



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No: 3351/2010

In the matter between:

MOSES MYENI T/A SINENKOSI

PLAINTIFF

and

MANZINI CITY COUNCIL

DEFENDANT

Neutral citation: Moses Myeni t/a Sinenkosi and Manzini City Council (3351/2010) [2011] SZHC 125 (13/7/2012)

Coram: MABUZA J

Heard: 25/10/2011, 26/10/2011, 10/4/2012.

Delivered: 13/7/2012

Summary: Damages - Action for damages - For loss of business - Assessment of - Apportionment of damages - Claim reduced thereby - Damages awarded to the plaintiff.

- [1] The plaintiff sued the defendant herein for payment of E40,700.00 in respect of loss of business interest at 9% and costs of suit. The cause of action arose on the 20th February 2010 when the defendant's motor vehicle collided into the plaintiff's motor vehicle on its rear end. Siyabonga Andreas Sithole drove the defendant's motor vehicle a refuse truck and Michael Siphso Mavuso drove the plaintiff's motor vehicle.
- [2] The plaintiff's motor vehicle is a mini-bus (kombi) and transports passengers for reward. It is non-scheduled which means that it goes up and down with no time restraints. Both drivers were on duty and the accident occurred during morning hours at about 9.30 hrs along Ngwane Street in Manzini.
- [3] The amount sued for in respect of loss of business is from the 20th February 2010 being the date of the accident to the 5th May 2010 when the defendant resumed business operations. It is alleged by the Plaintiff that the loss of business occurred while his motor vehicle was being repaired at the behest of the Defendant.

- [4] The Defendant admitted that its driver was the cause of the accident but denies that it was the cause of the plaintiff's loss of business for the entire duration of the period stated and that the defendant should take responsibility for part of the delay it took to repair the said motor vehicle and by extension some of the loss of business.
- [5] The plaintiff computed his daily loss of business at E550.00 per day; the defendant denies this figure on the ground that it is not market related and that there are buses and many kombis on the stated route.
- [6] In order to prove that the delay in repairing the motor vehicle was caused by the defendant, Moses Myeni (PW1) the owner of the kombi gave evidence in support thereof. He testified that it was a 15 seater and plied the route between Manzini city and Matsapha Industrial Sites. He produced a permit (Exhibit "A") in respect thereof. He stated that after the accident the defendant asked him on the 20/2/2010 (Friday) to furnish three quotations for the repair of the kombi which he did and submitted four quotations on Monday the 23/2/2010. One of the quotations was from the Defendant's preferred garage called Out of Africa. The defendant's insurers who preferred the more reputable Auto

Garage rejected the quotations including that of Out of Africa. Even though he was unhappy about the preferred garage, he took the kombi there. He cannot recall when he did so.

[7] He later removed the kombi. The garage had not started repairs on it as it was awaiting authorization from the defendant who had lodged a claim with its insurers Messrs Aon. Messrs Aon rejected the claim and the defendant had to repair the kombi using its own resources to pay for it. As they normally used Auto Garage the defendant gave the go ahead for the kombi to be repaired and the plaintiff returned it.

[8] He stated that the period between submitting the quotations on the 23/2/10 to when he removed the kombi from Auto Swazi was one week and three days; and from the time he returned it the second time to its release on 5th May 2010 was one month.

[9] When the defendant's transport officer Donald S. Dlamini (DW1) gave evidence he stated that on the 23/2/10 he met with the plaintiff and asked for three quotations which included Auto Swazi. The plaintiff requested that he park the kombi at a garage where he normally parked overnight known as Folish Filling Station. The kombi was parked there from the 23/2/2010 -

28/2/2010. It was removed on the 28/2/2010 or 1/3/2010. When DW1 noticed that the Kombi was no longer at Folish Filling Station he insisted that the plaintiff take it back to Auto Swazi which he did but after three days removed it around the 3rd or 4th March 2010. After much persuasion the defendant returned the kombi to Auto Swazi on the 25th March 2010 after three weeks and three days. On the 5th May 2010 after being fully repaired it was released to the plaintiff.

