



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1426/02

In the matter between:

SWAZILAND ROYAL INSURANCE CORPORATION

PLAINTIFF

and

**SAMKELISO CYRIL MSIMANGO
JOHN MSIMANGO**

**1ST DEFENDANT
2ND DEFENDANT**

Neutral Citation : Swaziland Royal Insurance Corporation vs Samkeliso Cyril Msimango and Another (1426/02) [2018] SZHC 50 (30 APRIL 2018)

Coram : MABUZA – PJ

Heard : 18 FEBRUARY 2017; 16 DECEMBER 2017

Delivered : 30 APRIL 2018

SUMMARY

Civil Law – Claim for damages arising from a collision of two motor vehicles

– Subrogation of claim to Plaintiff – Defendants applying for absolution from the instance – Application refused – *Prima facie* case established on a balance of probabilities.

JUDGMENT

MABUZA -PJ

- [1] The Plaintiff is Swaziland Royal Insurance Corporation a corporate body established by the Kings Order in Council No. 32 of 1973 carrying on business as insurers with its principal place of business at Lilunga House, Gilfillan Street, Mbabane.
- [2] The 1st Defendant is Samkeliso Cyril Msimango a Swazi adult male presently residing at New Checkers Canadian Flats in Mbabane in the District of Hhohho.
- [3] The 2nd Defendant is John Msimango an adult Swazi male employee of the 1st Defendant, c/o Lazarus Makama, Kuyehlela Flats Mbabane District of Hhohho.

- [4] The Plaintiff issued summons against the Defendants in which it claimed payment of the sum of E17,557.68 (Seventeen thousand five hundred and fifty seven Emalangenis sixty eight cents) interest thereon at the rate of 9% per annum *a tempore morae* from the date of judgment to the date of final payment; costs of suit; and further and or alternative relief.
- [5] The claim is defended by the Respondents who deny any negligence and liability therefor.
- [6] The particulars of claim herein are that the Plaintiff was the comprehensive insurer to the First National Bank Swaziland Limited, to whom Plaintiff was liable for compensation in terms of an comprehensive insurance policy taken out by the said First National Bank Swaziland Limited with the Plaintiff in respect of motor vehicle SD 612 LG a 1996 Sentra 160 GX under Policy No. MF 034759 which was purchased on higher purchase by Sikhumbuzo Prince Khumalo a Swazi male adult of Eveni Township in the District of Hhohho.

[7] It is alleged that on or about the 23rd September 2000 at about 0830 hrs near St. Marks High School along Lanhan Street, a collision occurred between motor vehicle SD 612 LG and SD774 HG.

[8] That the motor vehicle bearing registration letters and numbers SD 612 LG was being driven by Sikhumbuzo Prince Khumalo whilst the vehicle bearing registration number SD 774 HG was being driven by the 1st Defendant with the permission and authority of the 2nd Defendant who is the owner of the motor vehicle.

[9] It is alleged by the Plaintiff that the aforesaid accident was caused solely by the negligence of the said Samkeliso Cyril Msimango in one or more of the following respects:

- 1. He failed to keep a proper look out.**
- 2. He failed to keep his motor vehicle under proper control.**
- 3. He failed to avoid the accident when by exercise of due care and caution he could and should have done so;**
- 4. He drove the motor vehicle when he knew that he was an unlicensed driver.**
- 5. He drove the said motor vehicle across the lane of travel of the insured motor vehicle without any warning to other motorists and in particular the Plaintiff's insured driver of the new source of danger he had created on its right of way.**
- 6. He attempted to execute a U-turn on the insured's lane of travel when it**

was inopportune to do so.

[10] The Defendants in their plea deny that the 1st Defendant was negligent and that he was the proximate cause of the accident. They aver that the collision was as a result of the negligence of Sikhumbuzo Prince Khumalo in one or more of the following respects:

- 1. He collided with a stationery vehicle.**
- 2. He failed to keep a proper look-out.**
- 3. He failed to keep his motor vehicle under proper control.**
- 4. He failed to avoid the collision when by the exercise of due care and attention he could and should have done so.**

[11] They further plead that in the event the Court finds that the Defendants were negligent, the Defendants aver that the said Sikhumbuzo Prince Khumalo was also negligent and that his negligence contributed to the said collision, hence The Apportionment of Damages Act of 1970 should be invoked.

