David Andrew Gwaitta – Magumba

Plaintiff

V

JOHN MARRENGANE Defendant

Civ. Case No. 539/96

Coram S.B. Maphalala J

For The Plaintiff . Mr. H. Currie

For The Defendant Mr. T Simelane

JUDGEMENT

(05/07/99)

Maphalala J:

The plaintiff issued a combine summons against the defendant for the payment of E19, 646 - 32, payment of the sum of E302-50, interest on the said sum at the rate of 9% per annum from date of judgement to date of payment, costs of suit and further and/or alternative relief. The action is defended by the defendant who filed his plea and a counter-claim and thereafter the plaintiff filed his plea to defendant's counter-claim.

The cause of action is that on or about the 23rd July 1995, the plaintiff was driving his motor vehicle SD 710 TM along Gilfillan Street, Mbabane. At the same time and place the defendant was driving motor vehicle SD 994 WH. A collision took place between the two motor vehicles. According to the plaintiff's particulars of claim the collision was due to the negligence of the defendant in one or more of the following respects.

a) He failed to keep a proper lookout.

b) He failed to observe that the plaintiff was indicating his intention to turn to the right.
c) He attempted to overtake the plaintiff's said motor vehicle at a time when it was unsafe to do so.
d) He travelled at a speed which was in the circumstances excessive.
e) He collided with the plaintiff's motor vehicle from the rear.
f) He failed to avoid the collision when by the exercise of due care he could and should have done so.

On the other hand the defendant in his plea avers that the collision was occasioned solely by the negligence of the plaintiff who was negligent in one or more of the following respect.

2.2.1 He failed to keep a proper lookout.
2.2.2. He failed to keep the motor vehicle under control
2.2.3. He failed to avoid collision when by exercise of reasonable care he could have and should have done so.
2.2.4. He failed to apply his brakes timeously alternatively, if it is found that the defendant was negligent, defendants deny that such negligence was a cause of the collision.

Alternatively, if it is found that the defendant was negligent and thus such negligence was the cause of the collision, defendant state that the plaintiff was also negligent and that his negligence was a contributory cause of the collision so that the provision of the Apportionment of Damages Act should

apply.
The defendant in his counter claim avers that the collision was caused as a result of the negligent driving of the plaintiff who was negligent in one or more of the following respect.

a) He failed to keep a proper look out.
b) He failed to indicate that he was turning to the right.
c) He suddenly turned into the right and thus disturbed the defendant who was already overtaking.
d) He failed to apply brakes timeously or at all.

e) He failed to keep the motor vehicle under control.
f) He failed to avoid the collision when by exercise of due care he could and should have done so.

By reason of the said negligence and in consequence of the said collision the defendant sustained damages as follows:

a) Fair and reasonable repairs El5, 000-00.
b) Hiring alternative transport E6, 000-00

In the premise the defendant has suffered damages in the sum of E21, 000-00 and the plaintiff is liable therefore, but refused to pay out same notwithstanding verbal demand.

The plaintiff in his plea to defendant's counter-claim denied all the averment contained therein and placed defendant to strict proof thereof. Plaintiff claims that the defendant's counter claim be dismissed with costs alternatively pleads that the defendant's counter claim be reduced as to this court may deem fit in terms of the Apportionment of Damages Act and that an appropriate order be made as to costs.

At the commencement of trial the parties agreed on the question of damages as follows:

For the Plaintiff

a) E19, 646 - 32 reflected in the particulars of claim
b) E302 - 50 in terms of prayer (b)

For the Defendant as per the counter claim

E21, 000-00 according to paragraph 5 of the defendant's counter claim.

The court then heard evidence of the plaintiff and the defendant.

The plaintiff's version is that on the day in question he was driving his motor vehicle along Gilfillan Street, Mbabane on a Sunday at around 1.00pm. He was travelling at about 60km per hour and as he was to turn Muir Street to the right he had started to indicate about 80metres before the turn off to Muir Street. He reduced his speed drastically and shifted to the 2nd gear. He was travelling on the left side of the street and there was a blind rise. There was a motor vehicle behind his and he glanced at his rear view mirror and saw that the motor vehicle was travelling at a high speed. The motor vehicle was driven by the defendant and it hit his motor vehicle from behind and his motor vehicle was hurled at about 15 metres to an embarkment and turned round. He deposed that there was no way he could avoid the accident as defendant was travelling at a high speed. He said at the time the collision took place he had already committed to turn right. The left lane at that point was empty. After the accident some people came to the scene and at about 5 minutes after the accident the fire brigade arrived and pulled his

motor vehicle away. The defendant had a passenger. He came out of the motor vehicle and threatened to hit him. He was joined by his passenger and they were both in an aggressive mood. Plaintiff deposed that the defendant appeared drunk. The police came to the scene and interviewed both the plaintiff and the defendant.

The plaintiff was cross-examined at some length and I am going to revert to some aspects of his replies in the course of this judgement.

The plaintiff then called a police officer who attended to the accident 2846 Constable Dan Dlamini. His evidence is that he drew a sketch plan of the accident and pointed to the point of impact which he said was on Gilfillan Street.

The plaintiff closed his case.

