



## IN THE HIGH COURT OF SWAZILAND

### JUDGMENT

Case No. 3190/2009

In the matter between:

<b>CLEARANCE GAMA (NEE HLOPHE</b>	<b>1<sup>st</sup></b>	<b>Plaintiff</b>
<b>NKOSINATHI GAMA</b>	<b>2<sup>nd</sup></b>	<b>Plaintiff</b>
<b>YENZOKUHLE</b>	<b>3<sup>rd</sup></b>	<b>Plaintiff</b>

And

<b>MOTOR VEHICLE ACCIDENTS FUND</b>	<b>Defendant</b>
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**Neutral citation:** Clearance Gama (nee Hlophe) & 2 Others v Motor Vehicle Accidents Fund (3190/2009) [2013] SZHC 20 (28<sup>th</sup> February 2013)

**Coram:** M. Dlamini J.

**Heard:** 6<sup>th</sup> February 2013

**Delivered:** 28<sup>th</sup> February 2013

- *Action proceedings – claim for damages against Motor Vehicle Accident Fund – basis of claim not collision but motor vehicle overturning due to mechanical fault – definition of third party – intention of legislature – such claim not envisaged by legislature.*

Summary: By means of a combined summon, the plaintiffs are claiming for compensation of E500,000.00 as a result of loss of support. The breadwinner died as a result of overturning of a motor vehicle driven by the breadwinner owing to a mechanical fault according to the combined summons. Defendant has raised an exception stating that the Motor Vehicle Accident Act 1991 (the Act) does not provide for such claim.

[1] The defendant in its exception, submitted that there was no cause of action. The circumstances under which the driver of the motor vehicle met his death are such that they do not fall within the ambit of section 10 of the Act.

[2] The plaintiff on the other hand argued that the mere fact that the deceased met his death while driving is sufficient to enable his dependants to claim.

[3] I have already outlined the particulars of claim in this matter. There was no collision with another motor vehicle. The accident which caused the death of the deceased was attributed to a mechanical fault in the motor vehicle driven by the deceased.

[4] The question seized by this court is whether the defendant is liable to pay the plaintiffs under the circumstances of this case.

[5] I must point out from the onset the rationale for the legislature to establish the Motor Vehicle Accidents Fund. In doing so, I quote from **Ramsbottom J. A.** in **Aetna Insurance Co. v Minister of Justice 1960 (3) S.A. 273 AD** at 285 who, with precision states:

*“The obvious evil that it is designed to remedy is that members of the public who are injured, and the dependants of those who are killed,*

*through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor-vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance. The scheme of the Act is that the owner of a motor vehicle must obtain a declaration of insurance from a registered company. The insurance ensures for the benefit of any person who has been injured and of any person who has suffered loss through the death of a person who has been killed: such persons claim compensation direct from the registered company.”*

[6] Mr. S. Masuku for the defendant correctly, in my view, submitted that the introduction of the insurer brought about the idea of three parties into this cycle *wit.* the first party was the plaintiff, usually the driver or owner of the motor vehicle who is alleged to have caused or contributed to the accident; the second party is the insurer while the third party is the claimant. The claimant could be the driver of the other motor vehicle, the pedestrian or their dependants.

[7] As already alleged, Mr. S. Masuku for the defendant submitted that the particulars of claim fall short of the requirements as set out in section 10 (1) of the Act. Section 10 (1) reads as follows:

*“The Motor Vehicle Accident Fund shall, subject to the provisions of this Act and to such conditions as may be prescribed, be utilised for the purpose of compensating any injured person or, in the event of death, any dependant of the deceased or where reasonable funeral expenses only is payable, the relatives of the deceased (in this Act*

*called “the third party”) for any loss or damage which the third party has suffered as a result of:*

- a) Any bodily injury to himself;*
- b) The death of any bodily injury to any person;*

*which in either case is caused by or arises out of the driving of any motor vehicle by any other person at any place in Swaziland and the injury or death is due to the negligence or other unlawful act of the person driving the motor vehicle (in this Act called “the driver) or of the owner of the motor vehicle or his servant in the execution of his duty.”*

[8] The definition of a third party by Mr. Masuku corresponds with that envisaged by Section 10 (1) of the Act.

[9] From the reading of the Act, it categorises three classes as third party: i.e.

*“any injured person; any dependant of the deceased and for purposes of claiming funeral expenses, relatives of the deceased.”*

[10] A further reading shows that the third party claim is based on *“the driving of any driving motor vehicle driven by any other person”*. The use of *“any other person”* connotes that the third party cannot be the driver himself in order to claim under the fund. In other words, the claimant cannot point to himself as the cause of the injury or death. He must point to *“other person”*. In *casu*, if the claimant was alive, he would point to himself. This is not the spirit of the legislature. It would be absurd to say in the present case the claimants as dependants are pointing not to themselves but to the

deceased as “*other person*” who caused the accident. The efficacy of the Act would be defeated.

[11] A further salient feature of this provision is “*negligence or other unlawful act of the driver*”.

[12] The “*negligence or the unlawful act*” must be alleged in the particulars of claim. In *casu*, plaintiff states at paragraphs 11 and 12:

“11. *The defendant is liable to compensate the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs’ for loss of support as a result of the motor vehicle accident which claimed the life of the late Samuel Gama.*

12. *The motor vehicle accident which claimed the life of the said Samuel Gama was caused by mechanical faults on the vehicle registered as SG 034 CT and could not be attributed to the negligence of the late Samuel Gama.”*

[13] The allegation that the driver was not negligent when the Act expressly calls for the driver to be negligent in order to successfully claim for compensation under the Act renders plaintiff action to be groundless and therefore without *causa*.

[14] **Kunleben J. in Stegen and Others v Shield Insurance Co. Ltd. 1976 (2) S.A. 175** at 177 adjudicating on the question of a third party on a section which is *pari material* with ours stated:

“*The section in terms obliges the registered company to compensate “any person whatsoever who is injured in the circumstances stipulated”.*

[15] In the **Stegen** case *supra*, the deceased was injured while being chauffeured in “*her own motor vehicle by her driver*”. The court upheld plaintiff exception to the plea on the basis that she could claim.

[16] These facts are slightly different from the present case by reason that in *casu* the deceased was the one driving while in **Stegen** *op.cit.*, she was considered by the court as passenger and consideration given to the language “*any motor vehicle*” to me it is immaterial that the motor vehicle belongs to the third party. It was established that the injury or death was caused by “*other person*”. This cannot be said in *casu* and therefore plaintiffs’ action stands to be thrown out root and branch as it were.

[17] In the totality of the above;

- i) Plaintiffs’ action is dismissed;
- ii) Costs to follow the event.

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**M. DLAMINI**  
**JUDGE**

**For Plaintiffs** : **Mr. M. M. Manana**  
**For Defendant** : **Mr. S. Masuku**