

HELD AT MBABANE

BETWEEN

SIFISO CHRIS MADUNA...

PLAINTIFF

THE COMMANDER OF UMBUTFO
DEFENCE FORCE...

FIRST DEFENDANT

JOSEPH MSIBI...

SECOND DEFENDANT

THE ATTORNEY-GENERAL...

THIRD DEFENDANT

CORAM

AGYEMANG J

FOR THE PLAINTIFF:

B.

NGCAMPHALALA ESQ.

FOR THE DEFENDANTS:

K.

MNGOMEZULU ESQ.

DATED THE 3RD DAY OF MAY 2010

JUDGMENT

In this action the plaintiff claims the following reliefs:

1. Payment of the sum of E38,000;
2. Interest at the rate of 9% per annum;
3. Costs of suit;
4. Further and/or alternative relief.

The plaintiff is an adult Swazi male who alleges himself to be the owner by purchase of a Toyota Corona motor vehicle with Registration No. SD 943 YG.

The first defendant has been cited in his capacity as head of the Army in Swaziland. The second defendant is a soldier employed by the Swaziland Army and the driver of a Toyota Hilux with Registration No. S199, belonging to the Swaziland Army, headed by the first defendant. The third defendant has been sued in a nominal capacity.

It is common cause that on or about the 23rd day of January 2005, at about 15:20 pm, the two vehicles aforesaid were involved in an accident along the Nhlanguano/Casino Public Road. The plaintiff's vehicle was driven by one Zakhele Mthembu who gave evidence for the plaintiff in this case.

It was the case of the plaintiff that he bought the vehicle for the price of E38,000 from one Nhlanhla Clement Thwala. He tendered the copy of a sale agreement between himself and the said Thwala in evidence. It was admitted as exhibit B. He alleged the sale to have taken place on 3rd December 2004. The vehicle he said was a 1993 model which was in good shape and furthermore, it had such features as a working air-conditioning system and radio speakers. The plaintiff alleged that the vendor of the vehicle put him in possession of the motor vehicle and gave its blue book to him to enable him travel out of the country, but did not transfer the ownership thereof to him. This was because the plaintiff who had made a part payment of E20,000 still owed E18,000 on the transaction. He alleged that the vehicle had been in his custody for just about six to eight weeks when having lent the use thereof to his friend Zakhele Mthembu, it was involved in an accident on or about 23rd January 2005 along the Nhlanguano road. The plaintiff testified that following the accident, mechanics declared the vehicle damaged beyond economic value. It was then towed to a place called Monene, he did not know what

happened to it thereafter. He testified that he was never able to effect the change in ownership at the Central Motor Vehicle Registry although he eventually made full payment of the vehicle's purchase price because the vehicle would not pass the requisite test, having been extensively damaged in the accident. He also misplaced the blue book. In spite of these, it was the plaintiff's case that he was the owner of the vehicle driven by Zakhele Mthembu on that day, and had the requisite capacity to bring the present action.

The plaintiff alleged in pleading that the accident was caused by the negligent driving of the second defendant the particulars of which he gave as follows: that,

1. The second defendant failed to keep proper control of the motor vehicle
2. That he failed to keep a proper look-out;
3. He failed to apply his brakes timeously or at all;
4. He failed to prevent the accident when by use of due care and skill, he could and should have.

The plaintiff further alleged that his vehicle was damaged beyond economic repair. Thus did he make a claim for inter alia, the sum of E38,000 being the alleged pre-accident value of his vehicle.

The driver of the plaintiff's vehicle, the said Zakhele Mthembu in support of the plaintiff's case testified that on that fateful day, he was returning from Phumula Guest House at Nhlngano where he had gone to carry out a television cable installation contract to Manzini. He had been in the company of his now estranged girlfriend. It was his evidence that he was

on his way to the city centre to buy some petrol when he was involved in the accident. He described the circumstances that led to the accident thus: that it was a clear day and he was travelling on a straight road. Along the straight road to its right, was a bus rank from which buses joined the main road at a T-junction. At the T-junction three stop signs were displayed in the following directions: from the bus rank to the main road, from Nhlanguano to the bus rank, and from the main road to the city centre. According to the witness, when he got to the T-junction, he stopped his vehicle to allow a bus coming from the bus rank which was Nhlanguano-bound, to enter the main road. He testified that it was while he was concentrating on the bus that he heard a loud bang: a vehicle had collided with his. The witness alleged that his vehicle was hit at the right side, from the bonnet to the driver's door. Following the collision the witness fell unconscious and remained in a coma for one week. After he recovered sufficiently to move about, he went with the plaintiff to look for the driver of the other vehicle who he had been informed was a soldier. The purpose he said, was to seek an amicable settlement of the matter. When the attempt proved fruitless (as they were unable to meet with the said driver), the plaintiff commenced the present action for the reliefs aforesaid. The witness tendered a Police Accident Report in support of the plaintiff's case. It was admitted as exhibit A.

Albert Vilakati, a mechanic who has been in the employment of Fortune Panel Beaters since 1995 and whose work entails panel beating and painting of vehicles, gave evidence in further support of the plaintiff's case.