The defendant also gave evidence under oath. He told the court that the accident took place on Gilfillan Street just before the turn off to Muir Street. He was travelling towards Scots following a certain motor vehicle. That when he hit the motor vehicle he was attempting to overtake it but suddenly the motor vehicle driven by the plaintiff suddenly cut in. The two motor vehicles hit each other on Gilfillan Street before Muir Street. He deposed that it was not true that the plaintiff indicated that he was turning to Muir Street. He said he was travelling at 50 kilometres per hour but when he overtook the plaintiff's motor vehicle he accelerated to 60 kilometres per hour. He was not travelling at an excessive speed as deposed by the plaintiff. He further told the court that he was alone he did not have a passenger and was not aggressive when he confronted the plaintiff. That before the accident he had just had his lunch accompanied with two glasses of wine and was not drunk. In any event no tests were conducted to establish whether he was drunk or not.

Defendant was cross-examined briefly by plaintiff's attorney. It was put to him inter alia that if plaintiff suddenly turned to the right the damage would not have been on the rear of his motor vehicle on which defendant replied that he did.

At this point the court heard submissions. It was contended on behalf of the plaintiff that this case revolves around the question of credibility and it thus falls within the discretion of the court to weigh the evidence on a balance of probabilities. Mr. Currie argued that the probabilities favour the plaintiff, as his version of events is quite probable. He pleaded with the court to accept the plaintiff's version.

Per contra it was submitted on behalf of the defendant that the defendant's version was more probable if one looks at the facts of the case. If plaintiff's version is true the damage would have been on the right. The court was referred to The South African Motor Law by Cooper Vol II at page 88 where the learned author cited the judgement of Miller J (as he then was) in the case of S vs Olivier 1969 (4) S.A. 78 (n) where he stated thus:

"The very multiplicity of the different situations which may exist or arise when a right hand turn is contemplated and has been signalled renders it impracticable to formulate a general rule as to what

the signaller may or may not assume. Nor do [think that it is practicable to require of a driver that, before executing the turn, he must satisfy himself that his signal has been observed by other drivers whose vehicle might be endangered thereby. Not only in there no generally recognized means by which drivers may unequivocally signal that they have seen and understood the signal.....but movements by following vehicles which are suggestive of acknowledgement of the

signal might in truth be entirely fortuities and bear no relationship at all to the signal".

The thrust of the defendant's contention is that the plaintiff did not signal his intention to turn to the right being Muir Street and his story that he started signalling about 80 metres from the scene of the accident cannot be true. As on the right hand side of the road towards Scot there are about four small roads going to private homes. The plaintiff if he indeed signalled he would have been giving a wrong signal as a traveller following him would think that he was turning into one of those houses not Muir

Street which was 80 metres away. Mr. Simelane further cited the case of Rex vs Gronheim 1932 T. P. D. 86 where the head note states that a motorist turning across the traffic in a main street to go down a side street must do more than merely signal by putting out his hand. It is his duty to see that the way is clear, and he owes this duty to traffic which is following him in the main street as well as to oncoming traffic.

These are the issues for determination. It is common cause that the accident involving plaintiff and defendant" motor vehicle took place at the junction between Gilfillan Street and Muir Street. It is also not in dispute that the two motor vehicles were following each other from town towards the Scot direction plaintiff's motor vehicle in front and defendant's motor vehicle following behind. It is also not disputed that defendant's motor vehicle knocked plaintiff's motor vehicle from behind and it was thrown to the opposite side of Muir Street about 14 paces from the point of impact. It does not seem to be a point of dispute that plaintiff's motor vehicle was extensively damaged from behind and one may make an observation at this point that it appears defendant's motor vehicle was travelling at a very high speed to cause such damage to the plaintiff's motor vehicle and for it to be flung to that distance and turn over facing the direction where it came. Defendant's story that he was travelling at 50 kilometres per hour is incredible in view of the facts that I have already alluded to. The officer who attended to the accident in his sketch plan places the point of impact in the middle of the left lane before the junction between the two streets. This facts disproves the plaintiff's version that the point of impact was in the middle of the two streets as he was executing what he term as "oblique" turn to the right. There is another uncanny aspect of the plaintiff's story that the accident took place when he was turning in this "oblique" fashion to the right but this does not agree with the objective fact that his motor vehicle was not hit at the right side as one would expect but was wholly concentrated at the back of his motor vehicle.

I have looked at the facts of this case closely and considered the submissions and it appears to me that both parties were negligent in varying degrees in this matter. Plaintiff's version is flawed as I have indicated earlier on in the course of this judgement in that if his story was true that he was taking a right turn to Muir Street when this speeding car knocked his car, surely the damage to his motor vehicle would have been on the right side to his motor vehicle There is no way it can be at the back. This defies logic. The defendant on the other hand also contributed to the accident by the high speed

he was travelling at in a 60km/h zone. This is borne by the impact on the plaintiffs motor vehicle. The motor vehicle was flung into the embarkrnent 14 paces from the point of impact. This is indicative of excessive speed in a residential area of town. If he were travelling at the mandatory speed he might have avoided this other motor vehicle which suddenly cut in.
It is my considered view that the provisions of the Apportionment of Damages Act No. 4 1970 should come into operation in the present case. The plaintiff's conduct was the proximate cause of the accident and would therefore base any apportionment of damages on the defendant's counter-claim. My view is that the blame should be apportioned as to two-thirds on the plaintiff and one-third on the defendant.

Further each party to pay his own costs.

S. B. MAPHALALA

JUDGE