IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 1983/10

In the matter between

ALIKI ENTERPRISES (PROPRIETARY) LIMITED PLAINTIFF

and

PUNKY MHLONGO 1ST DEFENDANT
FIRST INTERNATIONAL INVESTMENT2ND DEFENDANT

Neutral citation: Aliki Enterprises (Proprietary) v Punky Mhlongo (1983/10) [2012] SZHC 82

Coram: OTA J.

Trial dates: **27th March 2012, 28th March 2012 and 4th April 2012**

Delivered: **19th April 2012**

Summary: Claim for the sum of E56,074.91 for repairs to Plaintiff's vehicle, as a result of collision caused by 1st Defendant's negligence, Principles of negligence; Who is a reasonable

person? whether 2nd Defendant vicariously liable for 1st Defendants negligence.
Held: 1st Defendant negligent, liable to pay the amount claimed. 2nd Defendant not vicariously liable for the negligence of 1st Defendant.

[1] On the 2nd of August 2007, along Nkoseluhlaza street in Manzini, the Plaintiff's vehicle A 2009 model VW Golf, with registration number SD 738 VN, then driven by the Plaintiff, collided with a Mercedez benz sedan with registration number SD 636 ZL, then driven by the 1st Defendant. Both vehicles were damaged as a result of the collision. Suffice it to say that, in consequence of the damages on Plaintiff's vehicle and repairs resulting therefrom, that the Plaintiff instituted these proceedings against the Defendants claiming as follows:

1) Payment of the sum of E56,074.91 (Fifty Six Thousand and Seventy Four Emalangeni and Ninety One Cents).
2) Interest thereon at the rate of 9% per annum a *tempora morae* from date of summons to date of payment.

3) Costs of suit.

4) Further and/or alternative relief.

[2] The Plaintiff's case is that the collision was caused by the 1st Defendant who was negligent. Plaintiff detailed particulars of the alleged negligence in paragraphs 7.1 to 7.8 of his particulars of claim, as follows:-

> *''7.1 she drove without due care and attention, and/or*
>
> *7.2 she drove at an excessive speed in the circumstances, and/or*
>
> *7.3 she drove the motor vehicle recklessly and without having regard nor consideration for other traffic lawfully on the road; and/or*
>
> *7.4 she failed to avoid the collision when by the exercise of reasonable care and skill, she could and should have done so, and /or*
>
> *7.5 she failed to slow down turn aside and/or accelerate or take any precautionary action/measure so as to avoid the collision, and/or*
>
> *7.6 she conducted herself and acted in a manner that was dangerous to other road users; and /or*

7.7 she failed and/or neglected to satisfy herself that there was no other traffic on the fast lane before changing lanes; and/or

7.8 she swapped lanes without indicating to other road users her intention to do so and when it was not apportune to do so ''

[3] In paragraph 8 of his pleadings, the Plaintiff alleged, that in consequence of the 1st Defendants negligence, Plaintiff's motor vehicle was extensively damaged as a result of which Plaintiff sustained damages quantified at E55,674.91 (Fifty Five Thousand Six Hundred and Seventy Four Emalangeni Ninety One Cents) in respect of the fair and reasonable cost of repairs necessary to restore his vehicle to its pre-collision condition, plus the sum of E400-00 (Four Hundred Emalangeni) for towing fees.

[4] The Plaintiff further alleged in paragraph 9 of his pleadings, that the 2nd Defendant is vicariously liable for the conduct of the 1st Defendant, because 1st Defendant

was at all relevant times of the incident in the employ of the 2nd Defendant as a General Manager and was acting in the course and scope of her employment, as such at the time.

[5] In proof of the foregoing material allegations, the Plaintiff tendered evidence and called two other witnesses **PW 2 Sibeko Lucky Enock and PW 3, 4241 Constable CA Dlamini.**

[6] The relevant aspect of the Plaintiff's evidence is that, the collision occurred because the 1st Defendant was negligent. Plaintiff told the Court that on the day in question, himself and 1st Defendant were both driving in the same direction on the two lane one way road heading into Manzini . That Plaintiff was on the right lane and 1st Defendant was on the left lane. That the two vehicles must have been following each other from the circle which is about 500 – 700 meters away . Plaintiff told the Court that his vehicle must have been

5 meters away beside the 1st Defendants vehicle, when they approached a four way junction, that the 1st Defendant suddenly turned right into the Plaintiffs lane resulting in the collision. It was further Plaintiff's evidence, that 1st Defendant did not put on the hazards or indicators of her car before she made the right turn and that they did check this factor after the collision and these gadgets were not on.

