

IN THE HIGH COURT OF SWAZILAND
SAMUEL MFANUFIKILE MALAZA

And

SWAZILAND ROYAL INSURANCE CORPORATION

Civil Case No. 169/1999

Coram

S.B. MAP HAL ALA - J

For the Plaintiff

Advocate L. MAZIYA

For the Defendant

MR. H. CURRIE

JUDGMENT

22nd June 2007

[1] The Plaintiff a business man of Flat No.6 Block 20 Mobeni, Matsapha in the district of Manzini has filed a combined summons against the Defendant the Swaziland Royal Insurance Corporation, a public corporation established in terms of the Swaziland Royal Insurance Order-in-Council of

1973, having its principal place of business within the area of jurisdiction of this court at CDC Building, Johnstone Street, Mbabane.

[2] The Plaintiff avers in the said summons that at all material times hereto and more particularly on the 4th June 1988, the Defendant was the registered insurer under the provisions of the Compulsory Motor Vehicle Insurance Order in Council No. 47 of 1973 (hereinafter referred to as "the Order") and was the insurer in terms thereof of certain motor vehicle with registration number SD 114 PM (hereinafter referred to as the insured vehicle"). The token of identification number 016415 issued by the Defendant in respect of the insured vehicle was displayed on the insured vehicle, which token was current and in force at the time of the collision hereinafter referred to.

[3] On the 4th June 1988, and at or near Emhobodleni on the Manzini/Mbabane public road the insured vehicle which was then driven by one Themba Ndlovu collided with a certain motor vehicle SD 693 JH which was there and then driven by the Plaintiff.

[4] The Plaintiff avers that the afore-mentioned collision was caused solely by the negligence of the said Themba Ndlovu who was negligent in one or more of the following respects:

- (1) He failed to keep a proper lookout;
- (2) He failed to deed his headlights for on-coming motor vehicle;
- (3) He drove too fast under the circumstances prevailing;
- (4) He failed to keep the insured vehicle under proper control; and

- (e) He failed to avoid a collision when the exercise of reasonable care he could and should have done so.

[5] The Plaintiff further avers that as a result of the collision aforesaid, he sustained the following bodily injuries:-

- (5) Severe injuries on the head and lower limbs; and
- (6) Dislocated fracture of the right hip.

[6] Furthermore, Plaintiff avers that as a result of the injuries sustained in the collision he suffered damages in the amount of E273, 755-00 which is calculated as follows:

(a) Hospital expenses	55,000.00
(b) Medical expenses	20,000.00
(c) Estimated future medical expenses	100,000.00
(d) Loss of earnings	100,000.00
(e) Estimated future loss of earnings	100,000.00
(f) General damages inclusive of loss of Earning capacity shock pain and suffering, Loss of amenities of life and permanent	100,000.00

	273,755.00

273,755.00

[8] The court then heard evidence in the action. The first witness called for the Plaintiff was PW1 Muzi Mavela Matsebula who is an attorney of this court. He testified that the original file in this matter got missing in the National Archives. He handled the matter whilst he was attached to the law firm of Millin and Currie. He testified that he had the original file in this matter. He appeared before this court to move an application to remove the application. He made a note of what transpired in court that day. This was the 3rd August 2001 before me. The Plaintiff action was dismissed with costs. He testified further that this matter came back when he was with the MVA Fund. It was set down for hearing. He set up to find out what had happened. He approached Mrs Maziya. This transcript is here and he sent it to Millin and Currie. There was a Notice in terms Rule 16 which was entered as exhibit "K".

[9] *Mr. Maziya* for the Plaintiff cross-examined the witness briefly if he had any independent record that the matter was disposed of where he replied in the affirmative. He was further asked whether on the 24th April 2003 he appeared before Annandale ACJ (as he then was) together with attorney Mr. T.L. Dlamini and he replied in the affirmative that at that point he was already working for the MVA Fund. He stated that he would not know what took place. He testified further under cross-examination that the matter was not dealt with on the merits.

