# THE HIGH COURT OF SWAZILAND

**CIVIL CASE NO.2438/04**

**In the matter between:**

**CELANI KHUMALO**
**AND**
**MINISTRY OF EDUCATION**
**DANIEL MAYISELA**
**ATTORNEY GENERAL**

**CORAM** **CHIEF JUSTICE**

**FOR THE CROWN** **MR. B.S. DLAMINI**
**FOR THE DEFENCE** **MS H. NDZIMANDZE**

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## JUDGMENT

February 2008

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[1] The plaintiff Celani Khumalo is suing the defendants for damages in respect of a car accident which happened on or about 11th December 2004. It is alleged that while the plaintiff was lawfully driving along the Mahamba – Hlatikulu public road, in his motor vehicle

VW Golf sedan with registration number SD 610 SG, collided with the first defendant's motor vehicle being a Nissan van registered as SG 077 ED.

[2] At the time of the accident the motor vehicle SG 077 ED was being driven by the second defendant within the scope and course of his employment with the first defendant.

[3] The plaintiff has contended that the collision was caused solely by the negligence of the second defendant in that he drove the vehicle negligently and/or recklessly. The plaintiff has further submitted that the second defendant failed to keep a proper look out and that he failed to apply his brakes timeously. The defendants have denied negligence on their part and have instead alleged that the accident was caused solely by the negligence of the plaintiff himself.

[4] The plaintiff was the only witness called in support of his case apart from the police officer who produced the sketch plan which he drew after he visited the scene of the accident soon after it had happened. The plaintiff told the court that he resides at Madulini and works at Nhlangano at Montignya Investment. He was

driving along Hlatikulu and Mahamba main road in his red VW Golf registration number SD 610 SG towards a T-junction when suddenly another vehicle entered the road without stopping; that upon realizing that the other car was not going to stop he tried to apply his brakes but as the other car was so near there was nothing he could do and a collision happened. He stated that his vehicle was badly damaged and he was himself seriously injured on his head. He stated that he waited for the police to whom he gave a statement and he thereafter went to hospital. On his return from hospital he found that his car had been towed away. He stated that the accident happened at 6.45 in the morning and that the other car, involved in the accident, was a double cab Nissan bakkie white in colour with registration number SG 077 ED. He said that his car sustained a broken windscreen and a leaking radiator. He obtained a quotation for repairs which was produced in court as exhibit 1.

[5] In cross-examination plaintiff repeated his evidence in chief when he stated that he just suddenly saw a car infront of him and that although he applied his brakes the collision happened. He stated that he had hoped that the driver of the other car would stop as there was

a stop sign and that he did not expect that the other driver would enter the road before stopping. He asserted that he was a competent driver having obtained his driving licence ten (10) years before the accident happened.

[6] The second defendant gave evidence for the defence. He said that he was on the material date travelling to Manzini with three examiners who were going to attend a workshop. He admitted that he was the driver of the motor vehicle registration number SG 077 ED. He stated that as he approached the stop sign he stopped as "the law obligated him to stop." He said that while he was at the stop sign he saw a car approaching from Hlatikulu direction travelling at a high speed; that he saw the car move from its proper lane and came to hit his car where he had stopped. His car was hit at the back and because of the impact it turned and faced Hlatikulu direction. He contended that he had stopped behind the barrier at the stop sign but that after the impact his car landed on the barrier; that he could not reverse backwards because there was another car immediately behind him. He said that there were people at the scene as the accident happened near a filling station. He stated that he

tried to inform the police how the accident happened but the police would not listen to his story and that after he was charged he decided not to say anything hoping that he would put his case to the court. He said that the police failed to come to court.

[7] Three other witnesses were called for the defence case. They all repeated the same story which the second defendant told the court; that the plaintiff's car was travelling at a high speed and that it was travelling in "zig zag manner" but that they did not know what made the car travel in such an erratic manner. It was quite clear to the court that these witnesses had rehearsed a story to tell the court. What was even significant was that although they were working under the same Ministry of Education they purported not to know the second defendant well enough. Indeed in so far as Mr. Vusi Khumalo (DW4) was concerned he even refused talking to the second defendant after the accident. It is surely normal, when you see somebody you know and has been involved in an accident to stop and find out from him if there is anything you can do to help. And yet Mr. Khumalo said that he just moved off and drove away without talking to the people he knew. I found that the defendants' witnesses were not telling

the truth. Their evidence was clearly intended to protect the second defendant who is their colleague in the Ministry of Education and their superior. I can, therefore, attach little weight to their evidence.