[7] Plaintiff told the Court that at the time of the collision both cars were not traveling so fast, even though the 1st Defendants car was slower than Plaintiff's, however, Plaintiff must have been on a speed of 50/60kilometers per hour. Plaintiff further stated that he tried to avoid the collision but could not, consequently, he hit the 1st Defendant's vehicle just on the drivers side door either on or just behind the drivers right front wheel. That 1st Defendants vehicle went left and Plaintiff's vehicle spun left also. That after the collision, the 1st Defendant was taken by some people, including staff of the 2nd

Defendant, who had gathered at the scene, to the hospital. That Plaintiff called the police who arrived at the scene and he gave a statement but the 1st Defendant did not record a statement at the scene.

[8] The Plaintiff further told the Court, that the cause of the collision was because the 1st Defendant did not employ the due care and attention required of a reasonable driver. That a reasonable driver who wanted to make a right turn, would have slowed down, indicated, checked the rear and right hand mirrors to see if there was on coming traffic. Thereafter, she would proceed to changing lanes and making the right turn, but that 1st Defendant failed to employ this standard of care and attention. That the fault was not Plaintiff's because he was not charged with any offence.

[9] It was further Plaintiff's evidence, that as a result of the collision, his car sustained extensive damages. That the impact was on the left side of the vehicle, that both

air bags deployed. The windscreen, bumper and body of the front left, head lights, spot lights were all damaged. The front left wheel was also damaged. That the vehicle hit a pavement as it spun around resulting in the rear axel and rear wheel being damaged. That there was also some damage under the engine. That the vehicle was extensively damaged even though it did not look so bad.

[10] Plaintiff told the Court that after the collision his vehicle had to be towed from the scene by his insurers, Swaziland Royal Insurance Company, as it could not be driven. That before repairs commenced on the vehicle they got the police report (exhibit A), and police clearance, then they sought quotations for the repairs. That they did explore getting comparable quotations but ended up with the quotation from Magnum Panel Beaters, exhibit B. Plaintiff told the Court that the items emunerated in the quotation are in line with the damages sustained by the vehicle, amounting to

E49,237.58. That after the quotation was submitted, the insurance assessors assessed it, made a few adjustments and then approved it, as is shown in the assessment report exhibit C.

[11] It was further Plaintiff's case that he bought his vehicle brand new in July 2007. That he had been driving the vehicle for about a year before the collision. That the vehicle was insured with the Swaziland Royal insurers for about E224,000.00. That the amount expended in its repairs was reasonable as the vehicle was under warranty and had to be restored to the condition it was in, prior to the collision. Therefore, there was very little panel beating done as most of the damaged body works had to be replaced. This fact caused the escalation of the quotation price. That panel beating the vehicle would have had the big effect of probably negating the warranty on the vehicle.

[12] That the amount claimed is because after he received the vehicle, the air bag light would not go off. That he sent the vehicle back to the panel beaters, who traced the fault to seat belts that needed to be replaced, which were replaced, and the air bag sensors reprogrammed. That this additional repair cost E6,977.91. The Plaintiff also tendered exhibits D and E which are evidence in the sums of E48, 697.26 and E6,977.91 respectively, paid by Swaziland Royal Insurers to Magnum Panel Beaters, for said repairs.

[13] For his own part, PW 2 **Sibeko Lucky Enock**, an assessor with Swaziland Royal Insurance Company, told the Court that he inspected Plaintiffs vehicle and that it was only the front part that was damaged and the air bags burst. That an internal assessor with the insurance company, one Mavuso now deceased, was detailed to assess Plaintiffs vehicle and prepare a report. PW 2 told the Court that the insurers went through Mavuso's assessment report to satisfy

themselves that the damages alleged in the report were reasonable. PW 2 told the Court that from the quotation the insurers discovered, that most of the damaged parts of the vehicle could not be panel beaten. They therefore had to buy new parts so that the vehicle will not lose its warranty. PW 2 confirmed that the amount in exhibit C, increased to the sum of E56,074.91 claimed, because after the repairs, they realized that the seat belts were affected when the air bags affixed to them burst. The vehicle had to be returned for the seat belt to be repaired. PW 2 confirmed that the sum of E56,074.91 plus claimed constitutes a reasonable amount for the repair of the motor vehicle .

