IN THE HIGH COURT OF ESWATINI

<u>JUDGMENT</u>

Case No. 1313/2015

In the matter between:

SWAZILAND ROYAL INSURANCE CORPORATION — **PLAINTIFF**

AND

SIPHO KGOLOLO — **DEFENDANT**

Neutral citation: *Swaziland Royal Insurance Corporation and Sipho Kgololo* [1313/2015] *[2019] SZHC 94 (11th June, 2019)*

Coram: FAKUDZE, J

Heard: 30th April, 2019

Delivered: 11th June, 2019

Summary: *Civil Procedure – application for absolution from instance – all elements of claim must be proved by plaintiff – where plaintiff's*

case is weak absolution from instance inevitable – no proof that Defendant was under influence of liquor since alcometer print out not submitted in court – application succeeds with costs.

JUDGMENT

BACKGROUND

[1] The Plaintiff sued out the Defendant for the sum of E67,428.70 (Sixty Seven Thousand Four Hundred and Twenty Eight Emalangeni Seventy Cents). The claim arose from the Defendant's motor vehicle accident which was damaged beyond repairs. The Defendant took a Private Motor Vehicle Policy which he used to claim for the damages of his motor vehicle to be compensated.

[2] The Plaintiff's averment in its Particulars of claim are that:

"4. On or about 25th July, 2014 at about 2045 hours along MR3Public Road, Mbabane lane at or near Mnyamatsini, Motor Vehicle registered PSD 554 AH, a Volvo driven by the Defendant, at all Material times knocked the inner herb of the Median road and the

vehicle has extensively damaged on the right side rendering the vehicle a write off.

5. The driver of the said motor vehicle the Defendant was charged with the offence of considerate driving and driving a motor vehicle whilst under the influence of intoxicating liquor or drug having a narcotic effect and thereafter he was arrested and remanded in police custody on the same day of the accident.

6. The Defendant was removed from the police cell on the morning of the 29th July, 2014 to make appearance at the Mbabane Magistrate Court for the preferred charges against him under Case No. 1069/2014

7. The court found him guilty of both charges and he was sentenced to fifteen (15) months imprisonment for driving under the influence of intoxicating liquor or drug having a narcotic effect or an option of a fine of E1500.00 (One thousand Five Hundred Emalangeni) and five (5) months imprisonment for inconsiderate driving or E500.00 (Five Hundred Emalangeni) fine. He paid both fines with receipt number GR 05700858 and was released from police custody after paying the fines.

8. On the basis of a Police Report submitted to it by the Defendant dated 8th August, 2014, stating that "the docked is still pending investigation," paid the Defendant an amount of E67,428.70 (Sixty Seven Thousand, Four Hundred and Twenty Eight Emalangeni Seventy Cents) and deposited the funds at the Defendant's bank account held with Standard Bank, Mbabane Branch.

9. The Plaintiff subsequently received another police report with detailed information of the charges against the Defendant and later information from the police docket R.T.A. 613/2014 of the Defendant's charges and appearance in court and the court's finding over the charges.

10. The Plaintiff by virtue of the police report on his conviction, invoked General Exceptions 2(c) of the Private Motor Vehicle Policy which excludes the Plaintiff's liability if at the time of the accident, the vehicle was driven by the insured whilst under the influence of intoxicating liquor or drugs. In the circumstances, the Defendant drove his vehicle under the influence of intoxicating liquor or drug having a narcotic effect and was guilty of the charge preferred against him……."

[3] The Defendant's response was to file a Notice of Intention to defend and a Plea.

EVIDENCE

[4] In its quest to prove its case, the Plaintiff has led only two (2) witnesses. These are Constable Bhekithemba Maseko Force Number, 6462 and Sergeant Mlungisi Simanga Mpila, Force Number 6200.

[5] PW 1 testified that on the 28th July, 2014, around 2100 hours he attended a traffic accident together with a certain Constable Gule after receiving a report. They found a motor vehicles PSD 554 AH, a Volvo Sedan parked on the inner lane facing Mbabane duration at Mnyamatsini with its both right wheels damaged. On the left side of the sedan there was a motor vehicle DSD 353 BH, a Kia Sportage, which was found overturned facing up.

