IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 2769/09

In the matter between

WILSON NYENGWA MATSE **PLAINTIFF**

And

S & B CIVIL (ROADS) PTY LTD **DEFENDANT**

Neutral citation	***Wilson Myengwa Matse vs S & B Civil (Roads) Pty Ltd* 2769/09 [2014] SZHC 230 (19 September 2014)**
Coram:	**Ota J.**
Heard:	**17 September 2014**
Delivered:	**19 September 2014**
Summary:	**Civil Procedure: absolution from the instance in terms of Rule 39 (b) of the Rules of the High Court; principles thereof; application dismissed.**

JUDGMENT

OTA J.

[1] At the close of the case for the Plaintiff on 18 September 2012, Learned Defence Counsel, Mr Simelane, moved an application for absolution from the instance in terms of Rule 39 (b) of the Rules of the High court, which states as follows:-

> "**At the close of the case for the Plaintiff, the Defendant may apply for absolution from the instance, in which event the Defendant or one counsel on his behalf may address the court and Plaintiff or one counsel on his behalf may thereupon reply on any matter arising out of the address of the Defendant or his counsel."**

[2] The application was opposed by Learned Counsel for the Plaintiff, Miss Gwiji. After hearing arguments from both counsel, I dismissed the application and reserved my reason. This, I now tender.

[3] **REASONS**

The Plaintiff commenced this action in a representative capacity, as the natural parent of a minor child, Phumlani Mzizi Matse, born on 13 May 1990.

[4] The Plaintiff claims the sum of E35,010=00, being damages for injuries suffered by his minor child as a result of the negligence of the Defendants.

[5] In his particulars of claim, the Plaintiff alleged as follows:-

> **"4. At all material times hereto, Defendant was contracted by the Swaziland government to carry out road construction works on the Hilltop, Zone 4 Mahwalala public road.**

5. On or about the 16th March 2005 along the Hilltop Mahwalala Zone 4 public road; Defendant's employees, whose fuller and further particulars are to Plaintiff unknown; and who were at all material times hereto in the employ of Defendant and acting within the scope and course of their employment as such and did;

5.1 Dump a massive heap of soil across the road, making it inaccessible for residents of Hilltop Zone 4 to the community tap (emfuleni) to access water.

5.2 As a result of the heap of its soil, which should not have been there in the first place which in Plaintiff's view lacks or is short of the reasonable man measures, resulted in Plaintiff's minor child sustaining injuries whilst trying to climb over the loose heap of soil in an effort to get access to the community tap.

6. Plaintiff's minor child's injuries were occasioned solely by the negligence of S & B Civils (Roads) Pty Ltd's employees in that;

6.1 They placed the heap of soil in the middle of the road making the community tap inaccessible to residents of Mahwalala Zone 4.

7. Having fallen off the heap of the soil, Plaintiff's child sustained injuries on his left hand and elbow.

8. Plaintiff's child was thereafter treated, prescribed analgesics and discharged at the Mbabane Government Hospital.

9. By reason of the said injuries Plaintiff's child suffered damages in the sum of E35,010.00 being made up as follows:-

Medical expenses	**E 10.00**
Pain and Suffering	**E35,000.00**
	E35,010.00

10. Despite demand Defendant fails, ignores or refuses to pay the said sum of E35,010.00."

[6] The Plaintiff testified and called the evidence of four (4) other witnesses in support of his case. It was at the end of the Plaintiff's case that Mr Simelane move the application for absolution, contending that the Plaintiff has failed to make out a *prima facie* case for the following reasons:-

- His papers and the evidence led differ so much that it does not connect the Defendant.

- The witnesses gave contradicting versions of the size of the heap of soil.

- From the witnesses' description of the scene there appears to have been two scenes of the accident instead of one.

- PW3, Sibongile Matse, the mother of PW2, Phumlani Matse, was not at the scene during the accident. The allegation that she was taken to the scene by PW5, Phiri Mzamo Ndumiso on 17 March 2005, was contradicted by PW5 who told the court that be took no one to the accident scene on the said day.