[14] Under cross examination PW 2 told the Court, that it was not the procedure for the insurance company to receive 3 quotations from 3 different companies before they could carry out any repairs on a vehicle damaged as a result of a motor accident. That it is not also the

procedure that the 1st Defendant must be involved in the procurement of quotation for and the repair process of the damaged vehicle.

[15] PW 3, **4241 constable CA Dlamini** attended the scene of the collision. His evidence confirmed Plaintiffs evidence that the collision occurred because 1st Defendant who was on the left lane turned right and collided with Plaintiff's vehicle. PW 3 confirmed that on arrival at the scene, he found only Plaintiff and he recorded a statement. That 1st Defendant was not at the scene because she had been taken to the hospital. He said he was only able to record a statement from her on the 11th of August 2008. PW 3 told the Court, that when he took 1st Defendant's statement, he found that she had been negligent. Consequently, he gave her a notice of intended prosecution which had an admission of guilt. That on 12th of August 2008, 1st Defendant went to the police station and paid the sum of E120 for the admission of guilt. PW 3 told the Court

that Plaintiff did not contribute in anyway to the occurrence of the collision because he had the right of way to proceed, therefore, the police did not proffer any charges against him.

[16] Under cross examination, PW 3 told the Court that it was after getting 1st Defendants statement and looking at the damages on the car that he came to the conclusion that the Plaintiffs statement was correct. He told the Court that there is no sign that indicates the speed limit on the road where the collision occurred and there is no speed camera to detect the speed at which the Plaintiff was traveling.

[17] In her Defence, the 1st Defendant who is a consultant at Sun International, told the Court that whilst traveling along the said street on the day in question, she remembered that there was something she had forgotten at work. That she indicated and slowed down. That she looked at the right and left mirror and satisfied

herself that there was no on coming vehicles, and when she was about to turn right she heard a loud bang on her side of the door of the vehicle. That the car spun on the road, then hit an electric pole. That her left leg was squashed by the door and she had hit her head on the roof of the vehicle. That she was taken to the Mkhiwa Clinic where she was treated and discharged.

[18] 1st Defendant told the Court that a week later, she went back to work. That it was then, PW 3 came to her office with a statement written by Plaintiff, which he read to her. That she then narrated her own side of the story. Thereafter, PW 3 told her that since the Plaintiff had paid an admission of guilt that she should do likewise. That a day or two later, she went to the police station and paid the admission of guilt. That she asked for the Plaintiff's quarters, but the police did not know. That she asked what happens after she paid the admission of guilt, and she was told that the matter would be over.

[19] That on the 9th October she received a letter from the Swaziland Royal Insurance demanding that she pays E48,617.00. That her husband went to the insurers to make enquiries about the letter. After that, she got another demand letter for a figure which had increased by about E8,000.00 from the previous one. That her employers also received the same letters as she did. That her lawyer responded to all her letters.

[20] Under cross examination, 1st Defendant told the Court that before she made the right turn on that day, she had checked her mirrors and though there was a vehicle following her behind on the same lane, that she did not notice the Plaintiff's vehicle on the right lane. She agreed that the reason she did not see the Plaintiff's vehicle was perhaps because she was traveling so close to his vehicle that he could not be detected through her car mirrors. She admitted that after the collision the cars lost control. She stated that

the cars spun not because they lost control of them, but because of the excessive speed at which the Plaintiff was traveling.

