IN THE HIGH COURT OF SWAZILAND (HELD AT MBABANE) QINISO GULE

Plaintiff

And

THULANE MNDZEBELE

Defendant

Civil Case No. 1316/2004

Coram	S .B .MAPHALALA - J
For the Plaintiff	MR. M. SIMELANE
For the Defendant	MR. W. MABUZA

JUDGMENT

7th December 2007

[1] The Plaintiff in his amended Particulars of Claim has filed an action for the following relief:

(c) Payment of the sum of E27, 292-35 for the repair of the kombi;

(d) Payment of the sum of E43, 400-00 for loss of business;

(e) Interest at the rate of 9% per annum calculated from the 29th December 2003 to date of final payment;

(f) Costs of suit;

(g) Further or alternative relief.

[2] The Defendant after pleading to the Particulars of Claim filed a counterclaim seeking payment of E88, 314-99, interest and costs.

[3] The Plaintiff then filed a plea to the Defendant's counterclaim found at pages 28 to 29 of the Book of Pleadings.

[4] The court then heard the evidence of the parties. The Plaintiff gave evidence and called the driver of the bus who was involved in this accident. On the other hand Defendant gave evidence himself and did not call any other witnesses.

[5] It is a trite principle of law that the standard of proof required from the Plaintiff is one on the preponderance or balance of probabilities (see *Salmon vs Jacoby 1939 A.D. 589).* **In order for the Plaintiff to succeed in his claim the probabilities must be substantially in his favour. In the event that the Plaintiff succeeds to discharge the** *onus* **and the Defendant adduces evidence that explains that the occurrence was unrelated to any negligence on his part, the court will test the explanations by consideration of probability and**

credibility, (see *Arthur vs Bezuidenhout and Mieny 1962 (2) S.A. 566 (A) at 574* cited in *Cooper, Motor Law* at page *105).* Once the Defendant gives an explanation sufficiently cogent to disturb the probability of negligence the inquiry is whether on the evidence as a whole the probabilities favour the Plaintiff. If they do, the Plaintiff then succeeds but if not his claim fails, (see *Rautenbach vs De Bruin 1971 (1) S.A. 603 (AD)).*

[6] See also *Lawsa First -Re-issue Vol.3 paragraph 156* and the cases cited thereat and *Cooper (supra)* at page *252, 255.*

[7] The evidence of the Plaintiff is that he is employed by the Department of Customs and Excise stationed at Ngwenya Border Gate and that he is the owner of the kombi being SD 774 WG. He testified that on the 29th December 2003, his kombi was driven by one Freddy Fakudze who was a driver of the said vehicle. This kombi used to ferry people from Mbabane to Oshoek. On that day his driver told him that they were going to ferry people to Sidvwashini. Later on that day Freddy reported to him that the kombi was involved in an accident. He then went to where the kombi was. He went there and took pictures of the kombi in that state and he exhibited these photographs to the court as part of his evidence. The photographs were entered collectively as exhibit "A". The kombi was then taken to the police station and thereafter he took the kombi for repairs. He exhibited a quotation from 3M Garage and it was entered as exhibit "B". He testified further that he repaired the kombi and paid a sum of E27, 292-35.

[8] Plaintiff testified further that as a result of the accident he lost business as it took 124 days before the kombi was fully repaired. This was from the 29th December 2003 to the 19th April 2004. He testified further that he used to make E350-00 to E400-00 per day on the business of the kombi. The Plaintiff further exhibited records of his daily takings and these were collectively entered as exhibit "C".

[9] PW1 further deposed that the driver of the other vehicle was charged with negligent driving. He further read into the record a report of the police which was later entered as exhibit "E".

[10] The second witness for the Plaitniff was the driver PW2 Freddy Zwelithini Fakudze.