[6] PW 1 then drew a sketch plan of the accident without the involvement of the owners of the motor vehicles. Thereafter, he took statements from the drivers. Whilst taking down the statements he noted a foul smell from the Defendant's breath which he suspected to be alcohol. PW 2 then tested the

Defendant as requested when he arrived at the scene and a printout from the alcometer gave a reading of 0.55mg. He then charged the Defendant at the scene of the accident and at the police station for exceeding the legal limit and for inconsiderate driving.

[7] The Defendant was then detained at the Mbabane Police Station. He tendered an occurrence book "Exhibit1" also known as "RSP 3." He testified that RSP 3 is a book which keeps details of people awaiting trial.

[8] In "Exhibit 1," PW1 wrote the date and time of arrest, his particulars and those of the Defendant including the clothes the Defendant was wearing at the time of arrest. He also wrote the charges or the grounds for the Defendant's arrest as stated in paragraph 9(a) to wit "Grounds for arrest are given to custody officer (brief explanation to be made by arresting officer in the presence of suspect and read out to him in a language he understands." The charge read "You have been arrested for driving motor vehicle whilst under the influence of intoxicating liquor or drugs."

[9] PW 1 also tendered a copy of the alcometer print out in an attempt to prove the alleged reading of 0.55mg. He conceded that the copy did not show the alcometer reading and that he did not have the original document. On cross

examination, PW 1 conceded that he was not the author of the subsequent pages of exhibit 1, that is, removing the Defendant from police custody to court the following day and the verdict thereafter and the fine. He was only the author of up to where the Defendant was charged.

[10] The Plaintiff also brought PW 2 as a witness. His evidence was that he conducted the breathalyser test upon the Defendant on request by PW 1. After conducting the breath test he showed the Defendant the results that alcohol was found in the Defendant's body and that it had exceeded the legal limit. Thereafter PW 2 signed the alcometer; the Defendant also signed it. In cross examination PW 2 confirmed to have conducted the breath test.

[11] Following the leading of evidence by PW 1 and PW 2 the Plaintiff elected to close its case. The Defendant then applied for absolution from the instance in terms of Rule 39(6) of the Rules of the High Court.

THE PARTIES' CONTENTION

The Defendant's Case

[12] The Defendant contends that the Plaintiff has failed to establish a *prima facie* case against him. It has not adduced any evidence in support of all the

elements of its claim as pleaded in the particulars of claim. In his own evidence PW 1 admitted that there is no evidence of the alleged original print out from the alcometer and that the alleged reading of 0.55mg does not show on the copy of the print out. He also conceded that he did not personally witness the Defendant being taken to court and being found guilty. He simply relied on “Exhibit 1” a document which he conceded that he was the author of the first page of “Exhibit 1” after the Defendant had been charged by PW 1. The author of the rest of pages of “RSP 3” (Exhibit 1) was not called to testify about the contents of the information stated there in and no explanation was given as to why he could not be called.

[13] The Defendant further contends that there is no evidence which has been led to establish that the Defendant was found guilty of driving a motor vehicle whilst under the influence of liquor or a drug having a narcotic effect and for inconsiderate driving. The Plaintiff has failed to adduce evidence of the receipt “number GR 05700858.” No explanation was given for such omission.

[14] In terms of paragraph 7 of its particulars of claim, the Defendant was sentenced to fifteen (15) months and five (5) months for the respective

charges. However, ex facie "RSP 3" Defendant was sentenced to twenty four months (24). Clearly, there is a contradiction between the particulars of claim and "RSP 3." No evidence has been led to prove the alleged convictions and sentencing. Taking into account PW 1's own evidence and the fact that the Plaintiff did not call as a witness the author of "exhibit 1" such document constitutes hearsay evidence. It is inadmissible evidence in the circumstances.

