



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2148/2007

In the matter between:

STANLEY MSWELI

Plaintiff

And

**OHN INVESTMENTS (PTY) LTD
t/a CENTRAL FILLING STATION**

Defendant

Neutral citation: *Stanley Msweli v OHN Investments (Pty) Ltd t/a Central Filling Station (2148/2007) [2017] SZHC 113 (13th June 2017)*

Coram: M. Dlamini J.

Heard: 16th May, 2017

Delivered: 13th June, 2017

- **In our law, it cannot be overemphasised that pleading must state clearly the grounds upon which either a claim or a defence is based. It is wrong to waylay another party by**

**springing a surprise either in a form of a ground for a claim
or a defence.**

Summary: Serving before me are particulars of claim depicting that defendant negligently failed to close up plaintiff's coolant following plaintiff taking his motor vehicle for refueling and replenishing of a coolant in defendant's garage. Defendant vehemently denies any form of negligence on its part.

The parties

[1] The plaintiff (Mr. Msweli) is an adult male of Manzini. Defendant is a company duly registered in terms of the company laws of Swaziland and carrying on its business of a fuel retailer near Manzini Central High School by Central Distributor Road, Manzini region. It trades under the name Central Filling station (Central Filling Station).

Parties' contentions

Plaintiff

[2] By means of a combined summons, Mr. Msweli has articulated:

- "4. *On or about the 10th day of February 2007 Plaintiff brought his motor vehicle, a Mazda 3, Registered SD 755 PG to the Defendant for purposes of re-fueling and replenishing other engine necessities like coolant.*
6. *Defendant's employee afore said refueled Plaintiff's motor vehicle and in the process removed the radiator cap for purposes of replenishing the coolant but failed to replace the cap.*
 - 6.1 *Defendant's employee was negligent in failing to replace the radiator cap.*
7. *As a result of the negligence of Defendant's Servant, Plaintiff's motor vehicle over-heated and the cylinder head was damaged.*

8. *Plaintiff caused his motor vehicle to be towed to Nelspruit where it was repaired at a cost of E8,870.90 (Eight Thousand Eight Hundred and Seventy Emalangeneni and Ninety Cents)*
9. *Due to the extent of the initial damage, Plaintiff was forced to replace the whole engine within two months at a cost of E12,135.54 (Twelve Thousand One Hundred and Thirty Five Emalangeneni Fifty Four Cents).*
11. *In the premise Defendant is liable to Plaintiff in the sum of E21,006.44 (Twenty One Thousand and Six Emalangeneni Forty Four Cents) which sum, despite demand, Defendant fails and/or neglects to pay.”*

Defendant

[3] The defendant contended:

“3. *AD PARAGRAPHS 5, 6 and 7*
Save for admitting that defendant’s employee did refuel the motor vehicle, the rest of the contents are denied.

The said employee did not need to remove the radiator cap to refuel the motor vehicle and therefore was not negligent in anyway in his handling of his duties to the plaintiff.

The over-heating and damage to plaintiff’s motor vehicle were therefore not due to any negligence at the defendant’s filling station.”

Trial

[4] Each party led one witness. Mr. Msweli gave evidence in his own case. On oath, he stated that in 2007, he owned a motor vehicle Mazda 3 registered SD 755 DS. At that stage an application was made to his particulars of claim to read DS instead of PG. There was no objection and the court duly entered the amendment.

[5] In February 2007 Mr. Msweli testified that as branch manager of Shoprite trading as OK Furniture, he was due to attend a month-end meeting in

Nelspruit. He proceeded to Central Filling Station where he fueled his motor vehicle and parked it at Bhunu Mall over night as he would do whenever he was traveling to South Africa for the monthly meetings. The following morning, that is, 10th February 2007 he drove the car to Nelspruit. As he drove pass Jeeves rief, he noticed that the car was performing in an unusual manner. He continued to drive. When he had passed Malelane he noticed that the temperature metre had risen. He stopped the motor vehicle and switched off the engine and the radio. He heard a boiling sound. He opened the bonnet and realized that the radiator lead was missing. He remembered that on the previous day when he asked the petrol attendant to refuel the motor vehicle, he had asked her to refuel the window washer. He did not ask her to refuel the radiator liquid because his motor vehicle was new at that time, being a 2006 model. He called for a break-down. His motor vehicle was attended to by a Mazda dealership who advised that its engine had been damaged. He was told to replace the cylinder head following that it had bent from the motor vehicle overheating. He did buy a new cylinder head. At this stage Mr. Msweli handed to court two invoices marked exhibit A1 and A2 reflecting amounts of R2,712.11 and E5,508.79 respectively. The date reflected therein was 20th March 2007. He did not have a motor plan as he could not afford it.

[6] In May 2007 he was due to attend a work related meeting in Johannesburg. On his way, he experienced another problem. He took it to the dealers who opined that the motor vehicle needed a completely new engine. He purchased it and it cost him a sum reflected in exhibit C of R12,135.54.

