence was led. In the present case the defendant has raised, sudden emergency, as its defence.

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The defendant has admitted that the point of impact occurred on its incorrect side of the road. The defendant has to lead evidence to show a sufficiently strong balance of probabilities in its favour, in other words, the defendant quo that defence is regarded as claimant. I shall not use the word onus in its true and original sense namely, the duty which is cast on a particular litigant in order to be successful or finally satisfying the court that it is entitled to succeed on its claim or defence as the case may be, but merely of its duty to adduce evidence to combat a *prima facie* case made by its opponent.

Mr. Baloyi on behalf of the defendant has adduced evidence how on the 7th January 1997 as he was driving his truck upon the Mbabane/Matsapa public road at a speed of plus minus 60kms per hour he applied his brakes and found that they were suddenly not functioning. The failure of his brakes had given him no warning, so he stated. Realising the sudden emergency situation he found himself in, he told the Court that he switched on his lights and hazards and started sounding his hooter warning all the vehicles ahead of him to give way. Mr. Baloyi told the Court that motor vehicles gave way by moving to the side of the road to enable him to proceed and not collide with them. It was his evidence that he could not proceed travelling on as there was insufficient space for his truck to pass. He then decided to swerve to his incorrect side of the road towards a bank in an endeavour to get his truck to stop. He states that if he had not done this and carried on straight he would have collided with many motor vehicles. It was his evidence that it was as he was executing this manouvre to cut across the road and head towards the bank that a certain Cortina motor vehicle driven by Phillip Ndungane approached and swerved towards the same direction as he was and he states that there was no way he could have avoided hitting motor vehicle.

Mr. Baloyi was cross-examined at length by Mr. Flynn for the plaintiffs. According to his answers to questions put to him, Mr. Baloyi is a truck driver of a very vast experience having undergone extensive training. According to him the impact with the Cortina Sedan occurred just after he crossed the bridge which the Court saw when an inspection in loco was held. The Court observed that it could not have been across the bridge because of the distance between the scene of collision and the bridge was incorrect. The area referred to as the mountain by the witness Baloyi to which he said he was heading in order to bring his truck to a stop was also erroneous. It turned out during the

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inspection in loco that this place was further up towards a road which branches to the right as one proceeds to Manzini.

Mr. Baloyi also said once there was no air pressure the steering could not turn; as the truck was hydraulic. Of course this evidence by Mr. Baloyi was also contradicted by an expert witness called by defendant, Mr. Alberts. Mr. Alberts stated that the power steering system is not controlled by the braking compressor and it functions independently.

The inaccuracies in Baloyi's evidence places this Court in some difficulty. It is in his evidence that this Court must of necessity, decide the issue. He has raised the defence of a "sudden emergency" to that

end the onus rests on him to convince the Court that he exercised reasonable care and used reasonable skill at his disposal. This, he must do to dispel any prima facie proof of negligence on his part. See in this respect MOTOR LAW (COOPER) VOL. I at page 521 under heading, SUDDEN EMERGENCY and also THE LAW OF DELICT (BOBERG) VOL. I at page 334 and cases there quoted.

The Court is not adopting an armchair type of critic - a critic who is wise after the event. The Court has heard the evidence of defendant's witness Mr. Baloyi and the Court has considered his evidence and it is against his evidence that the Court is applying the standard of a reasonable manner in the circumstances of the driver of the defendant's truck. It is against this backdrop that the Court is judging the matter.

The Court is satisfied that the driver of the defendant's truck was negligent, consequently I find in plaintiffs' favour.

The parties had agreed that the question of quantum would either be agreed upon between the parties or decided upon by the Court at a future hearing.

J.M. MATSEBULA

JUDGE