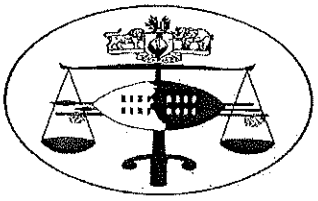

IN THE HIGH COURT OF ESWATINI

CASE NO. 1114/2019

In the matter between:

BENJAMIN DLAMINI **PLAINTIFF**

And

MFANAFUTHI NGUBENI **DEFENDANT**

NEUTRAL CITATION:		**Benjamin Dlamini v Mfanafuthi Ngubeni** (1114/2019) [2021] SZHC - 201 (15/09/2022)
CORUM	:	BW MAGAGULA J
HEARD	:	22/03/22, 13/06/22, 15/06/22 & 28/06/22
DELIVERED	:	15/09/2022

Summary:

Law of delict –actio legis acquiliae - Defendant denies liability – Plaintiff's case hinges on an alleged apology made by the Defendant to the Plaintiff, followed by the latter purchasing some parts of the damaged motor vehicle- Defendant explained the gesture as an act of altruism - legal principles applicable in an application from the instance visited.

Held- The test in an application for absolution from the instance is:- "is there

evidence upon which a reasonable man might, not should give judgment against the Defendant-". In the matter at hand, the evidence shows that the Plaintiff has been unable to establish a prima facie case against the Defendant. The Plaintiff's evidence is littered with hearsay evidence. There is nothing that has been adduced which demonstrate that a prima facie case of negligence has been against Defendant at this stage. Therefore, the Defendant cannot be made explain himself, when no prima facie case has been made against him. Application for absolution granted with costs

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Judgment

(Application for absolution from the instance)

Brief background facts

[1] The Plaintiff claims the sum of E92, 147.00 (Ninety Two Thousand One Hundred and Forty Seven Emalangeni) from the Defendant. The suit is premised on damages apparently suffered by the Plaintiff as a result of his motor vehicle being damaged. He uses the vehicle in his public transport business. It was involved in a motor vehicle accident that occurred on the MR6 Buhleni Madlangamphisi Public Road.

[2] The Plaintiff alleges that the collision was caused by the sole and exclusive negligence of the Defendant. It is alleged he was negligent in that he drove at an excessive speed, without due care and attention and he failed to exercise due caution[1]. The Plaintiff also asserts his claim on the loss of profit he

[1] Paragraph 6.1 and 6.2 of the Plaintiff's particulars of claim

allegedly incurred whilst the vehicle was undergoing repairs. He alleges that the motor vehicle was out of business for a period of 66 days[2].

[3] The Defendant opposes the action. In as much as he admits that the trailer bearing registration numbers; FD 20 KV GP was towed by a vehicle driven by him, he vehemently denies liability for the accident. The Defendant further denies that he was negligent, in fact he alleges that the negligent driving of one Kenneth Magagula who was employed by the Plaintiff as the driver of the Plaintiff's vehicle who was negligent and was the sole cause of the accident[3].

[4] The Defendant admits that he assisted the Plaintiff with purchasing certain body parts required to fix the damages on the Plaintiff's motor vehicle however the Defendant accepts that he did so without accepting liability.

[5] The Defendant also contests that he is not liable for the loss of business incurred by the Plaintiff during the period of 66 days, as the Plaintiff opted to use an unlicensed panel beater and refused to be assisted in order to have any damages that he may have suffered to be mitigated[4]. The Defendant also pleads that the Plaintiff failed to take any reasonable step to mitigate his loss. Whatever damages that he may have suffered are as a result of the vehicle not being in service, were a result of his own failure to mitigate his loss.

[6] When the trial commenced, the Plaintiff paraded two witnesses. The Plaintiff himself and also one Thembinkosi Dlamini who is the Plaintiff's ex-

[2] These averments are made in paragraph 8 of the Plaintiff's particulars of claim
[3] Reference is made to paragraph 2 of the Defendant's plea and averments put to the Plaintiff's witness by the Defendant's attorney during cross -examination
[4] See paragraphs 4.1 and 4.2 of the Defendant's plea

employee. He used be the assistant or conductor in the public vehicle. The Plaintiff closed his case after the testimony of only these two witnesses.

[7] The Defendant's counsel then moved an application for absolution from the instance, in terms of Rule 39(b) of the High Court Rules. It is the determination of that application that has translated into this judgment.

Survey of evidence

[8] I will now endeavor to consider the evidence before Court, both on the documentary evidence as adduced by the witnesses and their oral testimony given in Court.

