



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No.523/04

In the matter between:-

NCAMSILE PERTUNIA NDLOVU

Plaintiff

and

MOTOR VEHICLE ACCIDENT FUND

Defendant

Neutral citation:

*Ncamsile Pertunia Ndlovu v Motor Vehicle
Accident Fund (523/04) [2012] SZHC .. (12th June
2012)*

Coram:

HLOPHE J

Hearing dates:

15/02/12, 16/02/12, 20/02/12
22/02/12 and 27/02/12

Delivered:

12th June 2012

For the Plaintiff:

Mr. N. Fakudze

For the Defendant:

Mr. S. Masuku

JUDGMENT

- [1] Following the collision of two cars along the MR 9 road, which is popularly known as the Mhlaleni - Nhlangano road, the Plaintiff, who was a passenger in one of the cars - SD 598 JS - which was a Mistubishi Kombi driven by one Mbongiseni Sibandze, instituted Action Proceedings in terms of which he sued the Defendant, a Statutory Body established for purposes of compensating victims of motor vehicle accidents, in which negligence can be attributed to the insured driver, for damages and compensation.
- [2] It is common course that the collision occurred on the 11th December 2001 at or near a place called KaMdabula area along the road mentioned above. It involved Motor Vehicle SD 598 JS - a grey Mistubish Kombi - in which the Plaintiff was a passenger and SD 232 IS - a Ford Cortina Sedan - driven by the insured driver. SD 598 JS was driven by Mbongiseni Sibandze, a fiancée to the Plaintiff at the time, (and now her husband) whilst SD 232 IS was driven by one Bruce Carmichael.
- [3] It is further common course that the collision concerned occurred at around 2200 hours on the day in question. There is further no dispute that at the time of the collision, the weather condition was bad, as it was misty with thick fog, drizzling and with a wet tarmac.
- [4] Although it was initially being disputed how many cars were at the scene at the time of the collision, it later became common course that three cars were there at the time with the two mentioned above being the ones that collided. The other motor vehicle, which is shown to have been at the scene at the time was SD 343 DN, driven by one Muhle Shongwe. Otherwise this car, it is common

ground is the one that transported all the victims of the accident to hospital.

- [5] Otherwise SD 343 DN and SD 232 IS were driving towards the Hlathikhulu direction from the Nhlangoane one whilst SD 598 JS was driving towards Nhlangoane from the Hlathikhulu direction.
- [6] There is however a dispute as to how the collision occurred or even as to who was responsible or can be said to have caused it. Naturally, whilst Plaintiff avers it was a result of the negligent driving of the driver of the insured car, Bruce Carmichael, the Defendant avers the opposite, which is that the cause of the collision was the negligent driving of Mbongiseni Sibandze who drove SD 598 JS in which Plaintiff was a passenger.
- [7] The Plaintiff's version as testified to by the Plaintiff herself, is to the effect that on the day in question and whilst a passenger in SD 598 JS, driven by her fiancée at the time, Mbongiseni Nsibandze, and as they were driving from Hlathikhulu towards Nhlangoane and at KaMdabula area, their motor vehicle aforesaid was involved in a collision with another motor vehicle - SD 232 IS - driven by Bruce Carmichael. Whilst approaching the place where the collision occurred, and just shortly before the collision occurred, she, whilst seated on the front passenger's seat of the kombi she was travelling in, noted very bright lights from an oncoming car, subsequent to which she heard her fiancée comment, "where does this one come from" as he tried to avoid the said car. What was to follow was a loud bang as a result of which she claimed to have sustained serious injuries as the point of impact on the car was on her side.

- [8] When she saw the bright lights of the oncoming car, the motor vehicle she was travelling in was on its proper lane of the road - being the Hlathikhulu -Nhlangano lane - with the oncoming car also driving on the same lane but towards the opposite direction, which was improper for it to do. The impact of the collision was to result in the car she was in being flung for some 87 metres from the point of impact, whilst the sedan they collided with was forced to turn around and face the direction from which it came - Nhlangano direction - whilst it landed some 12 metres or so from the point of impact and on the Hlathikhulu - Nhlangano lane of the road which was not its proper lane. (Of course the distances are as measured by the Traffic Police who later attended the accident).
- [9] She recalls being transported to the Hlathikhulu Government Hospital following the serious injuries she says she suffered as a result of the collision by means of a motor vehicle she sounded to be knowing very little about.
- [10] I note the following from her evidence: - she does not say anything about any other car that was either turning right or one they met at that place at the time. In fact the only issue of note observed by her at that point, were the bright lights from the oncoming car on their lane and which were immediately followed by the comment she attributed to her fiancée as she says he, tried to avoid the oncoming car and thereafter the bang caused by the colliding cars.
- [11] After her evidence the Plaintiff closed its case from which that of the Defendant commenced. The Defence led two witnesses in DW 1, the driver of motor vehicle SD 232 IS, Bruce Carmichael and one Samson Sihlongonyane who was a passenger in SD 232 IS at the time of the collision. Otherwise the version rendered by the said

witness is to the effect that, they were driving from Nhlangano to Hlathikhulu on the night of the 11th December 2001, in SD 232 IS, which was driven by DW 1, Bruce Carmichael. The weather was not good as it was drizzling and heavily foggy. As a result one could not see very far and the tarmac was wet. Along the way they said they caught up with a certain kombi. This kombi they followed for some four or five kilometers until it reached a certain junction at a place called KaMdabula, where it signalled by means of indicators, to be turning right into a certain junction. They said that the vehicle concerned was allowed to execute a right turn into the said junction after which there emerged another kombi, heading towards Nhlangano, but driving on the wrong lane as it drove on the lane of a motor vehicle driving towards Hlathikhulu.

