



IN THE HIGH COURT OF SWAZILAND

Civil case No: 3508/2008

In the matter between:

MHAWU GWEBU

APPLICANT

AND

MOTOR VEHICLE ACCIDENT

FIRST RESPONDENT

COMMISSIONER OF POLICE

SECOND RESPONDENT

Neutral citation: *The Mhawu Gwebu v. Motor Vehicle Accident & Another*
(3508/2008) [2014] SZHC123 (19 June 2014)

Coram: **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – delict – claim for damages for personal injuries incurred in a motor vehicle accident – provisions of the Motor Vehicle Accident Act, 1991 considered – held that the accident is one contemplated by section 10 (1) of the Motor Accident Act 13/1991.

JUDGMENT
19 JUNE 2014

- [1] The applicant seeks an order declaring the accident in which the applicant was injured on 27 June 2007 at Maphalaleni to be one contemplated by section 10 (1) of the Motor Vehicle Accident Act 13/1991. He further seeks an order interdicting the first respondent from rejecting the applicant's claim lodged pursuant to the provisions of the Motor Vehicle Accidents Act 13/1991. He also seeks an order directing the first respondent to consider the merits of and settle the applicant's claim referred to in prayer 4 above as well as directing the respondents to pay costs at attorney and own client scale.
- [2] The applicant was injured on the 27th June 2007 at Maphalaleni area on a public road. He was assisting Albert Mdluli, the owner and driver of a tractor registration number SD 140 GH to dismount a trailer from the tractor. The trailer was loaded with bricks. He contends that his injuries were caused by the negligence of the said Albert Mdluli by speeding the tractor which in turn ejected the trailer violently; and, the trailer fell on his foot injuring him extensively. He contends that the accident is one which is envisaged by section 10 of the Motor Vehicle Accidents Act No. 13/1991.
- [3] The applicant was admitted at Mbabane Government Hospital where he was amputated below his left knee. The hospital advised that he required further specialist treatment in South Africa. He was referred to the administrators of the Phalala Fund at the Ministry of Health and Social Welfare to seek funding. He was given a confirmatory letter by the hospital to present to the Phalala

Fund in November 2007. However, the Phalala Fund advised him that its funds have been depleted.

Pursuant thereto the applicant lodged a claim with the first respondent on the 21st November 2007 with the assistance of his attorneys. A claim form was completed by his attorneys to which was annexed an affidavit by the applicant explaining the circumstances of the accident. A police report as well as a covering letter by the attorneys dated 21st November 2007 was also annexed to the claim.

[4] On the 13th November 2007 the Senior Medical Officer of the Mbabane Government Hospital wrote a letter to the chairperson of the Phalala Fund advising him that the applicant had been referred to Deist & Spuy in Pretoria; and, she requested them to issue a letter of guarantee for E50 000.00 (fifty thousand emalangeni) to that institution for the treatment of the applicant. As stated in the preceding paragraphs the Phalala Fund was of no assistance to the applicant.

[5] In the Medical Report the Doctor indicated that the injuries suffered by the applicant were severe, and, that this was a crush injury to the left foot. In conclusion the doctor indicated that the affected left leg had been amputated and that specialist medical treatment was required. It is common cause that the first applicant rejected the claim on the basis that the first Police Report stated

that the applicant was injured whilst he was removing a jack from a tractor, it slipped and the wheel of the tractor fell onto his feet fracturing the left leg.

- [6] The first respondent's letter repudiating the claim was dated 15th January 2008; it was addressed to the applicant's attorneys and it stated the following:

“....

Whilst admittedly we have not yet been furnished with an affidavit of occurrence, we are however, from a perusal of the contents of the police report, of the opinion that the injury in question is in no way causally connected to the driving of a vehicle but rather arose from your client's failure to take proper precautions when removing the jack from the tractor.

In this regard you may wish to revert to the Motor Vehicle Accident Act (1991) from which you will note that the Fund's liability to compensate is limited to injury caused by or arising out of the driving of a motor vehicle.