[9] The Plaintiff in his pleadings make specific averments of negligence in paragraph 6 of the particulars of claim. This is what the Plaintiff averred;

6 The aforesaid collision was caused by the sole and exclusive negligence of the Defendant, who was negligent in one or more or all the following expects;

6.1 He drove at an excessive speed and without due care and attention

6.2 He failed to exercise due caution

[10] These are the particulars of the negligence as articulated in the particulars of claim. I observe that, other than in this paragraph, the particularity of the negligence has not been stated anywhere else. Thereafter other than the oral narration that came from the witness, the Defendant faced the above allegations of negligence. What subsequently emerged through the oral evidence, the dislodging of the trailer was a subject of contention whether it dislodged on its own or as the version of the Defendant, it dislodged because

the Toyota quantum (Plaintiff's vehicle) collided with it, was not pleaded. I will return to this issue later on in the judgment.

Plaintiff's evidence in summary

[11] The Plaintiff in his oral evidence told the Court the following;

11.1 He is from Kwaluseni area in the district of Manzini. He is employed by the Eswatini government as the head teacher of Lubombo High School.

11.2 He also runs a public transport business as he is the owner of a vehicle, being a Toyota quantum registered MCD 652 BH.

11.3 He told the Court that on the 29th January 2019, he received a cellular call from his employee, the driver of the quantum, one Kenneth Magagula. He informed him that whilst he was driving on the Buhleni-Madlangamphisi road, specifically in an area called Ka- Lobabela, he was involved in a road traffic accident.

11.4 After talking to his employee, he also spoke to the Defendant also through a cellular phone. According to the Plaintiff, the Defendant apologized to him for the occurrence of the accident.

11.5 The Plaintiff continued to narrate to the Court what the driver told him how the accident happened. Plaintiff said a Toyota bakkie driven by the Defendant was travelling the opposite direction and his Toyota Quantum driven by his driver Kenneth Magagula was travelling in the

Manzini direction. As the van passed the quantum, the trailer which it was towing dislodged from the bakkie and went to collide with the Toyota quantum on its right hand side.

11.6 The Plaintiff continued to narrate that the Royal Eswatini Traffic police arrived on the scene. They recorded a statement. He subsequently then asked his driver to take pictures which he sent to him through his cellular phone, whatsapp application.

11.7 The pictures were printed and submitted and admitted to Court. They are exhibits "BD1", exhibit "BD2" and Exhibit "BD3". In exhibit "BD1" the picture portrays a mini bus branded with an MTN advertisement. It shows the Toyota quantum extensively damaged on the right hand side. There is also a visible scratch from the right mud guard at the bottom stretching all the way to the rear wheel. There also appears a police official motor vehicle registered GSD 868 PD parked behind the minibus with its left door opened.

11.8 Exhibit "BD2" portrays a picture of a white trailer with a visible damage on the right mud guard. The tyre is extensively damaged. It is raptured and the rim bent.

11.9 Exhibit "BD3" portrays what appears to be a panel ripped off from the Toyota quantum, lying next to the guard rail with the MTN advertisement sticker still stuck on to it.

11.10 The Plaintiff continued to tell the Court that what appears on the

pictures gives good impression of what his driver described to him as the extent of the damages.

11.11 When led by his attorney during the examination in chief, specific questions were posed as follows;

Q- From what you were told by the driver, what was the cause of the collision?

A- The dislodgement of the trailer

Q- It was the trailer that collided with the Plaintiff's vehicle?

A- Yes

Q- Did you speak with the Defendant on the day of the accident?

A- Yes on the driver's phone .He extended his apologies (wangincesitela) he said he also feels bad about what had happened

11.12 Despite that the second question was a leading question, the Defendant's attorney did not object to it. What came out through as the Plaintiff's contention is that it is the trailer that dislodged and unguided to collide with the mini bus

11.13 The Plaintiff continued to tell the Court that subsequent thereto he applied and received road traffic accident report which she also submitted in Court. He continued to tell the court that the police report is consistent with what he was told by the driver.

11.14 The police report was admitted by the Court as part of the Plaintiff's evidence without any objection from the Defendant, it was marked "BD4".

11.15 The summary of the police report is as follows;

It was written by 3723 inspector S Dlamini who states that on the 29th January 2019 at Nyakatfo Kalobela a trailer registered FD 20 KV drawn by a motor vehicle Toyota LDV registered HBP 674 NW driven by Mfanafuthi Ngubeni of Mankayane disconnected itself and thus collided with an oncoming motor vehicle being a Toyota Quantum driven by Kenneth Magagula a thirty six year old. The police report is silent on who was negligent in the accident.

