

**SWAZILAND HIGH COURT CIVIL
CASE NO. 3241/05**

BETWEEN

JAMES TSABEDZE ...

PLAINTIFF

AND

CARLOS MAPHANDZENI ...

DEFENDANT

CORAM:

AGYEMANG J B. NGCAMPHALALA ESQ.

FDR THE PLAINTIFF: FDR THE

SHEKWA ESQ.

DEFENDANT:

JUDGMENT

In this action the plaintiff has sued the defendant for the following reliefs:

1. Payment of the sum of E15,060.00;
2. Interest at the rate of 9% per annum;
3. Costs of suit;

4. Further and/or alternative relief. The matters giving rise to the plaintiff's claim are that on 2/10/03, the plaintiff a taxi driver by occupation, was driving a vehicle described as a Toyota Corolla with Registration Number SD 642 VG, along the Simunye-Maphiveni public road when he collided with a vehicle described as Toyota Hiace Registration Number SD 635 UG. That vehicle which was owned by the defendant herein, was at the material time, driven by one Linda Wesley Dlamini. According to the plaintiff, he bought the vehicle for the sum of E9,000 in the same year it was involved in the accident: AD 2003, and that he reconditioned it at an additional charge of E4,000. He allegedly used the vehicle for his business after hours.

The plaintiff pleaded that the accident was caused by the negligence of the said Linda Wesley Dlamini who was at the material time, an employee of the defendant, driving within the course and scope of his employment or alternatively, that his driving was for the benefit of the defendant.

The plaintiff further pleaded the following as the particulars of the alleged negligence of the driver, that the said Linda Wesley Dlamini:

- i. Failed to observe the rules of the road;
- ii. Failed to exercise proper control over the motor vehicle;
- iii. Failed to avoid the accident, when by the use of due care and skill, he could and should have;
- iv. Failed to apply the brakes of the motor vehicle timeously or at all.

Giving evidence in court, the plaintiff who alleged that on the day in question the defendant's vehicle operated as a vehicle for public transport with passengers on board, described the circumstances of the accident thus:"... I was moving towards Tambankulu. I reached the T-

junction, I saw a Kombi coming from Maphiveni, going to Simunye. The distance between the T-junction where I was and when I sighted the Kombi was about 1 km. I turned on my indicator and entered the main road in the direction of Simunye...I was to turn immediately to enter a gate going to Tambankulu. When I entered the main road, I looked in the right side mirror and saw the Kombi moving at top speed. I turned on my indicator to allow him to overtake on the left hand side...when I was about to enter the gate I saw that the Kombi was close to me on my right. It then collided with my motor vehicle..." The said description laid the fault of the cause of the accident on the driver Linda Wesley Dlamini in accord with the particulars of negligence pleaded. To buttress this, he stated also that the driver Linda Wesley Dlamini had not observed the road markings, particularly the barrier line that precluded overtaking of another vehicle. Nor had he reduced his speed when the plaintiff indicated that he was turning off the road. The version of the plaintiff was corroborated in every material detail by exhibit C, the Police Accident report which stated that: "...The driver of SD 642 VG was turning right to the junction and SD 635 UG came overtaking at high speed. They then collided. The driver of SD 635 UG was at fault as he tried to overtake another vehicle on the blind rise, white solid line and on the junction. He also fail (sic) to observe that the car in front was indicating to the right..." By reason of the accident, the plaintiff alleged that his vehicle got damaged beyond economic repair. He alleged the sum of E15,060.00 to be the difference between the pre- and post-accident value of the vehicle. He alleged that when he approached the defendant for help in repairing the vehicle, the defendant informed him that the driver of that day

had not been his driver. Thereafter, he failed to provide the assistance requested. Thus the plaintiff commenced the present action seeking the aforesaid reliefs. He supported this assessment with a quotation for the repair of the vehicle which was contained in documents admitted in evidence without objection as exhibits A A1. Although the plaintiff testified that he had suffered other loss being the loss of use for the vehicle and gave evidence regarding the obtaining of alternative transport, he made no claim under such head or for general damages.

