



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1392/2012

In the matter between:

BHEKOKWAKHO JAMES LUSHABA

Plaintiff

And

SINCEPHETELO MOTOR VEHICLE

ACCIDENT FUND (MVA)

Defendant

Neutral citation: *Bhekokwakho James Lushaba v Sincephetelo Motor vehicle Accident Fund (1392/2012) [2016] SZHC 49 (14th March 2016)*

Coram: **M. Dlamini J**

Heard: **22nd February, 2016**

Delivered: **14th March, 2016**

- whether DW1 is legally responsible to the plaintiff for the injuries sustained, will depend upon whether defendant's negligence was "part the cause" of plaintiff's injuries and this in turn "will depend upon what the conditions of visibility were, upon what DW1 saw or could have seen in the existing conditions upon the relative position"¹ of the plaintiff.

¹ n²

Summary: The plaintiff's claim is based on injuries sustained as a result of negligent driving by the defendant. The action is opposed.

Parties' pleadings

[1] The particulars of claim shows:

- “4. On or about 12th September, 2010 on MR9 public road at ka-Shali area the motor vehicle SDCD 578 collided with the plaintiff who was a pedestrian inflicting serious injuries on the said plaintiff.
5. The said collision was caused solely by the negligence of the driver of SDCD 578, Mary Lin, in one or more of the following aspects:
 - 5.1 She failed to keep a proper lookout thus the vehicle collided with the plaintiff who was timeously visible.
 - 5.5 She failed to avoid the accident when by the exercise of reasonable care she could and should have done so.”

[2] The defendant however denied any act of negligence on her part. She pleaded:

- “3. The defendant denies that the said Mary Lin was negligent as alleged or otherwise. Plaintiff is put to strict proof thereof.
4. In the alternative to 3 and in the event that the Court hold that the said Mary Lin was negligent (which is denied) then the Defendant denies that the negligence of the driver concerned was the cause of the collision.
5. In the further alternative to 3 and 4, should the Court find that the driver of the motor vehicle concerned was negligent and that such negligence contributed to causing of the collision (which is still denied) the Defendant alleges that the Plaintiff was also negligent in one or more of the following:
 - 5.5 He also failed to act reasonably when a collision seemed imminent.”

Viva voce evidence

[3] The plaintiff (PW1) on oath identified himself as **James Bhekokwakhe Lushaba** born in 1947. He testified that on the 12 September 2010 he was coming from the shops and the time was around 4:00 p.m. He intended to cross the road and an army truck approached. He stopped. The truck took the road to Nhlambeni area. As he still was standing, he looked towards Mhlaleni in order to ascertain if there was an oncoming vehicle. While he was looking, a car came behind him and knocked him. He woke up in hospital. The accident happened at kaShali in the Mhlaleni-Nhlangano highway. The court adjourned for inspection.

[4] At the intersection, viz. four way roads at Ngwane Park, the court was requested to stop. The court noted the Mhlaleni-Nhlangano highway. It also noted two dirt roads both approaching the highway on opposite directions. It was somehow a four way stop. PW1 pointed at the edge of the road but on the gravel road from Ngwane Park and stated that he was standing on the said spot when he noticed a motor vehicle belonging to the Army approaching from Nhlambeni area. This motor vehicle then came into the main road, crossing over the highway lane from Nhlangano. It took the Nhlangano direction. The witness who was, according to his evidence, at all times standing next to the highway near the Mhlaleni lane, was suddenly knocked down by defendant /plaintiff who was coming from Nhlangano direction using the highway.

[5] The witness then proceeded to testify that he did have occasion to meet the driver who was of Chinese descent and a female. The driver apologized. She paid his medical fees and also gave him a sum of E1000-00 as an apology.

[6] This witness was cross examined. It was confirmed under cross examination that the vicinity where he took the court to for inspection *in loco* was the correct one and that she was of Chinese descent and her name was Mary Lin. It was further confirmed that the time was around 4:00 p.m. I will refer to the rest of his cross examination later in this judgment.