11.16 The Plaintiff continued to narrate to the Court that subsequent to the occurrence of the accident he obtained contact numbers of dolphin breakdown, which towed his motor vehicle on his behalf. He paid the sum of E1500.00. He produced the receipt as an exhibit in Court. It was marked Exhibit "BD5".The motor vehicle was towed to premises of a certain Siboniso Simelane who owns a garage in Matsapha. Specifically at a place called Ndzevane, in Logoba.

11.17 According to the Plaintiff, subsequent thereto, the Defendant came to Simelane's garage. Apparently the Defendant told him that, what he can do is to buy certain panels of the Plaintiff's motor vehicle as he is someone that usually travels to South Africa. The Defendant apparently got an old tail gate and brought it together with other panels to Simelane's garage. It is only the panels were brought after that the panel beater commenced his work. The Plaintiff proceeded to tell the Court that the body parts that were bought by the Defendant, were not sufficient to complete the repairs to the motor vehicle. The tailgate that

he brought was problematic and not in a good condition. The Plaintiff also submitted receipts of the other parts that he had to buy. The receipts were admitted as evidence and marked exhibit "BD6" & "BD7", "BD8". The amounts reflected on the receipts are there totaling the sum of E4, 400.00 (Four Thousand Four Hundred Emalangeni). The entire documentary evidence reflecting the costs of repairs was admitted and it appears that it is not in dispute. I will thereafter not delve into the detail of the costs of repairs because it appears that it is not in issue. In summary, that was the evidence of the Plaintiff.

[12] The Plaintiff was subjected to intense cross examination by the Defendants Attorney. The highlights of the cross examination are as follows;

12.1 It was put to the Plaintiff that he would not be in a position to state before Court who was negligent between the driver of the van and the driver of the Toyota quantum Kenneth Magagula. The Plaintiff conceded that he would not be in a position to do so.

12.2 It was also put to the Plaintiff by Mr. Gumedze counsel for the Defendant that what he had told the Court is a version that was related to him by his driver. The Plaintiff agreed to this. He specifically confirm that yes, what he had told the Court is what he was told by his driver, although he then elaborated and said he also relied on the contents of the police report.

12.3 The witness was also asked if he realizes that the amounts he told the Court to be owing by the Defendant are at variance with the claims

contained in the particulars of claim. He also conceded that yes there is a variance.

12.4 The Plaintiff also conceded that he was not the driver of the motor vehicle on the day in question. It was also put to the Plaintiff that the accident occurred as a result of the negligent driving of his driver Kenneth Magagula. The Plaintiff disputed this and said he did not agree.

12.5 The Defendant's counsel continued to put to the Plaintiff that when the Toyota quantum collided with the trailer it was still attached to the van driven by the Defendant. The response of the witness was that this was not true as the Road Traffic Accident Report also reflect that the trailer was dislocated from the LDV and collide with the Toyota Quantum[5]. The counsel for the Defendant also put it to the witness that the pictorial evidence being exhibit BD1 the picture shows that the damage on the trailer is on the mud guard on the right hand side. However the Plaintiff did not agree with what was being put to him. In a nutshell that was the Highlight of the cross examination.

12.6 The Plaintiff was re-examined by his attorneys who highlighted that the discrepancy in figures was an error in calculation. The Plaintiff's counsel subsequent thereto the Plaintiff then stepped down from the witness box. The Court was initially advised that the Plaintiff intended

[5] The reading of paragraph 2 of the police report, states the following; "information gathered is that the Toyota LDV was driving from Madlangempisi direction towards Buhleni direction, disconnected from the LDV and collided with an oncoming motor vehicle a Toyota Quantum registered MSD 652 BH

to call Mr. Simelane the panel beater. However it transpired that Mr. Simelane was in prison and a postponement was granted to allow his production. Mr. Gumede, however, put it on record, that it is not part of the Defendant's case to dispute that Mr. Simelane attended to the repairs of the vehicle. The matter was adjourned and postponed to the 15th June 2022 for continuation. On the 15th June 2022 being the next date for continuation of the trial the Plaintiff did not call Mr. Simelane but called one Thembinkosi Mfanafuthi Dlamini as the second witness.