[12] It is stated that as a result of the said motor collision the insured motor vehicle sustained damage in the sum of E16,804.82 being the amount expended, alternatively being the fair, reasonable and necessary repair costs for the damage occasioned on the insured motor vehicle and additional expenses broken down as follows:

a)	Towing fees	E300.00
b)	Investigator's fees	E917.56
c)	Assessor's fees	E535.50

Totalling E17,557.68 (Seventeen thousand five hundred and fifty seven Emalangenzi sixty eight cents)

[13] The Plaintiff has in terms of the insurance policy between itself and the said First National Bank Swaziland Limited fully indemnified the latter in the sum of E13,804.62 in respect of the repair costs.

[14] The said First National Bank Swaziland Limited has in terms of the contract of insurance between itself and the Plaintiff paid the excess in the sum of E2,000.00 to the garage that executed the repairs and in terms of the said insurance contract the First National Bank Swaziland Limited subrogated all rights and claims that accrued on it as a consequence of the accident, to the Plaintiff herein inclusive of the excess in the sum of E2,000.00.

[15] And that despite demand, the Defendants have failed, neglected and/or refused to make payment to the Plaintiff in the total sum E17,557.68 or any sums whatsoever.

[16] The Defendants admit demand but state that they are not indebted to the Plaintiff in the amount claimed or at all and pray that Plaintiff's claim be dismissed with costs, alternatively. That the damages be apportioned accordingly.

[17] The parties agreed that the issue of negligence be determined by the Court and that the issue of quantum be stood over for determination by the parties.

[18] In order to prove its claim the Plaintiff led oral evidence. Its first witness was the driver of the insured motor vehicle, Sikhumbuzo Prince Khumalo (PW1). He testified that between 1996 to 2008 he was employed by the First National Bank. He had a motor vehicle a Sentra SD 612 LG financed by the First National Bank. The comprehensive insurance policy over the motor vehicle was covered by the Plaintiff.

[19] On the 23rd September, 2000 his motor vehicle SD 612 LG was involved in a collision with a motor vehicle SD 774 HG driven by the 1st Defendant and owned by the 2nd Defendant. The collision occurred near St. Marks High School, Mbabane, along Lanhan Street at about 5.30 a.m.

[20] He testified that he was driving from St. Marks Primary School towards Leites flats below St. Marks High School. As he was approaching St. Marks High School gate he noted the 2nd Defendant's motor vehicle which was stationery and inside the gate facing the road. As he was about to pass it, it entered into the road and collided with his motor vehicle. His motor vehicle was struck on its left side even though he tried to swerve to his right in order to avoid the collision.

[21] He alighted from his motor vehicle in order to inspect the damage and the 1st Defendant also alighted from the aforementioned vehicle SD 774 HG. There were two people behind SD 774 HG. They were pushing it towards the road.

[22] PW1 had a brief discussion with the three men and they disappeared. During the discussion he asked them what had happened and they told him that they had intended to make a u-turn on the road and that was the end of the discussion.

[23] After the three men left, PW1 called the police. When the police arrived one and half hours later the three men returned. He says that it was very cold and he sat in his car while waiting for the police.

[24] He says that when the police officers arrived one took him aside and recorded his statement and the other officer took the 1st Defendant aside and recorded his statement. He says that charges were preferred against him.

[25] He had the car towed and completed claim forms in respect of the damages to his car. An assessor assessed the damage and three garages were consulted for quotations including Universal Panel Beaters, Mbabane where the car was ultimately repaired.

[26] The total damage to his motor vehicle included damage to the left fender by the headlight and the front bumper.