[11] He deposed that he was traveling at between 60 to 65 kilometres per hour. He had 15 passengers in the kombi. He told the court that he has been a driver for 8 years and has been a public transport driver for about 4 years. He had in his possession a valid permit called "public" and one for road worthiness and this permit was entered as exhibit "B". He deposed that he was never questioned by the police about this permit which mentions someone else's as a permit holder.

[12] He described how the accident occurred on the day in question he was driving the said kombi driven by Phephela Mndzebele overtook him next to the over-bridge near Mbabane Central School. He then saw this other kombi standing next to the prison. He then took another lane and proceeded on his trip. As he was driving he saw that his kombi has knocked on his kombi. He did not indicate and it was not possible for him to apply bakes in his kombi. He stopped in another lane and passed in the second lane. His

kombi was damaged in front and the other kombi was damaged on the side next to the driver's side.

[13] PW2 was cross-examined searchingly by the Defendant and I shall revert to his replies in due course.

[14] In the trial the Defendant gave evidence at great length explanation that he is the owner of the kombi which had an accident with the Plaintiff. He deposed that it was not possible for a party to loan a permit to someone else. He referred to various conditions in the permit which states that a person is not permitted to loan a permit to another. He told the court that he started his business in 1995 and he also drives his own kombi because he is scared to employ drivers as they may drive it recklessly. He testified that on the 29 December 2003, he got out of Sidvwashini and when he was at Manzana before the overhead bridge he indicated to turn to the right. He looked behind him and there were oncoming motor vehicles. He then turned his vehicle towards Sidvwashini. At that junction he looked at both sides of the road and there was nothing to disturb him. He entered the road and then the accident occurred.

[15] DW1 deposed that this motor vehicle was another kombi and that it knocked him on his side from Sidvwashini. He deposed that it was not true that he overtook the other vehicle next to the overhead bridge. Further that it was not true that he stopped his motor vehicle. He turned at the junction as it was not busy there as there is a double lane. At the time of the accident there were no markings on the road. DW1 testified that the point of impact was on his side and that the impact happened when he was fully on his lane.

He tried to avoid the accident but could not do so. He testified that when the accident occurred the Plaintiff was traveling at a high speed. When he tried to turn there were no incoming vehicles and all of a sudden he heard the sound of a hooter. He does not recall being charged with the criminal offence mentioned by the Plaintiff. He then went to the insurance where he was told that his vehicle was write-off. He handed to the court a document from his assessors entered as exhibit "I". In court he applied to be compensated a sum of E88, 000-00 and interest on the amount.

[16] The Defendant was cross-examined at great length by Counsel for the Plaintiff and I shall revert to his pertinent answers in due course.

[17] In arguments before me both Counsel filed very comprehensive Heads of Arguments for which I am grateful to Counsel for their high professionalism.

[18] Counsel for the Plaintiff stated in his Heads of Argument that the following facts which are common cause between the parties are that:

> **10. Evidence was led that the accident occurred in a steep area and it was not denied that the Plaintiffs kombi was fully loaded with passengers totaling (15) fifteen in all.**

(h) **It is further common cause that the Plaintiffs kombi was damaged on the front part whilst that of Defendant was damaged on the right hand side on the middle which resulted on the side to be depressed inward without any running scratches to the front or the back of the kombi's right panel.**

(i) **It is common cause that the collision occurred on a public road along the Mbabane - Oshoek road.**

[19] It was further contended for the Plaintiff that the evidence of the Defendant that the road coming from Mbabane up to where the accident occurred, there was 300 metres of clear road without any obstruction, which according to him one could see a tiny object like a squirrel (imbolwane). The Defendant's version that the Plaintiffs kombi could be speeding so much that at a twinkle of a second after checking his rear view mirror and sideways the kombi was at the place of the collision is a complete falsehood that would shame Michael Schumacher. He never kept a proper look-out of other road users thus exposing them to danger. On a balance of probabilities he was emotionally disturbed by the fact that his uncle had gone so far, that in a sheer moment of desperation he lost concentration.