We accordingly return the claim form to yourself and perhaps you may wish to motivate your client's application for compensation.”

- [7] The applicant didn't accept the repudiation of the claim, and on the 1st February 2008, his attorneys advised the first respondent in writing that they were returning the Claim Form and annexures thereto on the basis that the tractor's driver Albert Mdluli drove the tractor at a fast speed causing the trailer to fall on the applicant's foot; hence, the applicant argued that the accident was

caused by the negligence of the driver, and, that it was an accident as envisaged by section 10 (1) of the Motor Vehicle Accident Fund Act13/1991.

[8] The first respondent didn't respond to the applicant until the 18th July 2008. In that correspondence the Fund acknowledged the discrepancy between the Police Report and the affidavit deposed by the applicant; however, the first respondent insisted that it would abide by the Police Report which absolves the driver of the tractor from any negligence. In addition the first respondent stated that this was an unfortunate accident of a jack slipping and the applicant injured in the process. Clearly the Fund did not make its own investigations of the circumstances surrounding the accident.

[9] On the 30th July 2008 the applicant's attorneys wrote a letter to the Station Commander of the Mbabane Police Station advising him to rectify the report on the basis that it does not correctly reflect the circumstances surrounding the accident. They enclosed the applicant's affidavit detailing the circumstances of the accident as an accurate version of what transpired. They contended that the applicant had a brief discussion with the police after the accident at the hospital where he was only asked the time of the accident. They further advised the Station Commander that the details of the accident appear to have been supplied to the police by the driver of the tractor, which are not true. It seems apparent from the evidence that the police merely relied on the Statement made by the driver of the tractor.

[10] The applicant's affidavit which was filed in support of the claim states in part as follows:

“....

2. **On the 27th June 2007 at about 1640 hours and at or around the Maphalaleni Hammer Mill, I was assisting one Albert Mdluli, the owner and driver of a tractor with registration No. SD 140 GH dismount from the said tractor, a trailer which was loaded with bricks.**
3. **A secure surface on which the front part of the trailer was to be cushioned when the tractor dismounted had been put in place.**
4. **I removed the bar that connects the trailer to the tractor which must have moved very fast because, before I knew it, the full weight of the trailer fell on my feet, largely the left foot injuring me seriously.**
5. **Naturally, I was shocked with the occurrence particularly the nature of the injuries I had suffered. I was taken to Mbabane Government hospital where I was admitted.”**

[11] The application is opposed by the first respondent. During the hearing of this matter, Counsel for the parties conceded that the point of law raised by the first respondent pertaining to urgency was now academic on the basis that it had been overtaken by events. On the merits the first respondent argued that the cause of action in so far as it seeks a declaratory order was incompetent in the circumstances on the basis that the Fund has not accepted liability or declared liable by an order of court in action proceedings as envisaged by section 16 (3) of the Act. To that extent it was argued that the claim was not one contemplated by section 10 (1) of the Act. It was further argued that the

prayers sought by the applicant were incompetent in circumstances where the first respondent has already repudiated the claim in terms of section 16 of the Act, and, that the remedy available to the applicant is to institute action proceedings.

[12] The second respondent deposed to an opposing affidavit in which he stated that the applicant did not report the accident to the police, and, that the police met him by chance on the 27th June 2007 at the hospital whilst attending to other road accident victims; and, that the applicant approached the police and informed them that he was involved in an accident in which a jack slipped from a tractor. The second respondent further contends that the police upon arrival at the police station recorded in the Occurrence book what they were told by the applicant in hospital. The second respondent conceded that there was no sufficient information at their disposal to enable the police to carry out their investigations.

[13] The second respondent further conceded that after the complaint filed by applicant's attorneys that the police report did not reflect the circumstances of the accident, an investigation was undertaken which culminated in annexure "AG1" which was the amended Police Report. This report provides as follows:

"On 27th June 2007 at about 1700 hours at or near Maphalaleni Hammer-Mill, a tractor International registered SD 140 GH drawing a trailer

driven by Albert Mdluli, Swazi Male adult 68 years of Maphalaleni got its trailer disconnected and one Mhawu Gwebu, Swazi male adult 56 years of Mpolonjeni a pedestrian got injured, fractured on left leg after the trailer fell on this leg and he was treated and admitted at Mbabane Government Hospital.