- The Plaintiff was required to prove the negligence of the Defendant and the causa connection between the accident and negligence. This was not proved.

- Even though the Plaintiff alleges that there was no warning sign around the soil, he does not deny the fact that the construction was very well known and there were warning signs of same.

- Even the unlawfulness of the conduct was not established. The road construction had been approved by government. As the grading of

the road was ongoing, the heap of soil was falling off the grader onto the side of the road. It was not intentionally dumped there by the Defendant. It does not therefore constitute unlawful conduct of the Defendant.

- The Defendant should be absolved from the instance.

[7] In reply, Miss Gwiji submitted the following factors:-

- Liability for delict is based on the fault of a party.

- The fault could be an omission or commission.

- It is common cause that the construction which was ongoing, was at a residential place.

- There was an obstruction caused by soil which was as a result of the grading going on at the construction site, which affected the road leading to the community tap, which was off the main road under construction.

- There is evidence from PW3 that after the accident, they at some stage approached the personnel of the Defendant who told them to tender both the receipt of the medical treatment and transportation to the

hospital. This shows that the Defendant has an idea of this case, contrary to the allegations in their plea.

- The Defendant has a case to answer and should be called to its defence.

[8] It is now settled law in the Kingdom, that the only enquiry before the court at this stage of the proceedings, is to see if the Plaintiff has made out a *prima facie* case, requiring the Defendant to be called to its defence. Whether there is evidence upon which a court applying its mind reasonably could or might (not should not ought to) find for the Plaintiff see **Ncamsile Eunice Tsela v Psychiatric Centre also known as Mental Health Centre and Another, Civil Case No. 2321/90, Meshack Langwenya v Swazi Poultry (Pty) Ltd, Civil Case No. 737/2009.**

[9] The question is has the Plaintiff made out a *prima facie* case? Before looking at the evidence led to see if the Plaintiff made out a *prima facie* case, and since it is alleged that the Defendant was negligent, let me first advise myself on the concept of our law on negligence.

[10] In the case of **Ncamsile Eunice Tsela v Psychiatric Centre also known as Mental Health Centre and Another, Civil Case No. 2321 [6] –[7] (judgment of 11 April 2014),** I adumbrated on this concept in the following terms:-

"[6] In my decision in the case of Aliki Enterprises (Proprietary) Limited v Punky Mhlongo and Another, Civil Case No. 1983/10, para [38], I **captured this concept in the following words:-**

'[38] The concept of negligence is that a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him. The judicially accepted criterion in establishing whether a person has acted carelessly and thus negligent, is the objective standard of the reasonable person, the bonus paterfamilias.'

[7] ----------

'(11) The test for negligence was thus formulated in Kruger v Coetezee 1966 (2) SA 428 (a) at page 430;

For the purposes of liability culpa arises if

(a) A <u>diligens paterfamilias</u> in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct.

(ii) injuring another in his person or property and causing him patrimonial loss:

(iii) would take reasonable step to guard against such occurrence, and

(b) the defendant failed to take such steps'

(12) Once the kind of harm, albeit not the degree or extent thereof, is reasonably foreseeable, all harm of the same kind must be compensated see Botes v Van Deventer 1966 (3) SA 182 (A) at pp 190-191."

[11] The totality of the evidence advanced by the five (5) witnesses in proof of the Plaintiff's case, demonstrate the following;-

1. Defendant was engaged by the Swaziland Government to construct the road at Zone 4 in Mbabane.
2. The Plaintiff, PW2, PW3 and PW5 were all resident at Zone 4 at this material time.

3. During the construction and grading of the main road, some soil fell off the grader and formed a heap on a side road leading to the community tap and completely blocked access to the tap.

4. Though the fact of the ongoing construction was well known to the residents of the community and signs warning of the construction were placed around the area, there was no sign or tape specifically placed around the heap of soil blocking access to the community tap.

5. Members of the community continued to gain access to the tap by climbing over the heap of soil, as the other alternatives would require a journey of about 25 metres (45 minutes).

6. On 16 March 2005, PW2 who was then about 14 years old, was sent by PW3 his mother, to go and fetch water from the community tap.