[7] The next witness on behalf of plaintiff was **Lungile Doris Motsa (PW2)**. She gave evidence under oath. She stated that when the accident occurred, she was coming from the shops and was with PW1. They were to cross the road. A motor vehicle belonging to the Army came from Masundwini (that is Mhlaleni). As they were watching, a white motor vehicle came from Sidvokodvo (Nhlangano) direction. The white motor vehicle tried to avoid the army motor vehicle. It veered off the road and hit PW1. It stopped at a distance.

[8] In cross examination she highlighted that the day was clear. When police arrived, PW1 had been taken by another motor vehicle to hospital. The police then followed the motor vehicle that had taken PW1 to hospital. I will also refer to the other part of her cross examination later herein. The plaintiff closed its case.

[9] The defendant led evidence in rebuttal. **DW1, Mary Lin** on oath testified that five (5) years ago in the company of a friend, they drove towards Matsapha for a holiday. At the T- junction, she saw PW1 in the middle of the road. She drove past him. PW1 moved towards her car and hit the car. He fell down. He stopped. There were other people around the vicinity as this was a Sunday afternoon. She asked them to call the police. She was driving a 4X4.

[10] DW1 denied that she was avoiding the army vehicle. She maintained that PW1 was in the middle of the road. She slowed down upon noticing him, thinking that he would cross over but he did not. She decided to follow PW1 to hospital. She too was cross examined. The defendant closed its case.

Adjudication

Principle of law

[11] The cause of action is based on negligence. **H.B. Klopper**, authored as follows on negligence.

“A driver will be negligent if a reasonable person or driver would have acted differently if the damage caused were reasonably foreseeable and preventable.”²

[12] The learned author eloquently pointed out:

“If the principles of negligence are applied to a motor vehicle accident, the court places itself as far as is possible in the place of the driver at the time of the accident”

Common cause

[13] It is common cause among the parties that an accident involving plaintiff as a pedestrian and Mary Lin as driver took place on 12th September 2010 around 4:00 p.m. at Ngwane Park Mhlaleni – Nhlangu intersection. There were other pedestrians along the scene of accident.

Issue

² The Law of Third Party Compensation, at page 69, 3rd Edition

[14] **Watermeyer CJ**³ in a similar case stated:

“The question whether the defendant was legally responsible to the plaintiff for the death of Cowan will depend upon whether his negligence was in part the cause of Cowan’s death, and this, in turn, will depend upon what the conditions of visibility were, upon what defendant saw or could have seen in the existing conditions, upon relative positions of car, horse and man upon the road from time to time during the few moments which elapsed just before the collision and upon the speed at which defendant drove.”

[15] Similarly in the present case, the question whether DW1 is legally responsible to the plaintiff for the injuries sustained, will depend upon whether defendant’s negligence was “*part the cause*” of plaintiff’s injuries and this in turn “will depend upon what the conditions of visibility were, upon what DW1 saw or could have seen in the existing conditions upon the relative position”⁴ of the plaintiff.

Analysis

Condition of visibility

[16] There is no dispute as to the condition of the weather on the day of the accident. The day was clear. It was not overcast as attested to by PW1 and confirmed by defendant’s counsel under cross examination of PW1.

[17] However, there is another aspect of the condition of visibility which needs interrogation. DW1 was cross examined as follows:

Mr. S. C. Dlamini: “You said you were from Sidvokodvo?”
DW1: “Yes”

³ South African Law Report Appellate Division 1945 AD page 81 at 83

⁴ n²

Mr. S. C. Dlamini: “How far were you when you saw PW1?”

DW1: “As there is a bend, I saw him about 100m away.”

Mr. S. C. Dlamini: “After taking the bend, the road is clear?”

DW1: “Yes”

[18] This position of the presence of the bend, a hundred metres away from the scene of the accident was observed by the court as well during the inspection *in loco*.