[15] The Plaintiff is inviting the Honourable Court to rely merely on its *ipse dixit*. Such an un warranted invitation must be refused by the court where enough and relevant evidence is not adduced (as it is the case in this matter) then it is Plaintiff who has failed to produce the evidence that is bound to fail in its case. There is no prima facie evidence that requires the Defendant to answer in case. Plaintiff cannot expect or hope to elect evidence from Defendant to support its non-existent or weak case. The Plaintiff has not adduced evidence to support the invocation of General Exceptions 2 (2) of the Private Motor Vehicle Policy. Even if the Plaintiff was to argue that it does not place reliance on the alleged Magistrate's conviction but merely on the allegation of driving under the influence of intoxicating liquor or drug having narcotic effect (which does not appear to be its case) it is submitted

that it has failed to prove that the Defendant's skill and judgment normally required of a driver, were indeed diminished or impaired as a result of the intoxicating liquor. The Defendant prays that the Plaintiff's case be dismissed.

The Plaintiff's case

[16] The Plaintiff contends that it has established a *prima facie* case. It brought two witnesses which are Constable Maseko 6462 (PW 1) and Sergeant Mpila 6200 (PW 2) and RSP 3 (Exhibit 1) and R.T.A 613/2014. The evidence of PW 1 and that of PW 2 corroborated and also that of RSP 3; R.T.A. 613/2014 corroborated with that of PW 1.

[17] PW 1 stated in his examination-in-chief that whilst he was taking down a statement from the defendant as a result of the accident, he noted a foul smell from the Defendant and suspected to be that of alcohol. He immediately called PW 2 to bring a breathalyser to test the Defendant if indeed he had alcohol in his body. PW 2 tested the Defendant as requested when he arrived at the scene of the accident and found that there was alcohol in the Defendant's body and it had exceeded the legal limit. He eventually

charged him both at the scene of accident and at the police station for exceeding the legal limit and for inconsiderate driving.

[18] It was also the evidence of PW 1 that after formally charging him at the police station he detained him on the basis of “Exhibit 1” which is a book for suspects awaiting trial. In Exhibit 1 he wrote the date and time of arrest and PW 1’s particulars and that of the Defendant and the clothes the Defendant was wearing at the time of arrest. He also wrote the charges for the Defendant’s arrest as stated in paragraph 9(a) to wit “Grounds for arrest as given to custody officer.” The charge was that the Defendant had been arrested for driving a motor vehicle under the influence of intoxicating liquor or drugs.

[19] Evidence was also led before court in the form of RSP 3 as “Exhibit 1” where PW1 was the author of the first page which is crucial to the case because this is all the Plaintiff wanted as evidence for its case because it showed that there had been a breach of the Policy especially General Exceptions 2(c). The charges as reflected in the Exhibit and the Second Police Report is clear evidence that the Defendant was under the influence of intoxicating liquor or drugs.

[20] The Plaintiff also brought PW 2 as a witness in its case in that he is the one who actually conducted the test. He testified that he conducted the test upon the Defendant on request by PW 1 since the breathalyser was in his possession at that time. After conducting the breath test, he showed the Defendant the results and explained to him that the alcohol was found in his body and it had exceeded the legal limit. Thereafter PW 2 signed by alcometer print out and the Defendant also signed it.

[21] The Plaintiff submitted therefore that a *prima facie* case had been established based on the evidence of PW 1 and PW 2 and Exhibit 1 and the Police Report. PW1 testified that he is the author of the first crucial page in Exhibit 1 where he charged the Defendant for being under the influence of intoxicating liquor whilst driving a motor vehicle. The Plaintiff submits that it was able to establish a *prima facie* case against the Defendant by the evidence of PW 1 PW 2 and Exhibit 1 coupled with the Police Report. The Plaintiff wishes to point out and submit that its case is not about whether the Defendant was found guilty of the charge or not. The case is about whether he was found to be under the influence of intoxicating liquor or drugs as written in the General Exceptions 2(C) of the Private Motor Vehicle Policy.

It need not go further than the charges which were proof. It is enough for the Plaintiff that indeed the Defendant was under the influence of intoxicating liquor. It is therefore irrelevant to the Plaintiff whether he was found guilty or not or whether he has exceeded the legal limit or not.

[22] The Plaintiff finally submits that the evidence adduced relates to all the elements of its claim. The Plaintiff has led evidence upon which a court, applying its mind reasonably, could or might find for the Plaintiff. Therefore the Application from the instance should be dismissed with costs and the Defendant be put to his defence.