[12] Because of the suddenness of the appearance of this motor vehicle at the scene, there occurred a collision between their motor vehicle and the oncoming one which bore registration numbers SD 598 JS.

[13] Apparently, so they alleged, SD 598 JS, was avoiding the kombi they were following which was executing a right - turn from the Nhlangano direction into the junction situate at KaMdabula area, when it collided with their motor vehicle.

[14] DW 1, Bruce Carmichael, denied that the collision occurred on the Hlathikhulu - Nhlangano lane but averred that the point of impact was on the middle of the road.

[15] This witness also alleged that SD 598 JS was driving at too high a speed as manifested by the distance at which it was flung upon the impact, which he said was a result of it spinning away and landing 87 metres away from the point of impact on the

Nhlangano - Hlathikhulu side of the road and more towards Hlathikhulu when viewed from the point of impact. He contended that the fact that the car in which Plaintiff was travelling was hit on its left side front corner, was an indicator that it was on his side of the road as it should have been hit on the right hand side if it was indeed travelling on the Hlathikhulu - Nhlangano lane.

[16] It was agreed that this court would have to go and inspect the scene so as to have a better idea on how the setting was. Otherwise the crown also closed its case after leading the two witnesses aforesaid, whose evidence corroborated each other.

[17] This is the situation the court found itself in - that is two contradictory versions. Of course I was alive to the fact that the matter could in such a situation be decided on the basis of the onus - which is to say had the party with the onus - the Plaintiff in accord with the principle "he who alleges must prove" - discharged such an onus. I however felt that deciding a matter like the present one on this basis whilst legally correct may not yield justice, which is the primary goal in court matters.

[18] What struck me as odd was that neither the driver of SD 598 JS nor the Traffic Police who attended the scene was being called, particularly by the party who had an onus to discharge. Whilst it is not the business of the court which witnesses a party calls or does not call, I found it odd that I would deal with a collision matter without at least having the benefit of the Police Officer who attended the scene and conducted investigations. The oddness of the situation was exacerbated by the fact that neither a Police Report nor a sketch plan on the accident / collision was handed in as evidence for the court to be best informed.

[19] I must say that from the evidence before me at this stage it was clear there was glaringly absent the evidence of one Mbongeni Sibandze said to have been the driver of SD 598 JS; the investigating Police Officer or the one who attended the scene and possibly drew a sketch plan over and above interviewing possible witnesses and that of the driver of the kombi said to have been followed by SD 232 JS and allegedly said to have executed a right-turn into the junction. I must say I was not even sure there was such a car in the first place because the Plaintiff was denying whilst the Defence witnesses were adamant there was. I felt that without descending into the arena and appearing to be assisting the party who was obviously failing to discharge the necessary onus, it would be in the interests of justice for the court to call at least the investigating officer so that the court is best informed on at least what he found at the scene including what the investigations uncovered if anything.

[20] The investigating officer or the Police Officer who attended the accident, I was informed by both Counsel, was 3270 - Constable Colani Vincent Motsa. Mr. Motsa gave evidence and stated *inter alia* that he is the Police Officer, who after receiving a report whilst at Hlathikhulu Police Station where he was based, attended the scene of the collision forming the subject matter of these proceedings. He attended the said incident at around 2200 hours, whilst in the company of two other colleagues. Upon arrival at the scene he said he was able to see the two vehicles said to have been involved in the collision. SD 232 IS, remained on the Hlathikhulu - Nhlango lane and was facing the Nhlango direction whilst SD 598 JS remained outside the road particularly on the Nhlango - Hlathikhulu road side and was facing the road on a somewhat 90° angle as it parked by some shrubs. He said he was able to identify the point of impact on the road which was on

the Hlathikhulu - Nhlangano lane and was some 24 paces or metres from the junction referred to above whilst it was 20 cm from the barrier line separating the two lanes. SD 232 IS was 12 metres from the point of impact, whilst SD 598 JS was some 87 metres from the point of impact. These measurements were borne out on the sketch plan he said he prepared which he read in court. Some other measurements not appearing *ex facie* the sketch plan were as identified during the inspection in loco exercise.