[7] Following the break-down of the motor vehicle on his way to Nelspruit on 10th February, 2007, Mr. Msweli hitch hiked his way back. He went straight to Central Filling Station. He demanded to see the CCTV recording of that day. After a long struggle, Central Filling Station

reluctantly allowed him to view the CCTV. At that stage he had not divulged the reason for viewing the CCTV. When he viewed it, in the presence of the manager for Central Filling Station, he confirmed the attendant opening the radiator, putting its cap on top of the fuel tank and failing to close it. He confirmed that he left the filling station with the radiator cap still on top of the filling station. He then left.

[8] The following day, the owner of the filling station came to his office as the manager had promised to inform him. However, the owner was cheeky and apportioned blame to Mr. Msweli. Mr. Msweli concluded his testimony by pointing out that the first break-down of his motor vehicle was caused by failure of the water to circulate in the engine as there was a missing radiator cap. The second breakdown was caused by failure to replace the entire engine. However, had there been non-failure of the water to circulate, there would be no need to replace the entire engine. He then pleaded that the court grants him the sum of E21,006.44, interest thereof at 9% per annum *tempore morae* and costs of suit.

[9] In order not to burden this judgment, I will deal with cross examination of this witness later in this judgment. The plaintiff closed its case and defendant opened its case by leading the evidence of Mumsy Victoria Ngcamphalala (Ms Ngcamphalala).

[10] Ms Ngcamphalala on oath testified that she was employed by Central Filling Station, first as the supervisor in 1998 and she is now the assistant manager. Her duties as the supervisor was to attend to customers' complaints. The common complaints from customers were that the attendants had fueled the wrong type of gas or fuel. She recalled a complaint pertaining to failure to close a radiator because it was a unique one. It was her evidence that the reported date of the incident was 10th

February 2007. She duly took the customer to the office of the manager. The manager did open the CCTV to view the complaint by the customer. However, she noted that the customer's complaint related to a Jetta and not a Mazda. At that stage, she left the office of the manager and the customer remained with the manager. The manager was still available.

[11] She was cross examined briefly on whether she was the one who attended the customer who later came to complain. She replied in the negative. She was also asked whether she did remember the said customer. She stated that as she dealt with many customers she does not recall the customer. She would not know whether the customer she testified about is the same customer that has instituted the present action. When she was confronted with the evidence that Mr. Msweli testified that the motor vehicle developed mechanical problems due to Central Filling Station's negligence, she replied that she saw a VW from the CCTV and that she knew nothing of a Mazda 3. The defence then closed its defence case.

Adjudication

Principles of the law

[12] The words of **Innes CJ** in **Frankel Ohlssons Cape Breweries Ltd 1909 TS 957 at 962** are very apposite in this matter.

“In order to investigate whether and under what circumstances, the onus is shifted in a case like the present, it is necessary to determine what allegations and what proof, are essential to found the plaintiff's claim, and then to ask what special defences are available in law to defeat that claim. For the purposes of this case in my judgment that inquiry may be narrowed to the limits of a single question – Is it necessary that the plaintiff should allege and prove negligence, or is it for the defendant to establish the absence of negligence by way of defence?”

[13] The learned Judge had prior¹ stated:

“When a litigant applies to a court for relief the burden is upon him to show that he is entitled to the remedy which he seeks; and the plaintiff must invariably begin, and must establish his case, except where the pleadings contain admissions which render the defendant liable unless the inferences to which they give rise are rebutted by him.”

Analysis of oral evidence and pleadings

[14] In establishing negligence on the part of Central Filling Station, Mr. Msweli testified under oath:

“The breakdown of my motor vehicle was caused by failure of the water to circulate in the engine and this was caused by the missing cap.”

[15] He had earlier on stated of the cap:

“When I got to the filling station, I found that the person who had assisted me the previous day was not at work. I asked for the manager who invited me to his office. I demanded that they play the camera footage of the day I was at the garage from the time I arrived at the garage. After a struggle and I threatened them to go to the police as the manager was not cooperative, they finally agreed ... I saw the attendant removing the yellow cap, that is, radiator cap being put on the petrol pump. It was easy to see it as the petrol pump is silver and the cap is yellow.”

[16] In rebuttal, Central Filling Station under cross examination by its Counsel, pointed that A2 reflected dates as 20th March 2007. This was in contradiction to Mr. Msweli’s evidence that he received the invoices after five days of the first break-down which was according to him at the end of February 2007. The witness clarified that he could not be sure of the date.