THE APPLICABLE LAW

[23] The test for absolution from the instance to be applied at the close of Plaintiff's case has been formulated as follows:

> *"When absolution from the instance is ought at the close of the Plaintiff's case the test to be applied is not whether the evidence led by the Plaintiff establishes what would be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should nor ought to)*

find for the Plaintiff." See ***Ngwenya V Commissioner of Police and Another (2700/07) SZHC 103*** *(08th April, 2011) at paragraph 14.*

[24] In the case of **Mabuza V Phinduvuke Bus Service Case No. 66/2017 [2018] SZCS 13** (30 May, 2018), His Lordship Dr. B.J. Odoki set out the principles as follows:

"An Application for absolution from the instance stands much on the same footing as an application for discharge of an accused person at the close of evidence for the prosecution…………

It is clear that a trial court should be very chary of granting absolution at the close of the Plaintiff's case. The court should not at this stage evaluate and reject the Plaintiff's evidence."

[25] Finally, Harms J.A, in the case of **Gascoyne V Paul and Hunter**, 1917 T.P.O 170, defines the principles as follows:

"This implies that a Plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim – to survive absolution – because without such evidence no court could find for the Plaintiff………… As far as inferences from the evidence

are concerned the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one."

<u>COURT'S ANALYSIS AND CONCLUSION</u>

[26] The Plaintiff case is for a refund of the whole amount paid by the Plaintiff to the Defendant as a result of a claim made by the Defendant to the Plaintiff in compensation of the Defendant's damaged motor vehicle from an accident. The Defendant was found to be driving his motor vehicle under the influence of intoxicating liquor or drugs. He was subjected to a breathalyser and eventually charged. The police report showed that he was charged with driving a motor vehicle under the influence of intoxicating liquor or drug having a narcotic effect.

[27] In applying for absolution from the instance the Defendant states that the original alcometer reading was not produced in court by the Plaintiff, that PW 1 and PW 2 never witnessed the conviction of the Defendant in court, that the Plaintiff has failed to adduce evidence of the receipt number GR 05700858 and that there is a contradiction between the particulars of claim and "Exhibit 1" in terms of sentencing. In that way the Plaintiff has failed to make a *prima facie* case.

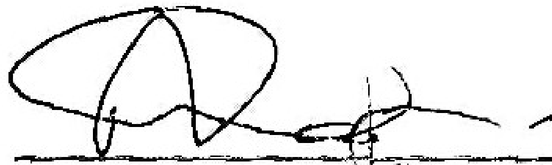
[28] The Plaintiff's case is that PW 1, PW2 and Exhibit 1 were produced in court to prove that the Defendant was under the influence of liquor. PW1 smelt the alcohol, PW 2 carried out the breath test and PW 1 recorded the charge against the Defendant. The problem or challenge with the Plaintiff's case is that there must be scientific proof that the Defendant was indeed under the influence of liquor. The alcometer reading plays this role and without the original print out, the Plaintiff's case is weakened. I want to believe that same was availed to the Magistrate who then convicted the Defendant based on it. In **Ngwenya V Commissioner of Police** (Supra), the Learned Justice M.M. Sey stated that:-

> *"The overriding consideration for granting absolution from the instance at the end of the Plaintiff's case is that it is considered unnecessary in the interest of justice to allow the case to continue any longer in the absence of a prima facie case having been made out by the Plaintiff."*

[29] It is trite that he who alleges or asserts a fact must prove it. It is not sufficient that the Defendant was charged. Evidence was necessary to sustain the charge leading to the conviction of the Defendant. It is also trite

that a Plaintiff in making a *prima facie* case must adduce evidence relating to <u>all</u> the elements of the claim. The plaintiff has run short of doing that with respect to the case at hand. Even if one were to find for the plaintiff as far as the evidence of PW 1 is concerned in that he authored the first page of "Exhibit 1" the point raised by the Defendant that the plaintiff did not bring the police officer who took the Defendant to court and later made the entries in the Exhibit to give evidence, further weakens the case for the plaintiff. Infact this part of the evidence of PW 1 constitutes hearsay evidence. Hearsay evidence is inadmissible.

[30] It is this court's humble view that the absolution from the instance application by the Defendant should succeed with costs.



FAKUDZE J.

JUDGE OF THE HIGH COURT

Plaintiff: M. Motsa

Defendant: Q. Magagula