



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 911/2012

In the matter between:

JUNIOR MDUDUZI DLAMINI

Plaintiff

And

ROBBY ZEEMANS

1st Defendant

MANDLAKHE MALAMBE

2nd Defendant

Neutral citation: *Vumile Magongo & Another v Phumzile Simelane (911/2012)*
[2014] SZHC 119 (13th June 2014)

Coram: M. Dlamini J.

Heard: 5th June, 2012

Delivered: 13th June 2014

Application for absolution from the instance – prima facie case – whether nexus between motor vehicle and quotation is a question not for determination at this stage owing to the circumstances of the case.

Summary: The defendants have based their application for absolution from the instance on the ground, *inter alia*, that there is no *nexus* between the motor vehicle given to it for repairs and the one said to be a write-off.

Evidence on behalf of Plaintiff

[1] The plaintiff under oath informed the court that while driving down Malagwane hill, Mbabane, on the 1st December 2011 he realised that ahead of him and on his side of the right lane, there was an accident. He slowed down. He noticed through the rear view mirror that a bus, belonging to 1st defendant was coming behind him at a high speed. He blew the hooter and switched on the hazard lights. All this was in vain as the bus drove straight to him, hitting his rear of the motor vehicle. The ignition went off. He was, however, able to swave the motor vehicle to the left lane as there was a queue of motor vehicles in the right lane, owing to the accident that was ahead. From its momentum, the motor-vehicle eventually stopped near the gut rail on the yellow lane.

[2] The motor vehicle he was driving was a black sedan BMW registered PSD 666 AH. He handed a picture of the motor vehicle photographed before the accident. He identified the driver of the motor vehicle as Mandlakhe Malambe. On enquiry, the driver referred him to Zeemans' family being 1st defendant.

[3] It was his evidence that when the motor vehicle stopped about 60 metres away, he went out of it and assessed the damage. He noticed that the boot "*had gone all the way into the car*". The car became a hunch-bang. There were sparks from the battery of the motor vehicle. Other motorists assisted him by disconnecting the battery. Police were called. Upon their arrival, he

realised through the pain that he was injured. He was taken to the nearby private clinic, Medisun. He was eventually admitted at Mbabane Clinic as Medisun could not accept him as it was after hours. He gathered, while at Mbabane Clinic, that the battery of the motor vehicle was reconnected and the motor vehicle driven to his homestead.

[4] The witness then handed the Police accident report. It was his evidence that the report points to the driver of the bus as the wrong person. He further informed the court that the most visible damage on the car was the boot. However, there were other damages on the motor vehicle. The only door that could open was the driver's door. The warning lights on the dash board were on. The back cable battery was damaged. Upon connecting the battery one would see sparks indicating a short circuit, although the motor vehicle could start.

[5] Upon discharge from hospital, he went to search for the bus at Mbabane bus rank. He found 2nd defendant driving it. 2nd defendant advised him to speak to a Mr. Khoza, the Manager. He called Mr. Khoza and they met at Ezulwini. Mr. Khoza advised this witness that as Zeemans, they had their own garage where they do repairs such as panel beating and service. Mr. Khoza further advised him that after panel beating the motor vehicle, they would take it to specialist for the other damage. He referred him to a Mr. Madolo to do the panel beating.

[6] He also drove the car to Mr. Madolo at Malkerns and handed over the motor vehicle. It was his evidence that he was skeptical on whether Mr. Madolo would be able to do the repairs. Mr. Madolo assured him by pointing at him a BMW motor vehicle which he said he had worked on it. He was painting the doors at that time. Mr. Madolo confirmed that he

would do the panel beating and then have the motor vehicle taken to specialist for the other repairs. He then left his motor vehicle.

[7] He checked the motor vehicle from time to time. In January 2012 after about four to five weeks, he was told the boot was available. He later went to check on the progress. He found that the boot had already been fitted. Mr. Madolo informed him that he would paint only the boot. He protested. Mr. Madolo gave him 1st defendant's number to call. He did and 2nd defendant informed him that he would instruct Mr. Madolo to paint the entire motor vehicle but would not be priority as Mr. Madolo was busy.

