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SWAZILAND HIGH COURT

NDZABANDZABA John
Plaintiff

Vs

MOTOR VEHICLE ACCIDENT FUND
Defendant

Civ. Case No. 2686/1999

Coram

Sapire, CJ

For Plaintiff

Mr. P.R. Dunseith

For Defendant

Mr. H. Currie

JUDGMENT

(14/10/2002)

This is an action in which the plaintiff seeks compensation for injuries suffered when he was run down on the 26th April 1997 at or near Mahlanya in the Manzini District. A pre-trial conference had been held at which it was agreed that the matter would proceed to trial at this stage on issue of liability only.

It took some 2 years for the matter to come to court. The blame for this is not unilateral.

The issue for determination in this case is simply whether or not the driver of the insured vehicle was negligent giving rise to liability of the Motor Vehicle Accident Fund for the damages suffered by the plaintiff. It is the plaintiff's case that

he went to Mahlanya to assist the driver of one of his combis which had broken down and become immobile at a certain point on the right side of the road. The plaintiff's case is that at about 3 or 4 o'clock in the morning he drove to this spot and parked his car at the side of the road facing Mbabane having come from Manzini, well off the tarmac surface. He alighted from his car in order to cross the road to the combi that was in a ditch on the other side of the road at the time. A vehicle proceeding from Mahlanya direction crossed the solid white line on to the wrong side of the road and knocked down the plaintiff as he was crossing the road after also colliding with his motor vehicle. The plaintiff was injured and taken to hospital.

The defendant's version is that the plaintiff did not park his car on the left hand side of the road as one faces towards Mahlanya but in fact parked it on the right-hand side of the tarmac facing Mbabane on his wrong side of the road. These two contending versions were supported by evidence on either side.

The plaintiff called Kenneth Mavimbela who testified that he was the driver of the kombi a Toyota Hiace registration numbers SD 537 WM. At 1 o'clock in the morning after he had passed Mahlanya he crossed the river there and was on the uphill. He had a collision with a cow on the road and although neither the driver nor the animal was injured to the extent of incapacitation, there was a dent in the motor vehicle. A further mishap occurred to him in that he apparently forgot to secure his brake and the vehicle rolled into a ditch on the side of the road.

From this predicament he had to be rescued and telephoned the plaintiff, his employer, to come and assist him. Having telephoned the employer he returned to the combi and sat there and waited for his employer. The plaintiff arrived on the scene at 4 a.m. The witness saw a vehicle approaching from Manzini travelling towards Mbabane and when he noticed that the vehicle reduced speed he got out of the kombi to ascertain whether the vehicle belonged to his employer or not. It was indeed the plaintiff's vehicle. It was a Nissan Skyline gold in colour which stopped and parked on the left hand side of the road as one faces Mahlanya direction. The motor vehicle, this witness attests, was off the tarmac. The plaintiff, he saw emerging from the vehicle as he wanted to cross the road to the side where the witness, Kenneth, was standing. The Nissan Skyline had its headlights still burning.

Whilst Ndzabandzaba was still standing on the side of the road intending to cross the road to where the witness was, two cars approached from the Mahlanya direction going towards Manzini. The witness described how at that point of the road there are two lanes going towards Manzini. There is a solid line and then there is one lane for traffic travelling towards Mahlanya. The witness then described how these two cars coming from the Mahlanya direction approached the scene where the accident took place. Although two cars were initially mentioned, it is clear that there was a third car. Two of the cars were occupying the two lanes on the side of the road for traffic travelling towards Manzini. A third motor vehicle attempted to overtake the other two vehicles going towards Manzini. The vehicle was travelling at a high speed. In order to overtake the two vehicles it had to go on to the incorrect side of the road crossing the solid white line. The third motor vehicle overtaking the other two motor vehicles travelling towards Manzini was not able to regain its correct side of the road and he left the road hitting the plaintiff and his motor vehicle. According to this witness the vehicle hit the plaintiff's vehicle first and then pushed the motor vehicle on to the plaintiff and hit the plaintiff.

At this point the witness said that the plaintiff was pushed into a ditch but it does seem that there is an error in this evidence and at a later stage the witness indicated that the plaintiff was not pushed into a ditch but came to rest on the tarmac. The witness was quite clear that the plaintiff was hit when he was standing on the road and waiting to cross. The on-coming vehicle, which apparently is the insured vehicle, then came to rest on its left hand side of the road after it had collided with the plaintiff and his vehicle.

One of the vehicles that was being overtaken stopped and turned out to be a taxi based in Manzini. The people in the taxi assisted and took the plaintiff from the scene of the accident. The plaintiff at this stage appeared to be comatose. Mavimbela saw the plaintiff taken to the hospital and then returned to the scene of the accident the same morning. By the time he reached the place of the accident it was already after daybreak. When he returned he found the plaintiff motor vehicle that is the Skyline Nissan on the right hand side of the road facing Mahlanya. Apparently it had

been removed from where it was parked by the plaintiff. There is evidence that the keys of the car were still in the keyhole.

This witness was cross-examined and apart from the one contradiction, assuming it is such, to which I have already referred, his version of the events remained unshaken. In particular the witness strictly adhered to the version he had given that the plaintiff had stopped his vehicle off the road on the left hand side. This is important having regard to the nature of the evidence later given by the defendant's witnesses.