[8] Constable No.3852 Sabelo Gwebu was called as second witness for the prosecution. He told the court that he received a report at about 7.00am on 11th December 2004 at the T-junction at a place which is commonly known as Kamjuda; that he went to the scene of the accident and that on arrival he found the two cars which had been involved in the accident. The relevancy of this witness's evidence can only relate to the sketch plan which he drew and produced in court. His evidence as to the manner in which the accident happened is inadmissible as hearsay as he was clearly not present when the accident happened; and the witness concedes as much.

[9] The sketch plan which was produced in court as exhibit 2 shows that the point of impact was on the left lane of the road towards Mahamba direction. This was clearly the proper lane in which the plaintiff was driving.

The brake marks of the plaintiff's car show that it started from the left lane veering to the left until it hit the defendant's car at its back. This is consistent with the plaintiff's story that upon suddenly being confronted with a car infront of him, only 20 metres away, the only reasonable thing to do was to suddenly apply his brakes and veer to the left to try and avoid hitting the defendant's car. This was, on the evidence given to the court, a dry day and no other cause was given why the plaintiff's car would have veered to the left.

[10] Negligence has been defined as failure to exercise towards another in given circumstances, that degree of care which the law considers a reasonable man should exercise in those circumstances. Vide Negligence in Delict, 5th Edition by J.C. Macintosh and C. Norman-Scoble.

[11] The essence of negligence, depending as it does, on the care of a diligent man, requires that the plaintiff should establish that the defendant should have foreseen the possibility of his conduct injuring another in his person or property and causing him loss. The plaintiff must further establish that the defendant failed to take

reasonable steps to have guarded against such occurrence; **ROBINSON VS ROSEMAN** 1964(1) SAR 701 at 715. In determining cases of this kind the normal procedure is first to consider whether the plaintiff has established defendant's negligence as well as the causal connection between such negligence, if any, and the harmful results and only where those are found to have been established, to consider the question whether on some ground recognized by the law the plaintiff is not entitled: vide **MANDILSON VS CENTURY INSURANCE COMPANY** 1951(1) SA 533 at 544. In the case of **WASSERMAN VS UNION GOVERNMENT** 1934 A.D. 228 AT 231 De Villiers JA pronounced the general principle of law in the following terms:-

> *"A person must take precaution against harm happening to another if the likelihood of such harm would be realized by the reasonable prudent man. He need not take precaution against a mere possibility of harm not amounting to such a likelihood as would be realized by the reasonable prudent man."*

[12] An allegation of negligence postulates a breach by the

defendant of a duty owed by him to the plaintiff. It is said that in civil law there is no such thing as negligence in the air. Liability only arises where there is a duty to take care and where failure in that duty has caused damage. In the case of (Hay) **BOURNHILL VS YOUNG** 1942 2 AER 396 it was held that the duty of a motorist on the public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury to such persons as he would reasonably foresee might be injured by his failure to exercise that care. The duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway, but it appears that the duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care. The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its consequence injury to others.

[13] It is my considered view that the defendant should have reasonably foreseen that as he was approaching a main road there was likely to have other motor vehicles driving along it, to and from Manzini, and that he should have kept a good look out for such traffic. By

attempting to enter the main road without keeping a proper look out the defendant failed to exercise due care and attention and it was this failure to exercise the duty of care which caused the accident. The facts in this case are similar in some respects to the facts in the case of **MANDERSON VS CENTURY INSURANCE COMPANY** supra, where the defendant was not found liable. In that case the defendant was driving when suddenly he saw an object in front of him. He immediately applied his brakes with such force that the car skidded along and hit a stationery car. He was held not liable for the accident. He had done all he could do to avoid the accident.

[14] This is a civil matter and the onus on the plaintiff is to prove his case on balance of probabilities. This case was based purely on the facts as deposed to by the witnesses called. I find that the plaintiff's story as the more credible story between the two versions and it is supported by the evidence as disclosed on the sketch plan. I am satisfied and find that the second defendant did not stop on the stop sign. He is required to give way to traffic on the main road. It was his negligence which was the sole cause of the accident. He did not keep a good look out for traffic

on the main road. He failed to exercise due care and attention on the road.

[15] I have considered the issue of quantum of damages. In cases of this nature the normal method of proving quantum is by producing evidence as to the estimated or actual costs of repairs required to put the vehicle back into as good a condition as it was immediately before the collision; vide the case of **HEALTH VS LE GRANGE** 1974(2) SA 262 and also the local case of **CLIFFORD MAGONGO VS MSONGELWA ZWANE** 1987 – 1995(3) SRL 147. The plaintiff produced a quotation of the costs of repairs. No attempt was made to challenge it. I find, therefore, that the quantum of damages has been proved.

[16] Accordingly I find that the plaintiff has proved, on balance of probabilities, his case against the defendants. Judgment will be for the plaintiff in the sum of E36,476.76 with interest at the rate of 9% and costs.

R.A. BANDA
CHIEF JUSTICE