[10] DW1 was undeterred in his evidence even after cross-examination that the plaintiff kept the kombi for three weeks and three days. The plaintiff on the other hand could not recall when he removed the kombi from Folish filling station nor when he took it to Auto Swazi.

[11] I am persuaded by the evidence of DW1 who gave evidence in a clear and credible manner. He was well informed having been employed by the defendant for twenty nine (29) years. He was very conversant with managing the defendant's fleet of cars, where they were repaired and over comprehensive insurance matters. The plaintiff on the other hand was vague about his business affairs; in fact his driver PW2 knew more about the business than his employer did.

[12] I hold therefore that the plaintiff lost business from the 20/2/2010 to 4/3/2010 (15 days) and from 25/3/2010 to 5/5/2010 (42 days) which adds up to 56 days and this loss I attribute to the defendant. The loss that the plaintiff suffered from the 5/3/2010 to the 25/3/2010 (20 days) must be attributed to the plaintiff as he was the author of his own misfortune.

[13] I turn now to the amount(s) that the plaintiff collected each day in order to arrive at the loss that he claims he made. PW1 testified that the daily takings ranged from E450.00; E500.00; E650.00 and that the average or mean of these amounts comes to E550.00 per day. This excludes petrol money which came to E600.00 per day. The driver of the kombi normally recorded the day's takings at the back of the petrol receipt and other expenses and gave PW1 the rest of the money which he either banked or used for his personal needs as he was not employed. He produced bank deposit slips (Exhibit B1 - 5). As he had not discovered the petrol receipts Mr. Ginindza successfully opposed their being handed in. PW1 asked the court to disregard the amount of E30,000.00 deposited on the 2/3/2010 as it belonged to his church who had requested temporary use of his bank account. The amount claimed was calculated from the

21/2/2010 to 5/5/2010 = 74 days x E550.00 totaled E40,700.00. His kombi traveled up and down several times per day between Manzini and Matsapha during peak time in the morning and late afternoon and between Mhlaleni and Industrial sites, Matsapha in between peak hours.

- [14] His driver, Michael Mavuso (PW2) corroborated the evidence of PW1. He stated that the gazetted fare that he charged per passenger was E4.00 per one way and one load amounted to E60.00. Business hours were from 5.00 a.m. to 6.00 p.m. On a good day his takings total led E1200.00 and on an average day E900.00. Daily deductions made from the takings include petrol and food for the driver and conductor which amounted to E60.00. He stated that between 5.00 a.m. and 6.15 a.m. he makes 4 return trips between Manzini and Matsapha; from 6:15 a.m. to 7.00 a.m. he does two return trips between Mhlaleni and Industrial sites. After the busy morning hours he returns to the Manzini bus rank to queue up. He makes three return trips to Matsapha. After that it becomes busy and he does two trips between Mhlaleni and the Industrial sites at 5.00 p.m. At 5.35 p.m. he drives to the Industrial sites picks up a load and returns to Manzini where he picks up another load and goes to the Industrial sites where after offloading picks up the last batch of

passengers and drives back to Manzini. After offloading he goes and parks for the night.

[15] Like most small businessmen the plaintiff does not keep a formal accounting record of his business transactions. I am satisfied from the evidence adduced that the plaintiff indeed operates a transport service and charges his passengers the gazetted fee. He deducts basic charges as stipulated including wages for the bus driver and conductor. Even though the court was not informed what the deductions for the wages were nor for regularly servicing the kombi. I accept the average daily figure of E550.00 per day. Therefore $E550.00 \times 56 \text{ days} = E30,800.00$.

[16] In the event I find for the plaintiff and order as follows:

- (a) The defendant is ordered to pay to the Plaintiff the sum of E30,250.00 (Thirty thousand two hundred and fifty Emalangeneni).
- (c) Interest thereon at the rate of 9% *a tempora morae* from the date of judgment to date of full payment.

(b) Costs of suit on the ordinary scale.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant

Mr. M. S. Dlamini

For the Respondent

Mr. F. Ginindza