[8] He returned a week later and the car was being polished. He opened the boot to inspect. He noticed that Mr. Madolo had cut the harness wiring. He enquired as to why he cut the harness and not only the board, no satisfactory response was forthcoming. He called the 1st defendant who instead became defensive and verbally abused him. He then told Mr. Madolo that he was now taking the motor vehicle to a specialist who would assess the further damage caused. Mr. Madolo allowed him to take the motor vehicle. The motor vehicle could not start. A mechanic was called and the motor vehicle taken to BMW, Carson Wheels, Moneni. They advised him to leave the motor vehicle and return the following day. They confirmed that harness should not have been cut. They gave him a quotation. It was Carson Wheels' advice that the electric fault could not be diagnosed. They would, once the harness has been fitted. There were a number of other faults noted and quoted for. He handed exhibit "C". He then took the motor vehicle to Magnum to get the total costs of repairing the motor vehicle. He was advised that the costs of repairs would exceed market value of the car. In support thereof, he handed exhibit "D". He later called Mr. Gama from Royal Swaziland Insurance who assessed the

motor vehicle and gave him the value of the motor vehicle. The assessor's report was exhibit "E".

[9] He took the exhibits to 1st defendant who refused to compensate him. The motor vehicle was declared a write-off.

[10] This witness was cross examined on the identity of the motor vehicle at great lengths. He was further cross examined on the quotation submitted from Carson Wheels, that is, Exhibits "B" and "C" and on other issues. It is unnecessary at this stage of the proceedings to delve much on it.

[11] The next witness on behalf of plaintiff was one Bongani Petros Simelane who was a colleague of Mr. Gama, the assessor. He came to court to read and interpret Mr. Gama's report as Mr. Gama was deceased. He too was cross examined.

Adjudication

[12] In their application for absolution from the instance, the defendants point as follows:

"Firstly the Plaintiff has not disputed the allegations made in the Defendants' plea in particular that the vehicle was not damaged beyond repair nor that the damage warranted a claim for E63,000.00. Secondly the Plaintiff alleged that he took the vehicle to specialists in Carson Motors, however no report was produced by the said specialists in stead exhibit "B" and "C" were submitted by the Plaintiff. The said quotations clearly have nothing to do with the Plaintiff's vehicle as they relate to an M3 vehicle. Plaintiff has failed to show any link between the quotations and his vehicle. Further, in the quotations the majority of the parts are for the front of the vehicle when in fact according to Plaintiff and exhibit "A" the vehicle was only damaged at the back.

It is further submitted that the Plaintiff has failed to prove any damages suffered as the vehicle at the time of assessment by the assessor which fact was confirmed by the expert witness had the same value of E63,000.00 claimed by the Plaintiff in these proceedings. The court is referred to exhibit "D" being the assessor's report."

[13] **De Villiers JP in Gascoyne v Paul and Hunder 1917 TPD 170** at 173 stated:

"At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is: is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence but closes his case immediately, the question for the court would then be: "is there such evidence upon which the court ought to give judgment in favour of the plaintiff?"

The learned judge continues:

"The question therefore is, at the close of the case for the plaintiff, was there a prima facie case against the defendant Hunter, in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against Hunter?"

[14] In **Shenker Brothers v Bester 1952 (3) SA 664** at 671 **Greenberg JA** on a similar application had this to say:

"For these reasons I am of the opinion that the plaintiff has failed to prove the existence of the rights on which his claim is based and that absolution from the instance should have been decreed."

[15] What of the instance case? Has the plaintiff failed to prove his case on a *prima facie* basis?

[16] Plaintiff's case is simple that there was an accident caused by 2nd defendant as an employee of 1st defendant. This accident led to his motor vehicle

damaged. By agreement, this motor vehicle was taken for repairs to 1st defendant's garage. However, in the process of effecting repairs, more damages were occasioned on his motor vehicle. He took the motor vehicle away for assessment and found that repair costs exceeded the market value of motor vehicle.

[17] The question is, in the eyes of a reasonable man, could it be said that the plaintiff has failed to prove a *prima facie* case? This is viewed in line with the grounds submitted by defendants such that the motor vehicle was not damaged beyond repairs, no report of valuation by Carson Wheels, no link between the quotations from Carson Wheels and the plaintiff's motor vehicle and no damages have been proved by plaintiff.

[18] In considering defendants' submission, it is my considered view that most of the grounds raised by defendants are relevant at the end of the case. I say this bearing in mind that one pertinent question on whether plaintiff has established a *nexus* between the quotation and the damaged motor vehicle is a question which plaintiff submits as having done so. It would be premature for me to decide on this question at this stage of the proceedings.

[19] It is my considered view that there is evidence upon which a reasonable man might find for the plaintiff and accordingly enter the following orders:

1. Defendants' application for absolution from the instance is hereby dismissed.
2. Costs to follow the event.

**M. DLAMINI
JUDGE**

For Plaintiff : S. J. Simelane
For Defendants : D. Ngcamphalala