[10] The Defendant then closed its case and the court then heard the evidence of the Plaintiff who called attorney Mr. T.L. Dlamini. He deposed that he was the attorney of record in this matter. He testified that he took over the matter in April 2003. When he went to Annandale ACJ (as he then

was) to seek assistance to have the matter allocated a trial date. This happened in open court. The witness further stated that Annandale ACJ (as he then was) further made an order that the matter be heard as soon as possible. The witness furthermore stated that he saw an endorsement on the file that it was at some point struck off the roll by Rooney J. There was no endorsement that it was dismissed. There was no endorsement after Rooney R_s endorsement.

[11] The witness further testified that in August 2003 another Registrar of the High Court Mr. Shiyumhlaba Dlamini was appointed and he allocated the 28th August 2003, for hearing of the matter. They subsequently filed a Notice of set-down where they appeared before Matsebula J. He appeared together with attorney Mr. Muzi Matsebula in Matsebula J's Chambers where Mr. Matsebula was told that the matter was dismissed. Matsebula J felt that he could not proceed with the matter and he allowed the other side to bring the file with the endorsement and he postponed the matter *sine die*. Sometime elapsed and nothing really happened.

[12] They then approached the Registrar on the 20th February 2006 and a date was allocated by the Registrar Mr. Shiyumhlaba Dlamini. On the date allocated there was no appearance for the other side and again the matter appeared before Matsebula J. The matter was recalled in Chambers of Matsebula J where Mr. Currie for the Defendant stated that the matter could be dealt with through negotiations. He then took all the documents relating to this matter. They did discuss the merits of the matter. Mr. Currie said he was still going to consult with his clients. Mr. Currie insisted that the matter was dismissed and they held a contrary view.

[13] The witness was cross-examined briefly by the other side and I shall revert back to his pertinent answers in due course.

[14] The court then heard submissions of the parties. It was contended for the Plaintiff that the question of *res judicata* does not arise at all in this case. That this matter was never dealt with at all. On the other hand it is contended for the Defendant that the matter is *res judicata* and therefore the action should be dismissed on this ground.

[15] It is trite law that *res judicata* may be raised by way of a plea in abatement. A Defendant may plead *res judicata* as a defence to a claim that raises an issue disposed of by a judgment *in rem*. The defence may also be based upon a judgment *in personam* delivered in a prior action between the same parties, concerning the same matter and founded on the same cause of action (see *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 478 and the cases cited thereat).

[16] The learned author *Herbstein (supra)* further state at page 249 in the above-cited textbook that for a plea of *res judicata* to succeed, however, it is not necessary that the "cause of action" in the narrow sense in which the term is sometimes used as a term of pleading should be the same in the later case as in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or

constitute an integral part of it, and will be *res judicata* in any subsequent action between the same parties in respect of the same subject matter, (see *Boshoff vs Union Government 1932 T.P.D. 567 (c)*).

[17] In the present case the question to be decided is whether the matter was decided by me as stated by the Respondent that the action was dismissed. The Plaintiff on the other hand has taken the position that this is not so. The record of the court's judgment cannot be found to verify the facts of the matter. The court is therefore to assess the balance of probabilities in the evidence of the parties to confirm or dispel the positions adopted by the parties. In my humble opinion after assessing the evidence of the parties I have come to the considered view that the court before me dismissed the action as stated by the Defendant. I say so, on the strength of the evidence of an attorney of this court Mr. M. Matsebula who dealt with this matter in all its twists and turns and the evidence of attorney Mr. T.L. Dlamini who came into the scene after the crucial event had taken place. Attorney Mr. Matsebula was involved in that crucial event where the action was dismissed.

[18] In the result, for the afore-going reasons I have come to the considered view that the matter is *res judicata* and therefore the present action is dismissed with costs.


S.B. MAPHALALA