[27] PW1 testified that his car was repaired at a cost of E15,804.42 (Fifteen thousand eight hundred and four Emalangeni forty two cents) which included an excess of E2,000.00 (Two thousand Emalangeni) which he paid and the Plaintiff paid the E13,804.42. He is now claiming the amount of

E15,804.42 (Fifteen thousand eight hundred and four Emalangeneni forty two cents).

[28] He also wanted the following amounts paid:

Towing fees	E300.00
Investigators fees	E917.56
Assessors fees	E535.50
Totalling	E1753.06

Mr. Lukhele objected that PW1 was incompetent to ask for relief with regard to these latter claims. The objection was upheld.

[29] PW1 was cross-examined by Mr. Lukhele. He revealed that on the material day the weather was foggy and cold and that he was with a passenger a Mr. Dube in his car. He stated that the 2nd Defendant's car was damaged on the right side. It was put to PW1 that this was incorrect and that he hit the 2nd Defendant's car from behind while it was stationery but PW1 denied that SD 774 HG was stationery or that it had been hit from behind.

[30] He was asked if he was sober on that day and he replied that he was sober as he had come from a funeral and he was on his way to work.

[31] PW1 was asked to read the statement that he had made to the police on 23/9/2000. He read the statement into the record. The pertinent portion read was:

“I do recall on 23/09/00 at about 0530 Hrs I was driving downtown from St. Marks Primary direction towards town while next to St. Marks High and I was driving at a speed of about 30 to 40 Km/H suddenly I saw a car across the road at a distance of about 30 metres away. I swerved to the right to avoid right angle collision and braked but to no avail and knocked the stationery motor vehicle on the right front wheel. My car was damaged on the left front side and no person wounded in my car. The weather was misty morning and dry tarmac”.

[32] It was put to PW1 that in the recorded statement there was no mention that the other vehicle was attempting to make a U-turn and PW1 agreed but he insisted that he got that response from the 1st Defendant.

[33] The statement recorded by police officer 3242 Constable P. Nyatsi on the 23/09/2000 at 0600 hrs (Exhibit B) was read into the record by PW1 at the request of Mr. Lukhele. It reads as follows:

“I am 3242 Constable Nyatsi. I am presently attached under traffic section in Mbabane.

Having attended to the accident I found that the cause of accident was due to driver of SD 612 LG driven by Sikhumbuzo Khumalo 28 years of First National Bank, Mbabane.

SD 774 HG Toyota had a breakdown and it got stuck on the opposite direction lane. While SD 612 LG came along on its lane and knocked against SD 774 HG which had a breakdown.

Both cars got damaged. No person was wounded. The weather was misty and slightly dry”.

[34] PW1 conceded that according to Exhibit B when the collision occurred SD 774 HG was stationery because it had a breakdown and that there is no mention of a U-turn in Exhibit “B”. He however, continued to deny that he was the cause of the collision.

[35] The alleged particulars of negligence set out in paragraphs 9 (1) - 6 above were put to PW1 and he responded that the 1st Defendant was guilty of all those delictual wrongs, except 9 (4).

[36] It was further put to him that all the above delictual wrongs indicate that the 1st Defendant’s vehicle was in motion he agreed. He did not see that SD 774 HG had its hazards on. He could not deny that the 1st Defendant at the time of the accident had a licence that he had obtained during 1999.

[37] The particulars of negligence that appear in the Defendant's plea and counterclaim were put to him as he being the negligent driver who caused the accident. He denied that he was negligent and that he was the cause of the accident. He did however, agree that the collision occurred because he failed to control his car.

[38] It was put to him that he was not entitled to the excess fee of E2,000.00 because he was not cited as a co-Plaintiff. And that in terms of the particulars of claim it was the FNB that had paid the excess fee of E2,000.00 to the garage that had carried out the repairs. But he was adamant that he was entitled to this amount.

[39] When he was re-examined he clarified that he could not see any hazards on SD 774 HG from where his car was as he could not see the front or back of SD 774 HG but only its side view.