[20] Counsel for the Plaintiff referred the court to a number of legal authorities including *W.E. Cooper (1965) South African Motor Law* **at pages** *247* **to** *255,* **the cases** *ofR vs Hatingh 1935 NPD 336* **at** *339, R vs Cronehelm 1932 T.P.D. 86, Van der Merwe vs Union Government 1936 T.P.D. 427* **at** *433 - 4* **and that of** *Moore vs Minister of Posts and Telegraphs 1949 (1) S.A. 815 (AD).* **Counsel for the Plaintiff further referred the court to legal authorities for loss of business in prayer 3 and the issue of illegality of borrowed permits.**

[21] On the other hand Counsel for the Defendant advanced *au contraire* **arguments and stated that the Plaintiff was a forgetful driver and was not careful of how he did things. Defendant was more truthful in that his version is more probable of the two versions. In this regard the court was referred to the South African case of** *Robinson Brothers vs Henderson 1928*

A.D. 138 at 141 **and the textbook by** *Cooper (supra)* **at page** *429* **and the cases cited thereat.**

[22] Counsel for the Defendant in his Heads of Argument referred to a number of legal authorities to support his arguments including the case of *South Cape Corporation (Pty) Ltd vs Engineering Management Services (Pty) Ltd, 1977 (3) S.A. 534, Salmons vs Jacoby 1939 A.D. 589, Arthur vs Bezuidenhout and Mieny 1962 (2) S.A. 566 (A)* **at** *574, Rautenbach vs De Bruin 1971 (1) S.A. 603 AD, Dlamini and Another vs Protea Assurance Co. Ltd 1974 (4) S.A. 906* **and** *Fortuin vs Commercial Union Assurance Co. of S.A. Ltd 1983 (2) S.A. 444.*

[23] On the issue of Plaintiff trading illegally it is the Defendant's arguments that since the Plaintiff did not possess a valid and/or legal permit by the Road Transportation Board in terms of the Act, compensating him for loss of earnings would be against public policy since Plaintiff was engaged in illegal trade. In this

regard the court was referred to the decision in *Dlamini and Another vs Protea Assurance Co. (supra).*

[24] The Defendant further argues in this regard that although the Plaintiff sought to legitimize his trade or business by renting a permit, the agreement to rent or lease the permit is in itself illegal as it contravenes the conditions set out overleaf the Road Transportation permit, particularly no. 2. In this regard Counsel for Defendant referred the court to the Road Transport Act No. 37 of 1963 in Sections 15 (1) (a) (iii) and Section 14 (f) of the said Act.

[25] On the counterclaim Defendant contends that he is entitled to be paid a sum of E88, 314-00 in respect of the damages occasioned by the negligence of the Plaintiffs motor vehicle. That Defendant has discharged the *onus* of proof that the driver of the Plaintiffs motor vehicle was negligent in the circumstances and that the Plaintiff is vicariously liable to the Defendant since he was driving the motor vehicle with the express authority of the Defendant.

[26] The first issue for consideration in my view is whether the Plaintiffs motor vehicle when it met the accident had a valid permit in terms of the law and if so who was negligent in causing the accident. If I find that it was the Defendant I ought to give judgment in favour of the Plaintiff but if I find that it was the Plaintiff then I have to consider the defendant's counterclaim.

[27] The argument in this regard is that Plaintiff was trading illegally since he did not possess a valid and/or legal permit by the Road Transportation Board Act. In this regard the court was referred to the South African case in the matter of *Dlamini and Another vs Protea Assurance Co. (supra).* The Defendant further contends in this regard that although the Plaintiff sought to legitimate his trade or business by renting a permit, the agreement to rent or lease the permit itself is in itself illegal as it contravene the conditions set out

overleaf the road transport permit, particularly condition no. 2 which reads as follows:

2. **This permit is valid only for use by the above named holder and is transferable.**

[28] Defendant further referred to Section 15 (1) (a) (iii) of the Road Transport Act No. 37 of 1963 read with the condition of permit cited above in paragraph [26] of this judgment.