Survey of Mr. Thembinkosi Mfanafuthi Dlamini's Testimony

[13] The evidence of the above witness in summation is as follows;

13.1 He is currently employed in Matsapha at SM Electrical where he is a driver; He told the Court that he has known the Plaintiff since 2011, when he was employed by him as a conductor. He worked with him until 2018.His duties whilst he was employed by the Plaintiff, was to collect money from passengers, wash the vehicle and also cash in daily takings.

13.2 When he was led in evidence in chief, the following question was put to him?

Q do you recall being involved in a motor vehicle accident in 2019?

A in 2019 I was not with babe Dlamini

13.3 However when he was asked further and showed the pictures the witness then said he does recall the accident.

13.4 He continued to narrate the details of the accident. He told the Court that whilst on their way to Manzini from Buhleni, there was an oncoming van towing a trailer going the opposite direction. He emphasized that they were driving slowly because they wanted to pick up customers along the way. They met this vehicle at Nyakatfo area before Madlangamphisi. He told the Court that he was not paying attention, as he was obstructed by the sit in front. He suddenly heard a loud bang on the right side of the kombi they were travelling in. He was shocked the kombi began to lose control, but it then came to a stop. Its Tyres were damaged by the time it stopped. He then asked the driver what was happening. After that he then saw the trailer having dislodged from the Bakkie that was previously towing it. The Bakkie had parked in front of the trailer. The driver told him the trailer dislodged from the van and went on to collide with the quantum. The police were then called and they arrived at the scene of the accident.

13.5 He was shown the pictures being exhibit "BD1" & "BD2" and he confirmed that what appears on the pictures, is indeed the trailer that he saw also the damages appearing on Exhibit "BD1" (the quantum) is the damages that were inflicted on the Toyota quantum.

[14] This witness was also subjected to intense cross examination by the defense counsel.

[15] The following were the highlight of the cross examination;-

15.1 He conceded that when the motor vehicle accident happened he was

sitting on a sit behind the front passenger and he did not see how it happened.

15.2 When it was put to him that at the point of impact the bakkie was moving on a decline and the quantum was moving on the incline at Kalobabela. The witness disagreed, he said the quantum was ascending and the van was descending.

15.3 It was also put to him that the last time he saw the Bakkie it was still pulling the trailer. The witness conceded to this and said yes, that was the position when he last saw vehicle. The trailer was still attached to the Bakkie. The witness also conceded that he never saw the trailer colliding with the quantum. It was also put to this witness that when the collision occurred Mr. Kenneth Bongani Magagula the driver had been talking on his mobile phone. This was allegedly confirmed by him when the driver of the Bakkie had discussion with him after the accident.

15.4 The witness when responding to this question said he would be lying if he would confirm this. He does not remember whether the driver was on his cellphone or not.

15.5 The witness was re-examined briefly on the distance where he saw the van which was about 15 meters. That was the only question asked on re-examination. The Plaintiff then closed its case after this witness.

[16] It is after the closing of the Plaintiff case that Defendant's counsel moved an

application for absolution from the instance, on the basis that there is no *prima- facie case* that has been made on the evidence of both Plaintiff's witnesses, to which the Defendant can be called to answer to.

The Law on absolution from the instance

[17] Rule 39 (b) of the High Court Rules "...offers no guidance on the actual principles that are applicable in application for absolution from the instance. For that reason, there is a need to resort to judicial interpretation regarding the application of the rule.

[18] I commonly refer to the ancestor of authorities in this area, **Gasogne v Paul and Hunter**[6] which has been consistently cited in most decisions pertaining to absolution from the instance hence my reference to it as an ancestor[7] this is the *dicta* that was stated;

"Is there evidence upon which a reasonable man might but not should give judgment against the Defendant?"

[19] In the matter of **Theresa- Marie Earnshaw Zeeman (supra)** Mlangeni J articulated the test as follows;

"The universally accepted test is, has the Plaintiff led evidence upon which a Court, applying its mind reasonably, could or might not should find for the Plaintiff".

[20] It is therefore acceptable now that in a case for absolution from the instance, to enable the Plaintiff to put the Defendant to his defence, must make out a

[6] Swaziland Procurement Agency v Stealth Security (Pty) Ltd Case No.1574/16 (5404042022)

prima facie case, which requires that evidence should be adduced in respect of all the elements of the claim. At this stage the Court does not usually evaluate the credibility of the evidence.

[21] **Neethling & Potgieter** in their work; **Law of delict 3rd edition**, define negligence as referring to the blameworthy conduct of someone who has acted wrongfully for the purpose of the law of delict. In the case of negligence 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.