[19] From this evidence therefore, it is common cause that the conditions of visibility were clear. In other words, an astute or reasonable driver would have seen the plaintiff from where he was before the accident, as DW1, the driver herein, attests that she saw him.

Relative position of plaintiff

[20] The plaintiff testified that he was standing next to the road (highway) which he intended to cross. He was intending to cross over the Mhlaleni – Nhlanguano highway road. When the truck from the Army crossed over from Masundvwini dirt road, to take the lane near which he was standing (Mhlaleni-Nhlanguano) as it was heading to Nhlanguano direction PW1 turned to look at oncoming cars from his side of the lane (Mhlaleni – Nhlanguano). It is then that he was knocked down by DW1, according to his evidence.

[21] The evidence of DW1 is however, in contrast. She testified that when she approached, she saw PW1 standing in the middle of the road, on the white line. She slowed down, hoping that PW1 would pass. PW1 did not. She

moved on and she had passed PW1, she heard a knock. PW1 knocked himself at the back of the motor vehicle by the right side.

[22] PW1 disputed the evidence by DW1 as it was put to him in cross examination. He maintained his side of the incident. PW1 further testified that when DW1 veered off the road to knock him, she was avoiding the army truck which entered the main road without indicating. This piece of evidence was contested as follows:

Mr. S. Masuku: “She (the driver) will tell the court that it is incorrect that there was an army truck and that she was to avoid it when she hit you?”

PW1: “Not true.”

Mr. S. Masuku: “You stopped in the middle of the road because you saw her coming otherwise you were crossing?”

PW1: “I did not even see the car.”

Mr. S. Masuku: “Do you remember which part of the motor vehicle hit you?”

PW1: “I do not know.”

[23] Indeed, when DW1 took the witness stand, she confirmed her instructions. She attested that there was no army motor vehicle that crossed the lane from her side to proceed to the opposite direction. She testified that she saw PW1 in the middle of the road standing on the white line.

[24] I consider that the evidence of PW1 was supported by PW2 as to the unfolding of the events at the scene of the accident. DW1 did confirm that PW1 was not alone at the scene. There were other pedestrians. PW2 identified herself as one of the pedestrians together with PW1.

[25] I further find that had the evidence by PW1 and PW2 that DW1, when she veered off the road to the spot where PW1 was standing, she did so in order to avoid a truck that suddenly came into the road, overlapping to take her opposite lane, had not been challenged, the court would be inclined not to find that DW1 was negligent. I note however, that for DW1 to exercise caution would depend for final determination, on the question of which was the best way to avoid the most homicide viz. to go under the truck or risk the death of the pedestrians. Of course, these would entail the number of people at risk of death. A further reason expanded by **Innes CJ**⁵ is as follows:

“The general rule under such circumstances is that persons using the road upon their proper side have paramount right and are entitled to preference, so that, in case of danger of a collision, it is the duty of those on their wrong side to give way first.”

[26] I find that the plaintiff was standing at his right side of the road, ready to cross over as verified by PW2. It is DW1 who veered off the road, taking the wrong side of where she was to drive. But for the reason that DW1 attest that there was no such truck and that she saw PW1 a hundred metres away on a clear road after the bend standing in the middle of the road intending to cross, such evidence is without doubt, consistent with a driver who is negligent. The reason is that a reasonable driver in the circumstances described by DW1 herself, would have by then come to a halt upon reaching a pedestrian that intends to cross while there is an on coming motor vehicle such as by DW1. This is more so if the pedestrian is spotted hundred metres away and is already in the middle of the road as attested by DW1.

⁵ Solomon and Another v Mussett and Bright Ltd 1926 AD 427 at 433

[27] For the above reasons, I find in favour of the plaintiff. The parties applied that I decide only the liability issue. The rest of the issues ought to be left to them. I accordingly do so.

**M. DLAMINI
JUDGE**

For Plaintiff : S. C. Dlamini of S. C. Dlamini and Company

For Defendant: S. Masuku of Howe Masuku Nsibandze Attorneys