The plaintiff then called the witness Jabulani Dlodlu who was the taxi driver referred to by the first witness. He arrived on the scene immediately after the accident had taken place and found that a person had been knocked down by a motor vehicle on the road. He had been driving from Lobamba towards Manzini using the old road. He had a passenger with him but apparently this passenger has passed away and he is no longer available as a witness.

Dlodlu describes that after he had passed Mahlanya and crossed the river there are two lanes and one lane says "keep left" and the other "pass right". Apparently there are traffic humps, over which he drove. In front of him was another vehicle that was driving slowly on the left hand side. This witness then proceeded to overtake that vehicle moving into the fast lane. While he was still in the process of overtaking that motor vehicle and were in the fast lane another motor vehicle approached from behind intending to overtake the vehicle driven by this witness. It went onto the far side of the road travelling towards Manzini and it is clear that the third motor vehicle then went over the white line and passed onto the incorrect side of the road. The witness then went on to describe how after overtaking the motor vehicle on the slow lane he returned to the slow lane. The other vehicle, however which was overtaking him continued on the incorrect side of the road for a long time after it had passed. Then on his arrival at the scene of the accident he found that a pedestrian, who later turned out to be the plaintiff had been run down. He was lying on the tarmac. The Skyline motor vehicle was still standing off the road on the left hand side as one travels from Manzini to Mbabane. The headlights were still on. This witness also describes how he took the plaintiff first to his homestead and then to hospital. The witness denies emphatically that there was any vehicle on the right

hand side of the road driving towards Manzini standing with its lights on. This of course contradicts with what was later said by defendant witnesses. This witness too was cross-examined but emerged from cross-examination largely unscathed.

The plaintiff himself testified and described the events much as the same as his witnesses. He, as a result of his injuries, was unconscious immediately after the accident and remained so for some five days. He does appear to have retrograde amnesia that makes his evidence as to the accident somewhat less reliable than that of his witnesses. They however do support him in contradicting the version given by the defendant witnesses.

The defendant called three witnesses in support of its case. None of them including the constable was impressive. Much attention was given to placing the plaintiff's motor vehicle on the wrong side of the road. Having regard to the fact that the plaintiff's vehicle was standing, according to the plaintiff, on the left hand side of the road with the ignition keys available, there is no reason why this vehicle could not have been moved after the plaintiff had been removed from the scene of the accident.

The two witnesses David Smith and Themba Dube who were driver and passenger in the insured vehicle gave a confused story as to how the accident occurred. They claim that they were travelling towards Manzini when they came upon a vehicle some distance away apparently on their side of the road but facing in the wrong direction and with its lights on. This they claim was the plaintiff's vehicle and they say that the presence of this vehicle on the road was the basic cause of the accident. They talk of vehicles approaching from the other direction that made it impossible for the insured vehicle to pass the plaintiff's vehicle safely and they had to swerve to the right in order to avoid a collision. When one bears in mind that the damage to the plaintiff's vehicle was on the right hand side it is equally consistent with a collision on the left hand side of the road by the insured vehicle travelling as described by the witnesses overtaking two cars. The defendant witnesses, Smith and Dube, had apparently been spending the night and early hours of the morning drinking at the Why Not, a well-known watering hole somewhere up the road. I am left with an impression that both of them had imbibed at least as much as they told me but probably more. There is a distinct probability that the driver was to some extent

intoxicated. Drivers in that condition may well have attempted the triple overtake described by the plaintiff's witnesses.

As was pointed out in argument the accounts given by Smith and Dube appear to be a fabrication, designed to exculpate the driver from the consequences of driving after many hours of carousing at the Why Not. One remarkable feature of "corroboration" is that they both claim to have been able to identify an oncoming vehicle with its lights on, from the sign painted on the front of the vehicle. It is common experience that if two vehicles approach each other like that in the dark with their headlights on as has been described by the parties it would be impossible for anyone to identify the vehicle by a logo on the body in this manner. That both defendant's witnesses say this, is an unsatisfactory aspect of the evidence, which together with less striking but equally unsatisfactory aspects gives rise to a strong impression of fabrication. The witnesses called by the plaintiff did not see this "oncoming" vehicle. The taxi driver was an independent observer whose evidence according as it does with that of Mavimbela is preferable to that of the Defendant's witnesses especially in regard to the place where the plaintiff parked his vehicle, and the approach of the three vehicles towards the scene of the accident. I entertain a strong suspicion that the Defendant's witnesses moved plaintiff's vehicle, after the plaintiff was taken from the scene and before the arrival of the police. It is not necessary to make a finding in this respect.

The defendant's version in itself and even accepted as truthful, which I cannot do failed to explain why instead of proceeding with the obvious danger ahead it did not slow down to enable the driver to avoid the danger. The driver's explanation of his dilemma is not impressive or convincing, and reveals, even if it were to be accepted, negligence on his part, which is the cause of the accident.

On a fair consideration of the evidence on both sides the probabilities are heavily weighted against the defendant and in favour of the plaintiff. The driver of the insured vehicle was solely to blame for the accident.


SAPIRE, C.