



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 779/2009

In the matter between:

MAGGIE TFWALA (NEE DLAMINI)	1st	Plaintiff
CELIMPHILO TFWALA	2nd	Plaintiff
NOKUTHULA TFWALA	3rd	Plaintiff
PHETSILE TFWALA	4th	Plaintiff

And

MOTOR VEHICLE ACCIDENTS FUND	Defendant
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Neutral citation: Maggie Tfwala (nee Dlamini) & 3 Others v Motor Vehicle Accidents Fund (779/2009) [2013] SZHC 21 (28th February 2013)

Coram: M. Dlamini J.

Heard: 6th February 2013

Delivered: 28th February 2013

- *Action proceedings – claim for loss of life and support against Motor Vehicle Accident Fund – basis for claim is avoiding a pedestrian – interpretation of Section 10 (1) of Motor Vehicle Accident Fund of 1991 – such claim not envisaged by the Act – Plaintiff’s action is without causa.*

Summary: Before me are particulars of claim where the plaintiffs' asserts that defendant is liable to pay the sum of E350,000.00 together with 9% interest per annum as compensation for loss of life and support by their breadwinner due to the breadwinner losing control of the motor vehicle he was driving when he attempted to avoid a pedestrian who was jay-walking. Defendant raises an exception to the effect that the particulars of claim do not establish a cause of action.

[1] In adjudicating upon the issue before me, I bear in mind the *dictum* well expounded by **Ota J. A.** in **Ezishineni Kandlovu v Ndlovunga Dlamini and Another 58/2012 SZSC 51** at page 20 which is:

“For such a pleading to meet the requirement of conciseness, clarity, precision and particularity commanded, it must comply with the general rules of pleadings as prescribed by Rule 18 (4) of the Rules of the High Court. That rule of court requires that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies on with sufficient particularity to enable the opposite party to reply thereto. Therefore, it is only material facts (facta probanda) that should be pleaded. Allegations such as pieces of evidence (facta probantia) or the pleaders opinions and conclusions should be excluded from such a pleading.”

[2] My duty therefore is to ascertain whether plaintiffs have pleaded “material facts (*facta probanda*)” in order to enable the defendant to plead or in brief have the plaintiffs established their cause of action in the particulars of claim.

[3] The answer to this question lies in the particulars of claim which are as follows:

“10. On the 1st November 2006 a motor vehicle accident took place along the MR3 highway at Magevini area which resulted in the death of one Bethwell Tfwala who at the time was driving a motor vehicle registered SD 097 AN.

11. The late Bethwell Tfwala at the said date and time was attempting to avoid a pedestrian who was in the middle of the road in the fast lane of the said public road. The late Bethwell Tfwala attempted to avoid knocking the said pedestrian and in the process lost control of the vehicle he was driving and knocked against the guard rails with the result that he suffered serious injuries which later claimed his life.

12. The accident was thus not caused by the negligence of the said Bethwell Tfwala as in the circumstances he did what every reasonable person would do, that is to try to avoid knocking down a jay-walking human being.

13. The defendant is by law obliged to compensate the plaintiffs on the resultant death of the said Bethwell Tfwala who in the circumstances was not negligent at all in the loss of his life, such compensation provided for in the Motor Vehicle Accident Act, 1991.

14. The defendant has wrongfully and unlawfully refused, neglected and / or failed to compensate the plaintiffs as

required by the law as a result of the death of the said Bethwell Tfwala.”

[4] Mr. S. Masuku for defendant contends that the legislature under the Motor Vehicle Accident Fund Act section 10 (1) never intended that drivers of motor-vehicles could claim against the defendant (insurer) where an accident occurred as a result of a pedestrian. He states that a pedestrian may claim against the insurer once injured by a motor vehicle being driven. However, Mr. Masuku insists, the converse is not true.

[5] Mr. M. M. Manana however asserts that the purpose of Parliament in establishing the Fund (defendant) was to enable any person who has been injured or his dependants where that person has died as a result of road accidents to claim against the Fund irrespective of the circumstances of the case. I understand Mr. Manana to be submitting that all the plaintiff has to establish is that the injury or death sustained was as a result of a motor vehicle accident on the road and nothing further.

[6] Section 10 (1) of the Act reads:

“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.”