Tendering a report on the vehicle from his company, he testified that the motor vehicle with Registration Number SD 943 YG which had been involved in an accident was taken to his company by the plaintiff for repair work and that he was personally responsible for the repair work. He alleged that an inspection of the motor vehicle however revealed that the chassis number of the vehicle was damaged. The chassis number he said, was an integral part of the car and damage thereto meant the vehicle was no longer in existence. Thus was the vehicle found to be damaged beyond repair and declared a write-off.

In their pleading, the defendants denied that the second defendant was negligent and alleged that the accident happened at cross-roads where there was no traffic stop sign and the painting on the road was invisible. Furthermore, that it was near impossible to see the adjoining road due to bush overgrowth. The defendant pleaded also that the driver of the plaintiff's vehicle was contributorily negligent in that he failed to keep a proper look-out. The defendant however failed to lead evidence in line with the said defence.

The sole witness of the defendant, was an employee of the Swaziland Government Treasury – the Central Motor Registry. He testified that contrary to the evidence of the plaintiff, the official records of the Central Motor Registry showed that the motor vehicle with Registration Number SD 943 YG was owned not by the plaintiff, but by Clement Thwala and moreover, the vehicle's licence was valid and was paid up in taxes till the present time. He averred that official procedures that were requisite for a change of ownership from the name of Clement Thwala into the name of the plaintiff herein were

never done. This procedure he said included going through processes at the Customs, Police, Income Tax, Revenue Department and the Central Motor Registry within seven days of the purchase of a motor vehicle. According to official records therefore, the owner of the vehicle that was involved in the accident SD 943 YG was not the plaintiff but the said Clement Thwala.

The witness also testified that in the official record of the Central Motor Registry, the said vehicle was operational as its licence was still valid and it was paid up in taxes. Once again, it was his testimony that the process of deregistering a motor vehicle that had been declared a write-off were not adhered to. This process culminated in the issuance of a de-registration or cancellation certificate upon submission of the vehicle's blue book.

The witness also testified that according to official records, the customs declared value of the motor vehicle in question was the sum of E8, 473.

At the close of the pleadings the following stood out as issues to be determined:

1. Whether or not the accident was caused by the negligence of the second defendant;
2. Whether or not the vehicle was damaged beyond repair;
3. Whether or not the plaintiff is entitled to his claim.

As aforesaid although the defendants joined issue with the plaintiff in their general denial of liability, the matters it relied on to negate negligence being the condition of the road, and their plea of contributory negligence were not pursued at all in evidence. Thus, the evidence they led did not give rise to issues that ought to be resolved for findings of fact to be made. Rather, they adduced evidence to challenge the capacity of the present plaintiff to sue for

loss or damage to vehicle with Registration Number SD 943 YG which per official records, belonged to Clement Thwala and not to the plaintiff.

Was the accident caused by the negligence of the defendant?

The evidence led by the plaintiff per PW1, the driver of the motor vehicle was that the second defendant came upon the plaintiff's vehicle being driven by PW1 suddenly while the latter had stopped at a T-junction where stop signs abounded, for a bus to enter the main road. The witness described the road as straight and the weather as clear and in fact, that the sun was up. It seems to me that the plaintiff's evidence constituted prima facie evidence of negligence on the part of the second defendant who in the circumstances described, hit the plaintiff at the right side, from the bonnet to the driver's

side, see: **SS**. Evidence in rebuttal of this was called for, **SS**. The defendants who pleaded that the condition of the road including a lack of stop signs caused the second defendant to collide with the plaintiff's vehicle failed to adduce evidence. The plaintiff's prima facie evidence was thus not rebutted and stood as the only account of what happened that day when the accident occurred. I find then that the plaintiff's allegation of negligence on the part of the second defendant, driver Toyota Hilux with Registration No. S199 has been proven on the balance of the probabilities. I hold the same to be a fact.

Was the motor vehicle with Registration Number SD 943 YG damaged beyond economic repair?

The plaintiff testified that the said motor vehicle was damaged beyond economic repair. His allegation was supported by the mechanic who worked on it when it was towed to Fortune Panel Beaters following the accident and

by exhibit C, the report that which was issued by the said garage in respect of the vehicle.

But though the defendants did not give evidence regarding the matters they pleaded, evidence led by the defendants per the official of the Central Motor registry was that the said motor vehicle was not a write-off as its licence was still valid and its taxes paid-up, that it was operational.

The burden of proof of the plaintiff's assertion that the motor vehicle with Registration Number SD 943 YG was damaged beyond economic repair lay with the plaintiff. As aforesaid, the plaintiff relied on the evidence of the mechanic to prove this allegation. In the face of exhibit 1 however, the prima facie evidence led by the plaintiff regarding the extent of damage was challenged and successfully rebutted. This is because if there were official procedures to be followed in the event of damage of a vehicle beyond economic repair, same would constitute actual notice to the whole world that the motor vehicle was a write-off. If the plaintiff failed to follow the requisite procedures, his assertion was belied by official records was evidence in that circumstance, the plaintiff will be held to have failed to meet the burden of proof he assumed as plaintiff who asserted that his vehicle had been declared a write-off. Moreover, there is a presumption of regularity in official records. Where such records show that the said vehicle's papers are valid and its liabilities are met, indicating that it is operational, the plaintiff's assertion of damage beyond economic repair is placed in question. The plaintiff's case was not helped by his failure to produce the vehicle's blue book in the circumstances. I find then that the plaintiff failed to meet the

burden of proving his allegation of the damage of the said motor vehicle beyond economic repair. I hold the same to be a fact.