[21] DW 2 was **Nathi Mhlongo,** 1st Defendant's husband. He confirmed that he went to Swaziland Royal Insurance Company for consultation on receipt of the first demand to pay E48,000.00 plus. He said he approached one **Mr Thulani Maseko** who could not tell him why 1st Defendant was not consulted before they reached the figures. DW 2's position is that the insurers ought to have obtained 3 different quotations from 3 different panel beaters before settling on the repairs and that the 1st Defendant ought to have been consulted. The letter of 9th October 2008 was admitted in evidence through this witness as D exhibit I

[22] At the close of the Defence, I ordered written submissions. Plaintiff was to file on 2nd April 2012, and the 1st Defendant was to file on 4th April 2012. It is on

record that the 1st Defendant filed her written submissions on the 4th of April 2012, but the Plaintiff failed, neglected or refused to file his written submissions. This notwithstanding, I deem it expedient to proceed to judgment at this juncture. It is apposite for me to state her, that the 2nd Defendant filed no processes and did not participate in these proceedings.

[23] Now, after a very careful consideration of the entire matrix of evidence tendered in this case, I find three issues looming large for determination:-

1) whether the collision was due to the negligence of the 1st Defendant?

2) whether the 1st Defendant is liable to pay the amount claimed by the Plaintiff?

3) whether the 2nd Defendant is vicariously liable to pay the sum claimed?

[24] Before proceeding to answer the above questions, it is imperative for me at this juncture, to first restate the

very familiar principle of law which cuts across national borders, that proof in civil matters is proof on a balance of probabilities. This principle of law was enunciated by the Court in the case of **Ramakulu Kusha V Commander Venda National Force 1989 (2) SA 813 at 815**, as follows:-

> *‘‘ It is said that in civil matters the onus of proof is discharged upon a balance of probabilities, but this simplistic statement must be used with care, since even if the onus bearing party puts into his ‘‘ pan of the scale of probability’’ slender evidence as against no counter-balance on the part of the opponent and although the scale should therefore automatically go down on the side of the onus bearing party, the Court may still hold that the evidence tendered was not sufficiently cogent and convincing---. It is not mere conjective or slight probability that will suffice---’’*

[25] Then there is the statement of Lord Denning MR, on this subject matter, in the case of **Miller V Minister of Pensions (1947) 2 ALL ER at 374,**

‘‘ It must carry a reasonable degree of probability but not so high as is required in a criminal case. If evidence is such that the tribual can say ‘‘we think it more probable than not’’ then the burden is discharged, but if the probabilities are equal, it is not’’.

[26] See **Juluka Dlamini V Swaziland Government, Civil Case No. 3073/1996, Mantai Mdluli V June Mdluli Civil Case No. 466/2009, Bongani Shabangu V Army Commander and another, Civil Case No. 4223/2006, Petros Mahhwayi V The Commissioner of Police and another, Civil Case No. 1982/2005.**

[27] It is thus the duty of a trial Court after evidence has been tendered by the two sides in a civil matter, to put the two sets of facts on an imaginary scale, weigh one against the other, decide upon the preponderance of credible evidence which weighs more, then accept it in preference to the other.

[28] I will now proceed against the background of the above principles of law, to consider the three issues raised herein, ad seriatim, to ascertain if the Plaintiff upon whom the onus lies, has proved his case on a balance of probabilities.

ISSUE ONE

[29] Whether the collision was due to the negligence of the 1st Defendant?

Now, the Plaintiff's case is that the collision was caused as a result of the negligence of the 1st Defendant. Plaintiff detailed the particulars of the alleged negligence in paragraphs 7.1 to 7.8 of his pleading, which 1 have hereinbefore reproduced in extenso. The Plaintiff in oral evidence testified that the 1st Defendant failed to satisfy herself that there was no other traffic on the fast lane before changing lanes. Plaintiff also contended that 1st Defendant failed to notify other road

users of her intention to change lanes by either switching on her indicators or hazards, thereby resulting in the collision. The Plaintiff thus contended that the conduct of the 1st Defendant in these circumstances, was negligent because she failed to employ the standard of care and caution required of a reasonable man.

[30] For her part, the 1st Defendant told the Court that before changing lanes on that day, she carefully looked in the left and right mirrors of her car, and only changed lanes after satisfying herself that there was no on coming vehicle. 1st Defendant also told the Court that she switched on her indicators before changing lanes. Therefore, the accident was not caused by her negligence, but by the excessive speed employed by the Plaintiff, by reason of his belief that he had the right of way.