[29] The court was also referred to the case of *Fortuin vs Commercial Union Assurance Co. of S.A. Ltd 1983 (2) S.A. 444*, **where Plaintiff was the widow of her late husband who had been killed when he was knocked down by a motor vehicle insured by the Defendant in terms of the Compulsory Motor Vehicle Insurance Act 56 of 1972. In an action for damages for loss of support it appeared that the deceased had earned his income as a woodcutter from the sale of firewood but that he had not possessed the required hawker's licence shortly before his death and that he would probably have applied for the licence. It was common cause on the pleadings that the deceased had been killed as a result of the negligent driving of the vehicle insured by the Defendant. The parties to the action had also agreed on the** *quantum* **of Plaintiffs damages. It was held on the evidence that an application by the deceased for a hawker's licence to sell firewood, would as a matter of probability, have succeeded. It followed that the deceased would have traded lawfully. It was held accordingly, that the Plaintiff should be granted judgment in the agreed amount for damages for loss of support.**

[30] On the other hand Counsel for the Plaintiff has argued in his Heads of Arguments in paragraphs 22 to 26 to the effect that the Road Transportation Act does not make it mandatory to file a tax return to obtain a permit licence in terms of Section 19 such that any argument on this issue is irrelevant. Further that Defendant failed to bring an official from the Road

Transportation Board which renders the argument on the conditions a nullity without any substance at all.

[31] Having considered the pros and cons of these arguments I am inclined to agree with the Plaintiff that the enabling Act does not prohibit the borrowing of permits nor is it an offence to do so as prescribed in Section 27 of the Act. Indeed the Defendant who has been in the transport business said that according to him there was nothing wrong with borrowing a licence but what was illegal was paying rentals for the use of the licence. Therefore for these reasons I am inclined to agree with the Plaintiff and the point raised by the Defendant cannot succeed.

[32] I now proceed to consider the gravamen of the case as to which of the parties has caused the collision between the two motor vehicles. In my assessment of the arguments of the parties and the evidence brought before this court I am inclined to agree with the Plaintiff that the Defendant was negligent in the circumstances of the case. On the probabilities of the case the Plaintiffs version seems to me to be what happened on the day in question. The Defendant's version that the Plaintiffs kombi could be speeding so much that at the twinkle of a second after checking his rear view mirror and sideways the kombi was at the place of collision is complete falsehood. Defendant never kept a proper look-out of other road users thus exposing them to danger. On a balance of probabilities he was emotionally disturbed by the fact that his uncle had gone so far, that in a sheer moment of desperation he lost concentration.

[33] **In this regard I agree with Counsel for the Plaintiff that his version ought to be believed based on the following facts:**

(a) **During cross-examination a picture of the junction where the accident as alleged by the Defendant to have happened was shown to Plaintiff who clearly stated that there are no two lanes next to the junction but same start at or near the gum tree where the accident happened;**

Such picture was not presented so that the court would not know the truth.

(b) The impact of the collision subsequently led the kombis to rest on the oncoming lane thus clearly showing that the Defendant's kombi was not entering the main road but was in the middle.

(j) **The depression on the Defendant's kombi shows that the kombi was in the middle of the road and it was moving across executing a dangerous U-turn and not on the oncoming lane.**

(k) **On a balance of probability it can be held that the defendant did not check his rear view mirror or signaled his intention thus the accident occurred within a short distance thus rendering the Plaintiffs driver not able to avoid the accident despite applying his brakes which were heard by the Defendant so clearly.**

The Defendant never mentioned that he switched on his indicators and was evasive when asked a simple question as to which mirror he used when executing the U-turn.[34] **In the result, for the afore-going reasons Plaintiffs action success**