Investigation revealed that the driver of the tractor Albert Mdluli contributed to the cause of the accident that he failed to take a proper lookout before he accelerated or engage a forward gear. The driver knew that there were people around but he failed to drive cautiously to avoid accident.

In the circumstances the driver Albert was charged for driving without due care and attention, operating an unregistered trailer and operating an unlicensed trailer.”

- [14] In his replying affidavit the applicant denies that the first respondent repudiated his claim in annexure “MG6” dated 15 January 2008 quoted in the preceding paragraphs on the basis that the last paragraph states “we accordingly return the claim form to yourselves and perhaps you may wish to motivate your client’s application for compensation”. The applicant further contends that in light of the amended Police Report which acknowledges that Albert Mdluli was actually driving the tractor when the accident occurred, the first respondent is obliged to perform its statutory duty to process the claim. He also refers to the conclusion in the Police Report which states that the driver was negligent in so far as he failed to take a proper lookout; and the fact that the driver has since been charged by the police for negligent driving.

I am in agreement with the applicant that the last paragraph in annexure “MG6” does not constitute a repudiation of the claim, and that the first respondent was actually giving the applicant an opportunity to put his papers in order and in particular the Police Report. As stated in the preceding paragraphs the first respondent had acknowledged the discrepancy between the first Police Report and the applicant’s affidavit accompanying the claim. In addition the police acknowledged that the accident had not been reported to enable them to properly conduct an investigation. In the circumstances the first Police Report which was the basis of the alleged repudiation cannot stand in the face of the second Police Report which was the product of police investigation.

[15] Furthermore, the first respondent had argued that the accident was not one contemplated by section 10 (1) of the Motor Vehicle Accident Act on the basis of the defective Police Report; however, such an argument cannot stand in the light of the second Police Report. Section 10 (1) of the Act provides the following:

“10. (1) The MVA 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 dependent 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 or 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.”

[16] It is apparent from the evidence that the accident in which the applicant was seriously injured is one contemplated by section 10 (1) of the Act. In the circumstances, the first respondent has a statutory duty to consider the merits of the applicant’s claim and make a decision. The applicant was seriously injured in the accident causing a fracture and the amputation of his left leg. The doctors attending to the applicant concluded that he required specialist medical treatment which could only be obtained in South Africa. In view of the time lapse from the date of the accident it becomes apparent that the first respondent should expedite the process of considering the application bearing in mind its statutory obligation to the people of this country.

[17] It is not in dispute that the applicant has become disabled and unable to work for his livelihood. Similarly, the applicant does not have any source of income. It is of great concern that such claims often take too long to finalise to the prejudice of the injured people. Justice and fairness require that such claims should be given the urgency they deserve.

It is against this background that *Cobert JA in Safcor Forwarding (Pty) Ltd v. NTC* 1982 (3) SA 655 AD at 675 had this to say:

“The decisions of public bodies or officialdom sometimes bear hard on the individual. The impact thereof may be sudden and devastating. Therefore, as in the case of other types of litigation, applications for the review of such decisions may require urgent handling and, in proper circumstances, the grant of interim relief. In my opinion, it would be unfortunate if our review procedures did not admit of this. Happily I think they do.”

[18] Accordingly, the following order is made:

- (a) It is hereby declared that the accident in which the applicant was injured on the 27th June 2007 at Maphalaleni is one contemplated by Section 10 (1) of the Motor Vehicle Accident Act 13/1991.
- (b) The first respondent is directed to consider the merits of the applicant’s claim and finalise it within thirty days of this order.
- (c) The first respondent is directed to pay costs of suit on the ordinary scale.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant

Attorney Sabela Dlamini

For Respondents

Attorney Sabelo Masuku