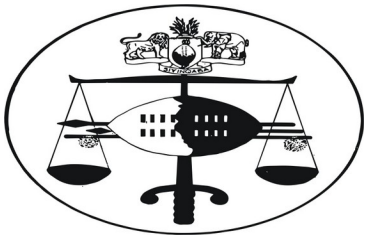

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4188/09

In the matter between

LOMATSAMO INVESTMENT **Plaintiff**

and

LENHLE KHANYILE **Defendant**

Neutral citation: *Lomatsamo Investment v Lenhle Khanyile* (4188/09) [2012] SZHC 94 (30th April 2012)

Coram: Mamba J

Heard: **11 April, 2012**

Delivered: **30 April, 2012**

[1] At all times material hereto the plaintiff was the owner of motor vehicle SD 559 MG, a 2000 model Isuzu bakkie or light delivery van. On some day in March 2009, not specified in the evidence before me, this vehicle developed some electrical problems whilst it was in the Motshane area and being driven by Mfanzile Oscar Simelane. He had been duly authorized to drive it by the plaintiff's managing director Princess Mncane Dlamini. The said Princess, testified as the first witness for the plaintiff and she was followed by Mr Mfanzile Simelane.

[2] Mr Simelane testified that on the day in question whilst driving the motor vehicle to Mbabane, he noticed that the motor vehicle had some electrical faults as the battery was rather low and the motor vehicle was failing to move, as expected. He then informed the princess about this. The princess in turn instructed him to park and leave the motor vehicle at the home of Mr Khanyile which was situate in the area. Mr Simelane did this and left the keys to the motor vehicle with "an old man" he found there. The Defendant is one of the daughters of Mr. Khanyile, the owner of the homestead referred to herein. These facts are largely common cause.

[3] It is common cause further that on 30 March 2009, the Defendant drove the motor vehicle out of the Khanyile homestead. She did this without the

authorization of the plaintiff. She drove the motor vehicle "whilst same was under the care and custody of Mr Khanyile [her father] …and drove the same to Mbabane … and eventually abandoned it at Makholokholo." The plaintiff alleges further that, "the defendant who at the time had no driver's license drove the motor vehicle negligently and it damaged its engine block beyond repairs." (The underlining and emphasis is mine).

[4] Lastly, the plaintiff alleges that it went around shopping for another but similar engine block and was quoted a sum of E19820.80 by Mbabane Motors, the only Isuzu dealer in Swaziland at the time. It is this amount that the plaintiff claims in this action, being the damages it has suffered as a result of the defendant's actions.

[5] From the quoted passage in paragraph 3 above, it is plain that although there is an allegation that the defendant was not licensed to drive a motor vehicle and that she had no permission from the plaintiff to drive plaintiff's motor vehicle, the plaintiff's cause of action is founded or based on the defendant's negligence (in driving the motor vehicle). These particulars are clearly excipiable in my judgment as being vague and embarrassing and woefully lacking in particularity. The distinctness and clarity that is required is wanting. The particulars of negligence are not stated at all. A claim whose cause of action is negligence that is unspecified or not

particularized is vague and embarrassing. It is a fishing expedition since it specifies nothing and every instance of negligence fathomable. The response it solicits is equally of that mould. That cannot be countenanced by the court. That the defendant did not find it proper to except to the summons does not make the particulars not excipiable. The summons is not for the parties alone but the court as well. See Boys v Piderit, 1923 EDL 23.

[6] But more fundamentally, the evidence led by the two witnesses for the plaintiff does not in my judgment touch upon the issue of negligence. In fact none of these witnesses were able to say how the engine was damaged or in what way the defendant was negligent in driving the motor vehicle. Mr Simelane only testified that when he parked and left the motor vehicle at the home of Mr. Khanyile, its engine was not damaged and did not show any signs of being malfunctioning. The princess did not see the condition of the engine when the motor vehicle was partked at Khanyile's house. The best that she could say in the circumstances, is what she was told by Mr Mfanzile Simelane. The evidence in support of the case for the plaintiff does not in any way show that the defendant drove the motor vehicle negligently and that her negligence was the proximate cause of the damage thereto. The evidence fails to establish how the engine was damaged and what the cause of that damage was. The plaintiff has only been able to

establish that the motor vehicle had its engine damaged after it had been parked at the Khanyile homestead.