It is the case of the defendant, both in pleading and in his evidence, that although the car driven by the said Linda Wesley Dlamini indeed belonged to the defendant, the former was unknown to the latter, was not his employee, and did not drive the vehicle with his knowledge or consent. The defendant alleged that he had an employee, one Joseph Mashwama employed to drive the vehicle in question on the Siteki-Lomahasha route. He alleged that the said Mashwama into whose custody he had placed the vehicle and who kept the keys therefor, was unwell on the day of the accident and that the vehicle was supposed to be parked at Simunye as was the custom of the driver when the vehicle was not in use. He alleged that he had not authorized his driver to place the vehicle in the care of the man found driving the vehicle, Linda Wesley Dlamini. He alleged also that he had given express instructions to the operators of the bus rank, not to give out his vehicle to anyone to drive if the driver Joseph Mashwama was not available to drive it. Nor said he, had he received money from the said gentleman for the use of the vehicle. He alleged that Linda Wesley Dlamini had informed him following the accident, that the trip on which he had the

accident was the maiden trip of the day and that due to the accident, no income accrued from the use of the vehicle.

At the close of the pleadings and the evidence, these matters stood out as issues for determination:

4. Whether or not the accident involving the plaintiff's vehicle was caused by the negligence of the driver of defendant's vehicle;
5. Whether or not there was contributory negligence on the part of the plaintiff;
6. Whether or not the plaintiff sustained loss;
7. Whether or not the defendant herein is vicariously liable for the loss/injury sustained by the plaintiff.

The plaintiff pleaded the negligence of the driver of the defendant's vehicle and adduced evidence in support of same. As aforesaid, his description of the accident and the acts of the other driver that caused it was corroborated by the Police Accident Report which was admitted in evidence without objection. Although the defendant pleaded certain matters pertaining to the cause of the accident which he alleged constituted the contributory negligence of the plaintiff, no such evidence was adduced in support thereof nor did the defendant adduce any evidence in rebuttal of the evidence led by the plaintiff which established a prima facie case of negligence against the driver Linda

Wesley Dlamini. I am satisfied from the evidence of the plaintiff as corroborated by the Police Accident Report, that the accident was caused through the negligence of the driver Linda Wesley Dlamini and I hold the same to be a fact.

The plaintiff testified that he suffered loss as his vehicle was damaged beyond economic repair. His pleading to that effect was not challenged by the defendant. In the absence of such challenge by the defendant either in pleading, through cross-examination or by evidence in rebuttal, I hold that the plaintiff's vehicle was indeed damaged beyond economic repair, he is thus entitled to the replacement value of the vehicle. Alleging the loss he suffered to be in the sum of E15,060 representing the pre- and post-accident value of his vehicle, the plaintiff tendered documentary evidence - exhibits A and A1 in support thereof. The said documents were not tendered by the author thereof who could testify in support of how he arrived at the figure therein contained. Furthermore, no other piece of evidence was adduced in support of the figure stated therein to represent the value of the vehicle. In the light of the fact that the plaintiff testified that he bought the vehicle in the same year it got damaged for E9,000 and fixed it up for an additional charge of E4,000 I do not find basis for the figure contained in exhibits A-A1. For this reason, and having held the plaintiff entitled to the replacement value of the vehicle, I hold the sum due from the wrongdoer to be in the sum of E13,000 which is the purchase price and the cost of improving same.

The question is, from whom is this money due? The plaintiff sued the defendant herein alleging him to be vicariously liable for the wrongful act of his servant or in the alternative, that the wrongdoer Linda Dlamini who may or may not have been the defendant's servant had been in the position of a servant in that he had operated that day for the benefit of the defendant. The defendant in pleading and in evidence has been adamant that

although the vehicle belonged to him, he had not authorized its use by the man found driving it at the time of the accident.