[40] He explained that when he agreed with Mr. Lukhele that he had failed to control his car, he meant that SD 774 HG had entered the road unexpectedly and his reflexes could not responded timeously in order to avoid the collision.

[41] He re-iterated that SD 774 HG was stationery as he was approaching and it suddenly went into the road hence the collision, almost at right angles.

[42] Alfred Thembinkosi Dube (PW2) testified that he was the passenger in the insured vehicle that was driven by PW1. He confirmed that the accident occurred near St. Marks High School. He could not recall how the accident occurred as it happened a long time ago. Mr. Dlamini tried to have him declared a hostile witness which in my view would have served no purpose because PW2 would still not have recalled the evidence, that much was clear to the Court.

[43] Thereafter Mr. Dlamini closed the Plaintiff's case without calling any further witnesses.

[44] Mr. Lukhele applied for absolution from the instance.

[45] Having outlined the evidence above, I found PW1 to be a credible witness. I agree with Mr. Dlamini that the evidence of PW1 was materially consistent. My view is based on the following:

- (a) PW1 in his oral evidence said that on the material day it was foggy (a synonym for misty), the police report stated that it was misty and the report made to the police by PW1 also stated that it was misty.
- (b) In his evidence in chief PW1 said that as he approached he saw a stationary vehicle at the gate of the school. The car was facing the main road. After the accident he approached the occupants of the car who told him that they wanted to make a U-turn on the main road. Even during cross-examination Mr. Lukhele tried to make out that it was PW1 who had said that SD 774 HG was making a U-turn in the road. In actual fact PW1 did not say this, he said he was told by the occupants of the car that they wanted to make a U-turn in the road.
- (c) Indeed SD 774 HG made its way possibly in the road by being pushed. PW1 says that after the collision when he conversed with the occupants of SD 774 HG he found two of them behind the car pushing it.
- (d) PW1 collided with SD 774 HG when it was in the road. He tried to swerve right to avoid colliding with it but still managed to hit it on its right side. PW1's car was damaged on its left side.
- (e) The damages on both cars are consistent with SD 774 HG being in the road and SD 612 LG colliding at almost right angles.
- (f) Even though the police officer says that the cause of the accident was due to the driver of SD 612 LG, he goes on to say that SD 774 HG had a breakdown and it got stuck in the opposite lane. My view is that SD 774 HG was in the road unlawfully.

[46] I believe that it was pushed into the road (probably to kick start it) and along came PW1 and collided with it. I believe the police officer that SD 774 HG had broken down. However, the driver of SD 774 HG was negligent in that he did not put warning signs on the road, warning motorists that ahead was a vehicle that had a breakdown. He may have taken a chance because it was during early morning hours and there was barely any traffic.

[47] The police officer's report supports the Defendants' case and it is the Defendants who should call him to give evidence.

[48] PW1 says that he did not see that SD 774 HG had its hazards on. That is consistent with the collision being on its side and not at the back. PW1 said he could not see any hazards from where his car was as he could not see the front or back of SD 774 HG but only its side view.

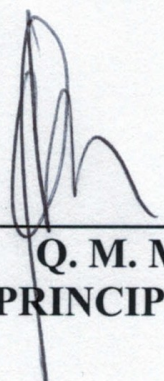
[49] I believe PW1 when he says that he failed to control his car because SD 774 HG entered the road unexpectedly and his reflexes could not respond timeously in order to avoid the collision.

[50] The standard of proof in civil matters is on a balance of probabilities and not proof beyond a reasonable doubt. Even in criminal matters where the standard is higher than in civil cases, a court can convict on the uncorroborated evidence of a single witness, it follows that the Court can find for a litigant on the evidence of a credible single witness.

[51] In the event I find that a *prima facie* case has been made out on behalf of the Plaintiff and the application for absolution from the instance is hereby dismissed. Costs to be in the cause.

AT MBABANE

Crim. Case No: 252/200



Q. M. MABUZA
PRINCIPAL JUDGE

For the Plaintiff : Mr. S. Dlamini
For the Defendants : Mr. A. Lukhele