[7] Plaintiffs’ counsel also urged the court to consider Section 13 of the Act which stipulates:

“Where a third party is entitled under section 10 to claim the Motor Vehicle Accident Fund any compensation in respect of any loss or damages as a result of any bodily injury or death caused by or arising out of the driving of a motor vehicle by the owner thereof or by another person with the consent of the owner, that third party shall not be entitled to claim –

- a) *Compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle; or*
- b) *Compensation in respect of that loss or damage from his employer, if that person drove the vehicle as a servant in the execution of his duty;*

unless the Motor Vehicle Accident Fund is unable or refuses to pay the compensation.”

[8] **A. B. Kloper “The Law of Third Party Compensation” 1st Edition** at page 21 states a general principle:

“...the basis of claims for the injury or death of a person resulting from the unlawful and negligent driving of a motor vehicle (third party claims) is delict.” (words underlined my emphasis)

[9] The learned author repeats a similar statement at page 22 as follows:

“The mechanism used by third party compensation legislation in order to ensure that a motor vehicle accident victim is protected against the possibilities of non-recovery of his damage due to the fact that the wrong-doer (driver and/or owner and / or employer who is vicariously liable) is a man of straw and unable to pay such victim’s loss or damage is the suspension of a victim’s common law delictual claim and the transportation thereof to a statutory created fund.” (words underlined my emphasis)

[10] **Muller J. A. in Protea Assurance Co. Ltd. v Matinise 1978 (1) S.A. 963 AD** at 971 hit the nail on the head on who is entitled to institute a claim when he stated:

“From the above it is clear that the plaintiff is only entitled to compensation if:

1) *his injuries were caused by or arose out of the driving of the lorry and if;*

2) *the said injuries were due to the negligence of the driver ...
There are accordingly two pre-requisites of liability”*

[11] So the question in *casu* is, can it be said that the causation of the injuries was the driving of the motor vehicle?

[12] From paragraph 11 and 12 above it is clear that the plaintiffs are alleging that the pedestrian was the cause of the death of the driver. These allegations therefore fail to meet the first requirements.

[13] The second requirement is the negligence should be attributed to the driver. In the present matter the plaintiff at paragraph 12 of the particulars of claim points to the pedestrian as one negligent and not to the driver. Section 10 (1) clearly informs us that the negligence must have been committed by the driver of the motor vehicle. I repeat the relevant wording of section 10 (1) of the Act:

“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.”

[14] I note that in laying out the requirements in an action for claim, **Muller J. A.** *supra*, cited the repealed Compulsory Motor Vehicle Insurance Act No. 56 of 1972 which was *pari materia* with our repealed Compulsory Motor Vehicle Insurance Order of 1973. However, it is my considered view that the present Act has not changed the position that the accident should result

from a motor vehicle and that the driver should be wrongful and negligent in the circumstances and not visa-versa. The reason for this interpretation is based on the following *inter alia*:

- The wording of section 10 (1) as highlighted above;
- Section 6 (1) and (2) of the Act read:

“(1) *The Minister, in consultation with the Minister responsible for energy, may impose motor vehicle accidents levy on fuel...*”

“(2) *Any person who imports fuel in bulk from any place outside Swaziland shall pay the levy imposed under subsection (1)..*”

[15] Although subsection 2 prescribes bulk importers of fuel to be subject to payment of levy, it is common knowledge that every motor vehicle contributes toward the levy. This levy forms the basis for the Fund. In other words, the Fund is sustained by levy collected from motorists when filling up fuel from the bulk importers. The levy is never collected from pedestrians. In other words the insurer (Fund) collects levy from motorists with the view that should the motorist be negligent or commit an unlawful act as demonstrated under section 10 (1), the insurer (Fund) would deep its hands into the levy collected from motorists and compensate the victim in the event of death.

[16] It therefore follows from the above parenthesis that it would be absurd to claim against the negligence committed by a pedestrian for the obvious reason that pedestrians do not contribute to the Fund. The Fund is a substitute for the motor vehicle driver or in cases of vicarious liability, the owner whose motor vehicle is driven by another person through the

sanction of the owner, who commits the negligence or unlawful act while driving or in control of the motor vehicle as the case may be.

[17] For this reason, the Fund pays on behalf of the negligent driver. It cannot pay on behalf of a pedestrian no matter how negligent he can be for the sole reason that pedestrian do not sustain it (Fund). Otherwise to demand a claim as a result of a negligent pedestrian would lead to an absurd result in that one would be calling upon the Fund to pay on behalf of persons who do not contribute to its resources.

[17] In the premise, plaintiffs' action proceeding stand to fall for want of *causa* and I enter the following orders:

1. Plaintiffs' action is dismissed.
2. Costs to follow the event.

M. DLAMINI
JUDGE

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