[31] I must say that after a very mature consideration of the totality of evidence tendered *vis a vis* the pleadings, I have come to the conclusion, that 1st Defendant cannot be availed of the contention, both in her evidence and written submissions, that the collision was caused by the Plaintiff.

[32] We must not loose sight of the fact that parties are bound by their pleadings. Therefore, the 1st Defendant is bound by the facts alleged in her plea. I say this because in paragraphs 7.6 and 7.7 of the particulars of claim, the Plaintiff pleaded as follows:-

'' 7.6 she conducted herself and acted in a manner that was dangerous to other road users; and/or

7.7 she failed and/or neglected to satisfy herself that there was no other traffic on the fast lane before changing lanes; ''

[33] It is on record that in paragraph 8 of her plea, as appears on page 14 of the book, that the 1st Defendant met the foregoing allegations of fact as follows:-

‘‘ 8

Ad paragraph 7.6 and 7.7

The 1st Defendant does not deny the contents of this paragraph’’

[34] It appears to me that by the foregoing deposition, the 1st Defendant in her pleading, outrightly admitted the facts pleaded in paragraphs 7.6 and 7.7 of the Plaintiffs particulars of claim, to the effect that she conducted herself and acted in a manner that was dangerous to other road users, by failing or neglecting to satisfy herself that there was no other traffic on the fast lane before changing lanes. Having expressly admitted these facts in her plea, the 1st Defendant is by law bound by these admissions and cannot seek to embellish or resile from same, as she was wont to do so in her oral evidence.

[35] The 1st Defendant who has no legal representation and who as can be seen from the papers, filed the processes in her own stead, sought during these

proceedings to distance herself from these admissions, by alleging that they were done in error. I find that I cannot acede to this proposition, being made now at the late hour of the trial. In coming to this conclusion, I am mindful that the 1st Defendant is a lay person. This notwithstanding however, my observation of her in the conduct of her case, is that she is a very intelligent young woman. It is also evident from her plea where she categorically denied all the other alleged ingredients of her alleged negligence, save for those alleged in paragraphs 7.6 and 7.8 of the Plaintiff's pleading. It appears to me therefore, that the 1st Defendant cannot blame these admissions on an alleged error or on her ignorance of the law. The only way the 1st Defendant could have escaped from these admissions was by way of their amendment pursuant to the leave of court. But that is not the position here. She is therefore bound by these admissions.

[36] Since it is a trite principle of law that what is admitted needs no further proof, I thus find it as a fact, that on the day of the incidence, the 1st Defendant acted or conducted herself in a way and manner that was dangerous to other road users by changing lanes without first satisfying herself that there was no on coming vehicle or vehicles on the fast lane, thus resulting in the said collision. The Court is still required, irrespective of these findings to proceed to weight the issue of the negligence of the 1st Defendant. This is because the 1st Defendant may still submit evidence to show that the occurrence in question bears no relation to any negligent conduct on her part or that the Plaintiff also contributed to the collision.

[37] The question at this juncture therefore is ‘‘was the 1st Defendants conduct in changing lanes in the way and manner that she did, negligent in the circumstances of this case?’’

[38] The concept of negligence is that a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him. The judicially accepted criterion in establishing whether a person has acted carelessly and thus negligent, is the objective standard of the reasonable person, the bonus paterfamilias.

[39] This position of our law was expressed by **Van der Walt and Midgley Delict, 166,** as follows

> *‘‘ conduct is negligent if the actor does not observe the degree of care which the law of delict requires. This involves a value judgment which is made by balancing various competing interests. The standard of care which the law demands is ordinarily that which a reasonable person--- in the position of the Defendant would exercise in the same situation’’*

[40] Furthermore, **Boberg Delict 274** declares as follows:-

‘‘ A person is negligent if he did not act as a reasonable man--- would have done in the same circumstances’’

[41] More to this is the position of **Van Rensburg Normatiewe Voorseinbaarheid 23-24, that;**

‘‘the Defendant is negligent if the reasonable person in his position would have acted differently; and according to the Courts the reasonable person would have acted differently if the unlawful causing of damage was reasonably *foreseeable and preventable’’*

[42] Then there is the definition of negligence as expounded in a more condensed manner, without reference to forseeability and preventability of damage, in the case of **Jones V Santam BPK 1965 2 SA 542 (A)**

‘‘ A person is guilty of culpa if his conduct falls short of that of the standard of the diligens paterfamilias – a standard that is always objective and which varies only in regard to the exigencies arising in any particular circumstances. It is a standard which is one and the same for everybody under the same circumstances’’.