[21] Constable Motsa went on to testify that he established that there was indeed a kombi travelling from the Nhlangano direction, and followed by SD 232 IS which however had signalled to turn into the right -junction from the Nhlangano direction. This motor vehicle was driven by one Muhle Shongwe, who had gone on to provide the Police with a statement on what had happened resulting in the collision. He had also managed to obtain a statement from the driver of SD 598 JS, Mbongiseni Sibandze. He handed in these statements as part of his evidence together with the sketch plan he had prepared depicting among other things the point of impact, where motor vehicle SD 232 IS landed, where SD 598 JS landed, as well as where the junction referred to was *vis - a - vis* the point of impact and the stationery SD 232 IS. There was no objection to the handing in of these documents.

[22] Both parties sought to rely on the statements albeit for different reasons. This suggested to me that the statements concerned were being handed in by consent. Indeed none of the parties objected to the court placing reliance thereupon. I will therefore conclude that the statements can and should be utilized even though they would have been ordinarily in the nature of hearsay evidence if they had not consensually been utilized including their

being relied upon. Furthermore both parties relied on the said statements for one reason or the other.

[23] On the relevant point, the statement by Muhle Shongwe revealed that he was driving home along the Nhlanguano - Hlathikhulu road and was from the Nhlanguano direction when around Mdabula area, he noted he was being followed by a certain motor vehicle, which turned out to be SD 232 IS.

[24] He then signaled a right turn into a certain junction, where his home was. The car behind him was driving too close to his notwithstanding that he was indicating his intended turn. It was whilst indicating such a turn that the vehicle following his car knocked it from behind. As he noted an oncoming car, and sensing danger, he decided not to turn anymore but instead to drive forward along the lane to Hlathikhulu. He drove to where the KaMdabula shops were situated and because he did not see the car that had been following him he stopped. This prompted him to return to see what had happened and he discovered that there had occurred a collision hence his decision to take all those involved in the collision and rushed them to the Hlathikhulu Government Hospital.

[25] On the other hand the driver of SD 598 JS stated in his statement that whilst approaching the junction concerned at KaMdabula area he observed a motor vehicle that had slowed down and was indicating to enter into the junction on his left as he headed towards Nhlanguano, otherwise that motor vehicle's right hand turn. This kombi however ended up not entering into the said junction but proceeding forward along the Nhlanguano - Hlathikhulu lane. It was at that time that he noted an approaching motor vehicle which suddenly appeared behind the car he was meeting

and it was driving on his lane, which was the Hlathikhulu - Nhlangano lane. It was apparently trying to overtake the other kombi that he was meeting. There was then what he termed a head on collision, which resulted in the passengers he had in his car who included the Plaintiff being seriously injured.

[26] I am now required to determine who between the parties was negligent as it was common course that is how liability in matters of this nature is to be determined. Defining negligence, **Mckerron's The Law of Delict, Seventh Edition, Juta and Company at page 25**, stated the following:-

“Considered as an objective fact, negligence may be defined as conduct which involves an unreasonable risk of harm to others. It is the failure in given circumstances to exercise that degree of care which the circumstances demand.”

[27] In the case of negligence in driving, **W. E. Cooper on the South African Motor Law, 1965 Juta and Company, at page 247**, puts the position as follows:-

“Driving is an activity which requires skill and experience and a motorist is obliged to acquire the necessary skill and experience before driving a motor vehicle. Should he drive without the necessary skill and experience he may be guilty of negligence.”

[28] On the evidence before me I have no hesitation that the collision and the point of impact occurred some 20 centimetres from the barrier line demarcating the two lanes. I conclude that same was caused by negligence on the part of the driver of SD 232 IS because; he drove too fast in circumstances where his visibility

was not clear as a result of the fog as well as the fact that the tarmac was wet. I also find that because of this high speed in the circumstance of the matter, he hit the motor vehicle he was following which had already signaled it was turning right. This knocking of the car he was following is in my view the one that resulted in him losing control of his motor vehicle which veered into his wrong lane. This resulted in his car colliding with that driven by Mbongiseni Sibandze. Clearly this car (SD 598 JS) had to attempt to avoid SD 232 IS which was now driving on its lane by driving into its right, hence the two cars colliding at the place they did on the road. It shall be remembered that there is no dispute over the fact that the two cars hit each other on the left hand sides which can only mean that SD 232 IS was fully on the Hlathikhulu - Nhlangano lane which was otherwise not its lane. Furthermore I have rejected Bruce Carmichael's version that the motor vehicle he was following turned right but accept that it did not execute the said turn after his car bumped it but continued along the Nhlangano - Hlathikhulu lane. This I do because of the apparent corroboration of the versions expressed in the two statements on this point.

[29] I am therefore convinced that the entire collision is attributable to the negligence of the driver of SD 232 IS. It was common course between the parties that my determination of who was negligent between the parties shall determine the issue of liability of the parties.

[30] It was otherwise agreed between the parties that at this stage I merely had to determine whether the Defendant was liable and end there as the parties would decide afterwards whether or not it was possible for them to settle the question of the quantum of damages. I have now come to the conclusion I have including

having reached this stage of the proceedings, as agreed between the parties, the way forward in the matter will now remain in their hands.

Delivered in open Court on this theday of June 2012.

**N. J. HLOPHE
JUDGE**