7. PW2, in the company of PW5, then about 13 years old, proceeded to the tap to fetch water.

8. On their way back from the tap and whilst ascending the heap of soil, PW2 fell down and injured his left hand.

9. PW5 immediately went home to report the accident to PW3 and a community police.

10. PW3 and the community police proceeded to the scene to go and see the place and the circumstances under which PW2 got injured.

11. Thereafter, PW2 was taken to the Mbabane Government Hospital by the Plaintiff, where he was treated and Plaintiff paid the sum of E10,00 for the treatment.

12. The medical report, exhibit C, which was extracted from the green paper, outpatient record / prescription, exhibit B, *prima facie* shows that PW2 sustained injuries to his left hand. Examination revealed a grossly swollen left wrist but x-rays revealed that there was no fracture. He was successfully treated with analgesics and an arm sling.

13. The medical report was prepared and tendered in evidence by PW4, Dr Makhozana Dlamini, who is a Senior Medical Practitioner at the Mbabane Government Hospital.

14. PW2 suffered pain and suffering from the injury which lasted for about a month. Since the injury occurred during school time, PW2 who is left handed, had a lot of difficulty trying to write with his right hand.

15. At some point shortly after the accident, PW3 in the company of others, approached the personnel of the Defendant at the site office to report the incident.

16. The Defendant's personnel requested PW3 to submit the medical bill and receipt for transportation to the hospital, for a refund.

17. PW3 did not submit these documents in view of the fact that she anticipated other hospital charges.

[12] Now, without the necessity of going into any analysis of the totality of the evidence led, expressing opinions or reaching conclusions, which course is undesirable at this stage of the proceedings, I am of the view, that the Plaintiff has made out a *prima facie* case warranting an answer from the Defendant. There is a definitive nexus between the Defendant and PW2's injury and the concomitant damages alleged.

[13] The contradictions that appeared in the Plaintiffs case, as to the exact height of the heap of sand; how many times PW2 was taken to the hospital; when the hospital bill was paid and when the x-ray was done; whether or not PW2 had a cast or a sling placed on his hand, when PW3 actually visited the scene of the accident and who led her there, are of no moment at this stage of the proceedings.

[14] I say this because, it is the judicial accord that absolution should not be granted simply because the evidence led contains contradictions. See **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa (4th ed) at 682, Mershack Langwenya v Swazi Poultry (Pty) Ltd (Supra), para 29, Marine and Trade Insurance Co. Ltd v Van**

der Schyff 1972 (1) SA at 38, Rex v Zonke Thokozani Tradewell Dlamini and Another Criminal Case No. 165/10, paras [46] – [47].

[15] In elucidating the fact that the presence of contradictions in the Crown Case, is not a *sine qua non* to the discharge and acquittal of an Accused at the close of the Crown case, in terms of section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 (as amended), which is akin to an application for absolution from the instance, in the case of **Rex v Zonke Thokozani Tradewell Dlamini and Another (Supra)**, I made the following condign remarks.

> **"47 Even though the foregoing authorities related to application for absolution from the instance at the close of the Plaintiff's case in civil proceedings, I see no impediments preventing them from applying with equal force where an application is made in terms of section 174(4) of the (CP&E). I say this because the issue that arise for consideration in the two applications in civil and criminal proceedings, are the same. This is whether the Crown or Plaintiff as the case maybe, has made out a *prima facie* case. The underlying consideration for excluding the question of contradictions at this stage is therefore, the fact that such a consideration will entail a detailed evaluation and assessment of the evidence led, followed by reasons and opinions which will invariably have the ill consequence of hamstrunging the case for the Accused or the Defendant as the case may be, if he is called upon to enter into his defence."**

[16] It was for the totality of the foregoing reasons, that I dismissed the Defendant's application for absolution from the instance and called upon it to enter into its defence. Costs to follow the cause.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE …….. DAY OF …….2014

OTA J.

JUDGE OF THE HIGH COURT

For the Plaintiff:	**N.E. Gwiji**
For the Defendant:	**K. Simelane**