[43] Finally, the test for negligence finds its most authoritative and clearest statement in the following dictum of **Holmes JA in Kruger V Coetzee 1966 2 SA 428 (A) 430**

'' For the purposes of liability culpa arises if

(a) a diligens paterfamilias in the position of the Defendant:-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence and

(b) the Defendant failed to take such steps''.

[44] Having established that the test for negligence lies in the objective standard of the reasonable person or bonus paterfamilias, the question at this juncture is ''who then is a reasonable person?''

[45] It is the overwhelming judicial concensus, across jurisdictions, that the reasonable person is merely a fictitious person, a concept created by the law to have

a workable objective norm for conduct in society. Accordingly, the reasonable person is not an exceptionally gifted, careful or developed person; neither is he under developed, nor someone who recklessly takes chances or who has no prudence. The qualities of the reasonable person are found between these two extremes. As the Court said in **Herschel V Marupe 1954 3 SA 464 (A) 490**

> *'' The concept of the bonus paterfamilias is not that of a timorous faintheart always in trepidation lest he or others suffer some injury, on the contray, he ventures out into the world, engages in affairs, and takes reasonable chances. He takes reasonable precaution to protect his person and property and expects others to do likewise''.*

[46] To my mind the reasonable person is nothing more than the legal personification of those qualities which the community expects from its members in their daily contact with one another, as is encapsulated in the dictum of **Jourbert JA,** in the case of **Weber V**

Santom Versekeringsmaatskappy BPK 1983 1 SA 381 (A) 410-411

‘‘ In my opinion it serves no purpose to ascribe various anthropomorphic characteristics to the diligens paterfamilias, because we are not dealing with a physical person, but only with the name of an abstract, objective criterion. We are furthermore not concerned with what the care of a legion of reasonable person types would have been, such as a reasonable educated person, a reasonable skilled labourer, a reasonable unskilled labourer, a reasonable adult or a reasonable child. There is only one abstract, objective criterion , and that is the court’s judgment of what is reasonable, because the court places itself in the position of the diligens paterfamilias’’.

[47] It appears to me therefore, that the test of the reasonable person is not static, but lies with the Court, to be arrived at after a consideration of the facts and circumstances of each case. It is however the judicial accord, that for the practical application of this standard of care in any given situation, the reasonable

person is deemed to have a minimum knowledge and mental capacity which enables him to appreciate the dangerous potentials of certain actions. For example, the reasonable person knows that there are inherent dangers involved in the use of arms, explosives, poison, motor vehicles, electricity, sports equipment etc. See **Clark V Welsh 1975 4 SA 469 (W) Labuschagne 2001 THRHR 62-63.** The law also generally makes no provision for the fact that an individual wrongdoer may be stupid, illiterate, inattentive, or intellectually retarded, everyone is required to conform to the objective standard of the reasonable person.

[48] Similarly, there is no authority for the proposition that the physical characteristics of the wrongdoer play a fundamental part in the reasonable person test. I hasten however to add here, that the law does not completely ignore physical handicap e.g a cripple or blind man, in determining the possibility of negligence, of these persons. A person suffering physical disability

may therefore still be negligent, where he engages in an activity which the reasonable person in his position would have regarded as unsafe (e.g, a blind person driving a motor car).

[49] In casu, the question is, when juxtaposed with the standard of the reasonable person, was 1st Defendant's conduct negligent in the circumstances of this case?