¹ *supra* at page 961

- [17] This witness was cross examined on a letter of demand. It was said that it was dated 7th March 2007 and that it stated that the negligence by defendant happened on or about 10th February 2007. This witness responded that he was not sure of the date.
- [18] During cross examination of the witness on the letter of demand, the court provisionally marked it as exhibit 1. However, this letter was not handed to court nor did Central Filling Station's witness submit it to court during its discharge of the evidential burden. In this way, the court is not in a position to make a determination on any contradiction in so far as the letter of demand is concerned.
- [19] The second ground raised under defence was that Mr. Msweli himself was negligent in that in his evidence in chief, he realised while at Matsamo border post that the motor vehicle had mechanical problems but continued to drive it over a distance of one hundred kilometers before calling for assistance. This witness explained that the motor vehicle jerked while at Matsamo. He only realised when he had just passed Malelane that the motor vehicle was overheating.
- [20] The last ground of defence was that the motor vehicle that was viewed in the CCTV footage was a VW Jetta and not a Mazda 3. Mr. Msweli insisted that he came driving a Mazda 3 and that it is this motor vehicle that was reflected on Central Filling Station CCTV. The witness for Central Filling Station, Ms Ngcamphalala testified on one aspect and that was the motor vehicle viewed from Central Filling Station was a VW Jetta. She stated that she knew nothing about a Mazda 3.
- [21] Glaring from the evidence of Ms Ngcamphalala is that she did not dispute the evidence adduced by Mr. Msweli that he confirmed his night mares

from Central Filling Station's CCTV namely, that the yellow cap of his radiator was not replaced. This evidence was not disputed even under cross examination of Mr. Msweli. The court is therefore compelled to accept this piece of evidence as admitted.

[22] The only dispute which remains for determination is whether Mr. Msweli was driving a VW Jetta or a Mazda 3 on the day when his radiator cap was not placed back in the radiator of his motor vehicle.

[23] Mr. Msweli testified that the dealer at Nelspruit advised him that the cylinder head was bent as a result of the overheating. A new cylinder head had to be replaced. This finds support from exhibit A1 and A2. The parts reflected therein were for a cylinder head. Further, the motor vehicle described under the exhibit is a Mazda 3 registered SD 755 DS. Mr. Msweli testified similarly that the motor vehicle he came driving was SD 755 DS. His evidence finds support from exhibit A1 and A2. It stands to reason therefore that his evidence on the type of motor vehicle he was driving must be accepted.

[24] On the contradiction in dates, it is apposite to point out that Mr. Msweli testified that every month end he would travel to Nelspruit to attend to the headquarters meetings. He testified that it was at the end of February when he went to Nelspruit and encountered a breakdown in his motor vehicle. Indeed this evidence did not tally with the invoices under exhibit A1 and A2 as they reflected the 20th March 2007 (A2). This contradiction inclined the court to accept Central Filling Station's position that this was not the motor vehicle which is the subject matter. However, this inclination was dispelled by Ms Ngcamphalala who testified that the customer came and asked to view the footage of 10th February 2007. This piece of evidence considered with Mr. Msweli's response under cross examination that he

was not sure of the date, clearly points out that the version by Mr. Msweli that he travelled to Nelspruit on the month end was a mistake which must be accepted. He must have travelled somewhere in the middle of the month as he stated that he received the invoice after some days from the date of the breakdown.

[25] Further even if one were to accept that it was a contradiction, in view of the undisputed evidence that Central Filling Station did not close its radiator, this contradiction is not material to Mr. Msweli's claim.

Contributory negligence

[26] Central Filling Station has alleged that Mr. Msweli contributed to the negligence as he appreciated that the motor vehicle had mechanical faults while at Matsamo but failed to take necessary steps to remedy the situation. Instead Mr. Msweli proceeded to drive a distance of over one hundred kilometers pass Malelane. Mr. Msweli answered that the car only jerked while at Matsamo. It is only when he had just passed Malelane that he noticed the motor vehicle overheating. He immediately called for help.

[27] It is my considered view that Mr. Msweli was not negligent in any way. As he testified, as soon as he noticed that the motor vehicle was overheating, he switched off the engine, opened the bonnet, and called for the dealers to attend to the fault. There is no evidence adduced to the contrary by the defence. I therefore accept that he was not negligent.

[28] Of note further in so far as contributory negligence is concerned, Central Filling Station did not raise it on its plea. It was raised for the first time during the trial. In our law, it cannot be overemphasised that pleading must state clearly the grounds upon which either a claim or a defence is based. It

is wrong to waylay another party by springing a surprise either in a form of a ground for a claim or a defence. Worse still no evidence was adduced on behalf of the defence on how Mr. Msweli contributed to the negligence. For these reasons as well, the defence of contributory negligence cannot stand.

[29] In the final analysis, the plaintiff's claim succeeds. Defendant is hereby ordered to pay the plaintiff the following:

1. The sum of E21,006.44;
2. Interest thereon of 9% per annum *tempore morae*;
3. Costs of suit.



**M. DLAMINI
JUDGE**

For Plaintiff : Z. Magagula of Zonke Magagula and Co.
For Defendant : B. Zwane of Rodrigues and Associates