There is no gainsaying that the burden of proving that the wrongdoer was the servant of the defendant, acting within the course of his employment and not on a frolic of his own, lies with the plaintiff whose assertion to that effect grounds the vicarious liability of the defendant. In the present instance, the plaintiff led evidence to establish that the said driver Linda Wesley Dlamini had been in charge of the vehicle at the time of the accident. And although the defendant, testified that there was no master/servant relationship between himself and the driver of the vehicle Linda Wesley Dlamini, he did not deny this in pleading. Indeed the defendant in his plea, merely denied that the driver was driving within the course and scope of his employment which denial left unanswered the question of employment of the driver who had indeed been in charge of the vehicle. The vehicle at the time of the accident, was said to have been full of passengers. It was also, on the showing of the defendant, plying its authorized route at the material time. It seems to me that sufficient evidence was adduced by the plaintiff to demonstrate that everything about the operation of the vehicle that day suggested that it was operating as public transportation which on the showing of the defendant, is its ordinary use and that, for the benefit of the owner of the vehicle, the defendant herein. Had it been found to be in use in other circumstances than its ordinary use, the burden of proof would have been on the plaintiff to establish that the vehicle was within the control of the defendant and for his benefit.

The defendant admitted that the vehicle that was involved in the accident was his and furthermore, that its regular route was the one on which it was found at the time of the accident. He acknowledged that the driver Linda informed him that due to the accident, the journey could not be completed and no money was earned. He did not deny that the vehicle had been full of passengers at the time of the accident, and he did not as aforesaid, specifically deny an employment relationship between himself and the driver Linda in his plea although he did so in his sworn testimony. It seems to me that all these raised the presumption that the driver Linda had either been employed by the defendant, or else, was in the position of an employee who was engaged in the work of carrying passengers for the benefit of the owner of the vehicle. In these circumstances, the burden of proving that the driver was unauthorized and further, that he was on his own frolic shifted onto the defendant whose duty it was to adduce sufficient evidence to establish that as a fact.

The defendant did not meet this burden. His protestations were not corroborated by any evidence documentary or otherwise, that the driver Linda used the vehicle without his authority or for his benefit. The driver Linda Dlamini was not called to testify as to how he came to be in charge of the vehicle and the terms on which he carried passengers on the regular route plied by the vehicle at the time of the accident. Neither was the said Mashwama who the defendant alleged was the vehicle's driver and his employee, who gave the vehicle out to the driver Linda Dlamini.

The principles of vicarious liability where a master-servant or principal/agent relationship is established are trite. But even where such a relationship is not proven but a man's chattel is used in an act that causes

damage to another, it is settled law that that owner may be held vicariously liable where it is established that not only did he retain a right to control the use of his property, but that he had an interest in interest the purpose for which the wrongdoer used it. Such a situation has been described as a situation analogous to employment, see: ***Messina Associated Carriers v. Kleinhaus 2001 (3) SA 868 (SCA)***.

The evidence led by the plaintiff was sufficient to establish that the defendant's vehicle, even if not driven by its regular driver and servant/agent of the defendant, was, being in the charge of the driver Lind Dlamini, in use as public transportation on which passengers were carried on its regular, authorized route. That the defendant allegedly obtained no income from the driver Linda was on his own showing, due to the fact that the journey was not completed that day. Having said that the burden of proof shifted onto the defendant who asserted that the driver of his vehicle at the material time was not only unauthorized, but did not drive for the defendant's purpose and benefit, I must emphasise that this is a case in which corroboration of the defendant's assertions was essential. There was no corroboration of the defendant's assertion that at the time of the accident, the vehicle had been in the charge of a stranger unconnected to him. He did not adduce evidence to demonstrate that at the time of the accident he had no control over the use of the vehicle, nor did he rebut the presumption that he had an interest in the act of carrying passengers on his vehicle plying its regular route.

In the absence of such cogent evidence, I hold it to be a fact that the vehicle which was driven by Linda Wesley Dlamini as public transport, on which he carried passengers on its regular, authorized route, was for the

benefit of the defendant, the owner thereof. I therefore hold the defendant vicariously liable for the wrongful act of the driver Linda Wesley Dlamini which caused damage to the plaintiff's vehicle and led to his loss.

Judgment is therefore entered for the plaintiff for the sum of E13,000 with costs.

DATED THE 27TH DAY OF FEBRUARY 2009

HIGH COURT JUDGE