[50] The Plaintiff told the Court that 1st Defendant was negligent because she failed to employ the standard of care required of a reasonable person. The police report exhibit A, as well as the evidence of PW 3, told the Court that the 1st Defendant was negligent thus she paid the sum of E120 fine for admission of guilt. The 1st Defendant for her own part told the Court that inspite of her conduct, that she was not negligent. Her contention is that Plaintiff could have avoided the accident if he was not driving with excessive speed on that day. She contended that because the Plaintiff

believed he had the right of way, he drove at an excessive speed and at a fourway junction, in total disregard of the fact that she was changing lanes. For this contention she relied on the case of **Robinson brothers V Henderson**, where **Solomon CJ** held that Plaintiff's conduct:-

> *'' was not a conduct of a reasonable man. It is the duty of every driver of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not to have regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street. Having seen such a car, he is not justified in taking no further notice of it on the assumption that the driver is a careful man and can be relied upon to respect his right of way. If every driver of another car were a reasonable man there would be few accidents; it is against the careless and reckless driver that one has to be on ones guard. The duty of the Plaintiff in this case was to keep the car coming down ~Alice street under observation and not to have*

entirely lost sight of it merely because he had the right of way'' The Court held that the Plaintiff was negligent.

[51] In casu, it appears to me that the facts of **Robinson Brothers (supra),** are easily distinguishable from the facts of this case. It is obvious that in **Robinson brothers (supra),** the Plaintiff had seen the Defendants car approaching the intersection from a side street but failed to take any further care or attention to avoid a collision with it, because he presumed he had the right of way and that defendant would respect that . In this case, the 1st Defendant was not coming from a side street towards the junction. The uncontroverted evidence is that both Plaintiff and 1st Defendant were on the right and left lanes respectively, of the two laned one way road towards Manzini. The two cars being about 5 meters apart from each other, when the 1st Defendant suddenly switched lanes right into the Plaintiff's path resulting in the collision. I have already found it as a fact that the 1st

Defendant failed to check to see that there was no vehicle on the right lane before she switched lanes. I hold the view that this is the standard of care required of a reasonable person in the position of the 1st Defendant driving on such a road to ensure that there are no on coming vehicles on the speed lane, before switching lanes.

[52] The danger of a collision resulting by reason of failure to employ this standard of care is clearly generally foreseeable to a reasonable person driving on the kind of road where the collision occurred. The 1st Defendant failed to employ this standard of care resulting in the collision. By her carelessness and recklessness she caused the collision. She was therefore clearly negligent in my view.

[53] The proposition by the 1st Defendant, that the Plaintiff employed excessive speed in these transactions, and thus contributed to the collision, cannot hold sway. I

say this because there is no proof of this allegation, in the entire matrix of evidence serving before Court. I hold the view that the mere fact that the vehicles spun around in the wake of the collision is not evidence of the alleged excessive speed by the Plaintiff. This could have been attributable to the fact that both drivers lost control of the respective vehicles upon collision. This fact was clearly recognised by the 1st Defendant under cross examination, even though she subsequently sought to depart from it. In the absence of any proof of the alleged excessive speed employed by the Plaintiff, I find that I cannot accede to the proposition of the 1st Defendant in this regard. PW 3 had told the court that there are no speed limits posted on that stretch of road and that there are no speed cameras to detect Plaintiffs speed at the material time of the collision. In her written submissions, 1st Defendant proposed a speed limit of 40kph for that stretch of road, premised solely on her imagination and calculations. This is highly baseless and speculative and cannot hold sway in these

proceedings. In any case, even if I were to accept the speed limit of 40kph proposed by 1st Defendant, there is still no evidence that the Plaintiff was traveling at a speed beyond that. This line of defence cannot therefore avail the 1st Defendant and it is discountenanced in its entirety.

[54] It seems to me therefore, that the 1st Defendant was clearly negligent thus resulting in the collision and her payment of E120.00 admission of guilt to the police in relation to these transactions. 1st Defendants contention that she only paid the admission of guilt because PW 3 told her that Plaintiff would also pay an admission of guilt, has no legs to stand upon. I say this because, this piece of evidence is clearly an afterthought since the 1st Defendant failed to put it to PW 3 in cross examination. It thus must be disregarded. This is because the effect of failing to put ones case to the other party's witnesses, but belatedly trying to raise same either in evidence or under cross

examination, entitles the Court to treat such evidence as an afterthought and to disregard it. See **Mantai Mdluli V June Mdluli (supra).**

[55] In the light of the totality of the foregoing, I come to the inescapable conclusion, that the Plaintiff has indeed proved that the collision was as a result of the 1st Defendant's negligence.

ISSUE TWO

Whether the 1st Defendant is liable to pay the amount claimed by the Plaintiff.