[7] Even accepting for the moment that the defendant drove the motor vehicle wrongfully inasmuch as she did not have permission from the plaintiff, her act of wrongfulness is not equivalent to an act of negligence. The issue of negligence is separate and has to be determined separately from that of wrongfulness or unlawfulness. An act of negligence is not per se unlawful. In considering the question or issue of wrongfulness, one should bear in mind that there is no evidence how the defendant got possession of the motor vehicle and in particular how and in what manner she drove the motor vehicle in question. The motor vehicle was at the time legally in the custody of Mr Khanyile or the old man there; and not the plaintiff. The plaintiff through Mr Mfanzile Simelane voluntarily surrendered it, with its keys to Mr Khanyile or his agents.

[8] This is not a case where the maxim or doctrine *res ipsa loquitur* applies and it has not been argued by the plaintiff that this is so. The facts in this case do not speak for themselves. The known facts are that the motor vehicle was at a certain point in time parked at Khanyile's; was driven by the defendant and had its engine block damaged. The said damage cannot be said to be inextricably or inexorably connected to the way or manner by

which the defendant drove the motor vehicle. One of the requirements or conditions that must be present in order to invoke the maxim is that the defendant must have had the sole control of the thing that caused the damage. There is no such evidence in this case. The only admission made by the defendant in her plea in this regard relates to the damage of the clutch or clutch plate. There is no evidence on when and how the engine block was damaged. It should also be borne in mind that in employing this maxim, the burden of proof does not shift, it remains with the plaintiff. In Ng Chun Pier v Lee Chuen Tat, (1988) R.T.R. 298, the Privy Council described the maxim as "…no more than the use of a Latin maxim to describe the state of the evidence from which it is proper to draw an inference of negligence." The stark reality here is simply that we do not know what happened to the plaintiff's engine block. In any event it is doubtful whether the said doctrine or maxim is part of our law (Roman Dutch).

[9] The defendant did not testify or appear at the hearing of this case. Her plea was filed but this does not constitute evidence save where it is an admission of the facts or allegations made by the plaintiff. For instance, she admits in her plea that she did drive the motor vehicle. That admission puts that issue not in issue or dispute. It becomes a fact; common ground.

[10] From the foregoing analysis of the evidence and the legal issues involved, the plaintiff has failed to show that the defendant was negligent in driving the motor vehicle and that such negligence was the proximate cause of the damage to the engine block. Vide *Dlamini, Philisiwe v Town Council of Mbabane, 1987-1995 SLR (1) 263 at 265.* There is no denying that plaintiff's motor vehicle's engine block was damaged under circumstances that are not clear in the evidence before me. As in Philisiwe's (supra) I do not think it would be fair and just to dismiss this action in the circumstances because doing so would leave the plaintiff without a remedy. I shall instead grant absolution from the instance with costs to the defendant.

[11] One further point deserves mention in this case. The plaintiff's engine block that was wrecked beyond repair was not new. The motor vehicle is said to be a 2000 model. There is no indication when it was first used and what the mileage thereon was. In an action such as the present, the plaintiff seeks damages so as to restore her motor vehicle to the situation or condition it was in immediately prior to the damage complained of. It stands to reason, I think, that one has to know, from competent witnesses, the value of the engine block immediately prior to its damage. The plaintiff has not attempted to satisfy this requirement. The court was only told that the damaged engine was the original engine for that motor vehicle and had never needed any repairs. I accept this. However, inspite of its prior good

use, it remained a used engine block. It could not therefore be valued at the same price as a brand new one. This is trite law and logic. (See *Swaziland United Transport Ltd v Youngs Farm Butchery (Pty) Ltd and Ano, 1987-1995 SLR (1) 228 at 231, Pasquallo v Goolam, 1982-1986 SLR (1) 215 at 217C-F* on the issue of costs of repairs in general).

[12] The quotation obtained by the plaintiff from Mbabane Motors does not state whether this was in respect of a new or used engine block. It had to though. Again the plaintiff has fallen short in its evidence on this aspect of its case. This is of course obiter in view of my earlier findings herein.

MAMBA J

FOR PLAINTIFF: **Mr. M. Mabila**

FOR DEFENDANT: **No appearance**