IN THE HIGH COURT OF SWAZILAND

a:Kamugisha

Tobias Kamugisha

vs

Vusi Nhlabatsi

Civ. Trial No. 329/1995

Coram S.W. Sapire, A C J

For Plaintiff Mr. Mdladla

For Defendant Mr. Ntiwane

Judgment

(17/3/98)

Plaintiff is claiming damages arising out of a motor car collision which took place on the 22nd August, 1994 at or about 1905 hours. The collision took place at or near Bahai entrance along the Mbabane - Manzini public road in the Hhohho District as it then was before the new road was constructed. By that I mean before the road was widened and before the new second lane was introduced. The plaintiff alleges that the sole cause of the collision was the negligence of the defendant who was negligent in one or more of the following respects.

(a) It is said he failed to keep a proper look-out for any at all for other traffic of the road, and

(b) he failed to apply the brakes timeously or at all whereby doing so he could have avoided the collision.

The plaintiff goes on to allege that he had suffered the damages as a result of the extensive damage to his motor car and the amount of the alleged damages is claimed from the defendant.

The defendant has pleaded to this by saying that the cause of the collision was the plaintiff's own negligence and the negligence of the plaintiff is said to be that he drove at an excessive speed in the circumstances and that he failed to avoid the accident when by the exercise of reasonable care he could and should have done so. He collided so it is alleged in the plea

with a motor vehicle which was off the road and that he had failed to apply the brakes timeously or at all and it is also said that he drove without due care and attention for other users of the road.

When the matter was called it became apparent that the plaintiff was not in a position to prove the quantum of damages and neither party had filed notices of expert evidence which they intended to call. Accordingly, I, the request of the parties agreed to hear the matter and to make a ruling on the issue of negligence and liability alone. This is such a ruling which I make.

The plaintiff in evidence explained how, on his version of the events, the accident happened. He said he was travelling along the road from the direction of Mbabane towards Manzini in the early evening and at a place near the Bahai entrance he was confronted by two trucks approaching from the opposite direction, that is from Manzini to Mbabane The one truck was overtaking the other. At this point the road up Malagwane comprised two lanes while there was only one lane going on the other direction on which the plaintiff was travelling . These two trucks approached and the plaintiff says that all of a sudden he was confronted by lights emerging from behind trucks. As it turned out these lights were those of the defendant's vehicle and the defendant was apparently executing a righthand turn across the road to enter the Bahai property. On plaintiff's left hand side of the road The plaintiff said when this happened he was placed in a position of such an emergency, that all that seemed, reasonable for him to do was to try and stop his vehicle which he did by applying his brakes. This was in vain because the Defendant's vehicle was blocking the road and a collision could not be avoided.

The plaintiff said the collision was between the plaintiff left hand side front fender and the rear potion of the defendant's car. It is quite clear that if this is correct it is the defended who was negligent and that the plaintiff cannot be held liable for taking a course of action which in the event turned out not to be the optimum course of action to have been taken, if indeed any avoiding action was possible.

It is also a question of whether the negligence described by the plaintiff in evidence falls within that described in the particulars and it seems to me that although the negligence should correctly be described as turning across the face of on-coming traffic it is also clear the defendant did not keep a proper lookout because if he had done so he would not have executed the dangerous movement.

The plaintiff has told the Court in evidence that immediately after the accident the defendant admitted liability for what he had done, He went on , and indicated that he was unable to pay for damages but that the plaintiff should contact the defendant's employer who by arrangement with the defendant would make immediate payment of the amount of the damages which was to be determined by a quotation from Capital Motors and that as between the defendant and his employer the amount would be deducted from his salary over a period of time.

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The plaintiff described how he in fact went to the defendant's place of employment, saw the defendant's employer and negotiations took place for the payment of the amount of damages which were sustained. The plaintiff says that these arrangements were made at the suggestion of and by and consent and full knowledge of, the defendant who continued up to that stage to admit liability. There were certain difficulties in making immediate payment and the plaintiff was asked to wait until the defendant's employer had received a cheque.

The plaintiff was disappointed in this arrangement because the defendant's employer eventually did not make payment and the defendant adopted an attitude far from the conciliatory one which he had shown on the day in question at the scene of the accident. He now disputed liability for the damages.

The defendant's case is that he had indeed executed a right turn across the plaintiff lane but had long reached the other side of the road at the bus stop outside the Bahai entrance and was in fact travelling alongside the road towards Mbabane to reach the entrance to the property into which he wished to go. He therefore says that the plaintiff in fact. Collided with his own vehicle which was off the road. He suggested that the plaintiff on seeing his lights lost his head, applied his brakes, lost control of the vehicle, sideswiped him by coming off the road and back onto the road. In this way it was plaintiff who caused the accident.

This version is highly fanciful and bears all the marks of a recent fabrication. For this view I am strengthened in the statement taken by a Police Officer who visited the scene of the accident shortly after it had taken place. He took a statement from the defendant who said

"I recall on the 22nd August, 1994 at about 1905hrs I was driving SD 976 DM from Manzini towards Mbabane direction. At Bahai I decided to go in my right side to Bahai where I stay. I tried to give right of way to traffic coming from Mbabane before I turned but unfortunately I failed to see a car coming from Mbabane. Accidentally we collided. There were no lights but when I intended to turn I found it was too late then we collided. My car was damaged on the lefthand side rear passenger door and my mudguard body portion. No person was injured"

This statement is in complete conflict with the version which the defendant now puts before the Court.

The defendant also says that the plaintiff did indeed visit his place of employment and spoke to his employer. He denies however that he ever consented to this or ever suggested it and claims that he did not know what was going on. Between the plaintiff and his employer He implies therefore that the employer had agreed to make payment of the amount claimed by the plaintiff without his knowledge or consent. This in itself is something which is hardly credible and is most improbable.

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The plaintiff called a further witness who was the relation of the defendant to confirm the arrangement which had been made at the scene of the accident. This witness although he gave his evidence satisfactorily in chief made so many confessions of a damaging and contradictory nature when cross-examined that in my view no reliance can be placed on what he said. I ignore his evidence for the purposes of the conclusion to which I come.

I come to the conclusion that the plaintiffs evidence is more acceptable than that of the defendant not only because of the inherent balance of probabilities on the versions attested to by the parties but by the manner in which the evidence was given.

The plaintiff gave his evidence in a straightforward manner and the defendant on the other hand gave the impression of patching up admissions and contradictory behaviour throughout.

For these reasons I find that the accident was caused by the negligence of the defendant.

I have considered whether apportionment should be made but in my view there is no fault which can be ascribed to the plaintiff and accordingly no apportionment is made.

S W Sapire

Acting Chief Justice