[56] There is no doubt that the Plaintiffs vehicle recorded extensive damages by reason of the collision, caused by the 1st Defendants negligence. This is established by the evidence of PW I, PW 2, exhibit B, the quotation from Magnum Panel Beaters, as well as exhibit C, assessment report by GSM Assessors and loss adjusters. A resume of the repairs effected on the said

vehicle is detailed in exhibit B and this was confirmed by the assessors as show in exhibit C. It is not controverted that the Plaintiff had been driving the said vehicle for only about one year before the collision. It is not controverted that the said vehicle had a warranty. Plaintiff told the Court that the escalated amount expended in the said repairs was necessitated because, most of the damaged parts were replaced with new ones and little panel beating done. This was to restore the vehicle to its original state in other not to lose the warranty. This piece of evidence which stands uncontroverted, was substantiated by the evidence of PW 2.

[57] It was further Plaintiff's case, that after the initial repairs to the tune of E49,239.58 quoted in exhibit B, and after delivery of said vehicle to him, that he detected a fault with the air bag light which necessitated that the vehicle be returned for further repairs. This development led to the repair of the seat

belts which had been affected when the airbags were damaged. A further sum of E6,977.91, as is reflected in exhibit D was paid for said repairs, bringing the total amount expended in repairing the said vehicle as well as the towing fees of E400.00 to the total sum of E56,074.91 claimed by the Plaintiff. This piece of evidence is also confirmed by PW 2.

[58] 1st Defendant, whilst not denying that the vehicle was damaged as a result of the collision and was repaired, however, queries the amount expended in the said repairs as too exorbitant. She and DW 2, expressed the view, that the proper course would have been for the 1st Defendant to be consulted and allowed to participate in the process of procurment of quotations for the said repairs. 1st Defendant and DW 2, also advanced the proposition, that due procedure mandated, that the insures be availed of three different quotations from three different panel beaters, for the purposes of

comparison, before settling for one and embarking on said repairs.

[59] I have been at much pains in these proceedings, in ascertaining which law or rule of practice or procedure, mandates the participation of the 1st Defendant in the question of the repairs of the vehicle by the Plaintiff's insurers, or which mandates that the insurers must be availed of three different quotations before the said repairs could commence. PW 2 who is a staff of the Swaziland Royal Insurance company, told the court that no such procedure holds sway in his establishment. 1st Defendant and DW 2 failed to avail the court of any such procedure, when tasked to do so in these respects. There is therefore nothing before the Court to show that the procedure adopted in the said repairs was wrong. There is no evidence which contradicts the necessity of the magnitude of the repairs. There is also no evidence which emasculates the reasonableness of the amounts expended in the said repairs. I therefore

find as a fact, the magnitude and style of repairs and the sums expended in respect thereof, reasonable.

[60] I also find it as a fact, that as a result of 1st Defendants negligence, 1st Defendant is by law liable to compensate the Plaintiff for the amount of E56,074.91, expended to repair the said damage to his vehicle.

ISSUE THREE

[61] Whether the 2nd Defendant is vicariously liable to pay the sum claimed?

It is trite law that a master is liable only for his servant or agent for tortious acts performed in the course of his employment. That means for instance, that when the servant is on a frolic of his own, his misfeasance cannot in law be imputed to the master.

[62] Now, even though there is uncontroverted evidence that the 1st Defendant is an employee of the 2nd Defendant, First International Investments, however,

the evidence tendered by the Plaintiff fell short of establishing that the 1st Defendant was in the course of her employment, when the collision occurred. It was not enough for the Plaintiff to allege vicarious liability in his pleading. The Plaintiff was mandatorily required by law to adduce cogent and convincing evidence in proof of the facts pleaded. He failed to do so. The Plaintiff thus failed to prove that the 2nd Defendant is vicariously liable for the negligence of the 1st Defendant.

[63] It is for all the above reasons that I enter judgment for the Plaintiff against the 1st Defendant in the following terms:-

1. Payment of the sum of E56,074.91 (Fifty Six Thousand and Seventy Four Emalangeni and Ninety one Cents).
2. Interest thereon at the rate 9% per annum a tempore morae from date of service of summons to date of payment.
3. Costs of suit.

For the Plaintiff: **Mr D. Manda**

1st Defendant in person

OTA J.