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IN THE HIGH COURT OF SWAZILAND

Khizitfao Simdane

vs

Motor Vehicle Accident Fund (MVA)

Civil Case No. 1501

Coram: S.W. Sapire A C J

For Plaintiff Mr. S.C. Dlamini

For Defendant Mr. H. Currie

JUDGMENT

26/3/98

The Plaintiff has sued the Defendant claiming payment of the sums of E72,404.96; E5,000.00; E16,164.00 as compensation for damages sustained by way of personal injuries in an accident which took place on the 16th December 1992.

When the matter was called, it was indicated to me that the Plaintiff was not in

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a position to prove his damages presently, and the parties were therefore agreed that I should proceed to hear the case on the question of negligence and liability. The parties were further agreed that once a judgement on this particular case had been given depending on the outcome the matter would be taken further

The Plaintiff proceeded to recount in evidence his version of what took place. The Plaintiff's case is that he was travelling from South to North along the main road Manzini Mbabane Highway. In other words he was travelling in the direction as if he had come from Manzini and was going to Mbabane. At a point at or near Mlalatini a collision took place between the vehicle driven by him and a vehicle insured by the Defendant and driven by one Mr. Vally. According to the Plaintiff the collision was caused when the insured vehicle approached at high speed at the opposite direction was unable to hold the curve in the road and crossover from the Plaintiff's right handside of the road onto the left hand side colliding with the Plaintiff's vehicle on Plaintiff's side of the road at a point some distance South of the Mlalatini turn-off. He says they had journey to this point from Lobamba.

The Plaintiff is to some extent supported by his witness Jabulani Nkosi who confirmed that they had left Lobamba a little while earlier and were travelling towards Mbabane when the accident occurred. This witness also described in rather vague terms the insured vehicle taking the bend at a high speed and crossing out of control onto incorrect side of the road.

The version given by the driver of the insured vehicle is completely different. He says that he had travelled from Johannesburg that morning to take some passengers who wish to fly from Matsapa

According to him he was driving at a moderate speed and

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approached the scene of the accident from the opposite direction from that of the Plaintiff. According to him he negotiated the bend in the road which is some 75 or so metres from the Mlalatini turn-off and was travelling on the straight portion when he noticed the Plaintiff's vehicle emerging from Mlalatini onto the main road. The Plaintiff had stopped his vehicle and appeared to be waiting for a break in the traffic to ensure a safe entry onto the main road. As he approached the turn off the Plaintiff emerged from the turn off onto the main road into his line of travel. This happened when he had drawn so close that there was very little he could do by way of applying his brakes and swerving to the right to avoid the collision which took place. He is supported in this account by his wife who was a passenger in the front seat of the vehicle and who was severely injured as a result of the collision.

It would be readily appreciated that the opposing versions cannot both be true and cannot be reconciled. As always in these cases is for the Plaintiff to prove on a balance of probabilities that his version is correct. This is an onus which he has failed to discharge. The version given by the driver of the insured vehicle is to be accepted in preference to that of the Plaintiff for several reasons.

Firstly, a policeman who came to the scene of the accident very shortly after it occurred made observations which favour the Defendant's version over that of the Plaintiff.

In the first place the point of impact is placed by this witness at a point in the middle of the road immediately opposite the Mlalatini turn off. The point of him that, according to him was, pointed out to him by the driver of the insured vehicle and he confirmed this by the presence of broken glass and mud which seems to have fallen from

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the vehicle at that particular point. This evidence is destructive of the Plaintiffs case that it was the driver of the insured vehicle which went out of control onto the wrong side.

The police evidence is also damaging to the Plaintiff's case in that according to him, the witness Jabulane Nkosi said to him at the time that the vehicle in which he was travelling had emerged from Mlalatini and did not come from Lobamba as he testified in court.

An inspection in loco was conducted, and I have recorded the findings in the body of the evidence. It does not seem likely that the Plaintiff's version of the driver of the insured vehicle having lost control on the bend is correct. The point of impact which on balance of the evidence was where the driver of the insured vehicle indicated and is far beyond the bend in the road which the Plaintiff says was not properly negotiated.

Faced with the opposing versions, the weight of the evidence is such that the Plaintiff has failed to discharge the onus of showing that his version is more probable than that of the Defendant.

This was recognised implicitly by Mr. Dlamini. In argument for the Plaintiff Mr. Dlamini was mainly concerned to demonstrate that the driver of the insured vehicle on his own evidence was negligent and that such negligence was the major cause of the accident. This argument cannot succeed. In the first place it is not the sort of negligence pleaded by the Plaintiff and the Defendant has not been called upon to meet such a case.

Furthermore, there is nothing to show that the driver of the insured vehicle on his version did not act in the

most appropriate manner having regard to the situation of

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sudden emergency in which he was placed. On the Defendant's version it is the Plaintiff who apparently entered the main road from the turn-off to Mlalatini when it was unsafe to do so having regard to the approach of the insured vehicle.

For these reasons I find that the Plaintiff has not established any basis of liability on the part of the Defendant to compensate him on such damages as he may have suffered.

The costs of the hearing are to be paid by the Plaintiff.

S.W. SAPIRE

ACTING CHIEF JUSTICE