[22] The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the *reasonable person*[8], the *bonus paterfamilias*. In **Mkhwanazi v Van der Walt 1995 (4) SA 589 A** the terminology was changed and requires the use of the expression reasonable person, instead of the reasonable man. The Defendant is negligent if the reasonable person in his position would have acted differently; and according to judiciary decisions[9] the reasonable person would have acted differently if the unlawful causing of damage was reasonable foreseeable and preventable.

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[8] According to this criterion, an un educated person acts negligently where e.g. children are injured by the explosion of the detonator after he, in his ignorance has picked up the detonator and given it to them as a toy. The problem here is that the uneducated person cannot really be blamed for his ignorance or lack of understanding in this regard.

[9] The test for negligence, as it appears from decided cases is formulated as follows; a wrong doer is negligent if "the reasonable person, if he had found himself in exactly the same position as the actor would have foreseen harm to another with such a degree of probability that he in light, of the circumstances, would either have refrained from the act or would have acted differently,3or would have taken further preventative measure; also see the dictum of home JA Krueger Coetzee 1966 2 SA 428 (A) 430

[23] In the case of **Krueger v Coetzee** (supra), the Court stated that for the purposes of liability, culpa arises if– a *diligence paterfamilias* in the position of the Defendant-

"i) would foresee the reasonable possibility of his conduct injuring another and his person or property and causing him patrimonial loss;

ii) Would take reasonable steps to guard against such occurrence; and b the Defendant failed to take such steps".

Adjudication

[24] At this stage the Court is called upon to consider whether the Plaintiff has thus far, demonstrated a *prima-facie* case that all the elements of the case have been established on which the Court might find for the Plaintiff not that the Court should find for the Plaintiff.

[25] This being a delictual claim and on the basis that the cause of action against the Defendant is negligence, it is proper that I commence my analysis by interrogating the evidence that has been adduced thus far establishing all the elements of negligence on the part of the Defendant. I have already alluded to the fact that the law and authorities refer to negligence as to the blameworthy attitude or conduct of someone who has acted wrongfully for a purposes of the law of delict[10]. The question therefore that begs an answer in the matter at hand is what evidence has been adduced thus far, which would attribute to the Defendant the blameworthy attitude or conduct that he has acted wrongfully to the occurrence of the accident. The first issue that must be considered are

[10] See S v Naidoo 2003 (1) SACR 347 (SCA) 357

the particulars of the negligence attributable to the Defendant in the Plaintiff's particulars of claim. Earlier on in the judgment I had indicated that I will revert to this issue I do so now. In paragraph 5 and 6 of the Plaintiff's particulars of claim, the basis of the blameworthy conduct, is that the Defendant drove a motor vehicle, Toyota LDV pulling a V-Tec trailer, which collided with the Plaintiff's motor vehicle.

[26] The averment that is being made here, is that the trailer that Defendant was towing with his van, collided with the Defendant's motor vehicle.

[27] It is imperative that the evidence as adduced in Court pointing out to this averment that the Defendant's trailer collided with the Plaintiff's motor vehicle be ascertained. What evidence has been adduced before Court that supports this factual averment made in the particulars of claim?

[28] The Plaintiff himself when he gave his evidence, stated unequivocally that he was not there when the accident happened. He relied on what he was told by his driver. According to the Plaintiff, what he was told by his driver is that when the two motor vehicles passed each other, at Kalobabela. The trailer dislodged from the van and then the trailer collided with the Toyota Quantum. The next question to be asked is the weight of this evidence. What evidential weight can the Court attach on the Plaintiff's narrative, even on *prima-facie* basis? This version that the Plaintiff told the Court is not what he personally witnessed. It is what he himself admits he was told by his driver. The driver was not called to Court. Clearly, this version is hearsay which is not

admissible in Court[11].

[29] I will now proceed to assess the other evidential material that was placed by the Plaintiff which he alleges equipped him with the authority to conclude that it is the dislodged trailer that collided with his vehicle. He said in cross-examination he also relied on the police report. The police report was compiled by 3723 Inspector S Dlamini. It is common cause that Inspector Dlamini was never called to come to give evidence in Court. The Plaintiff did not volunteer an explanation why inspector Dlamini could not be subpoenaed to Court to give evidence. Be that as it may, what inspector Dlamini wrote in the police report is the following; in paragraph 1;

"On 29/01/19 at about 11:45hrs at or near Nyakatfo Kalobabela along MR6 Buhleni/Madlangamphisi public road a V-Tec trailer registered FD 20 KV GP drawn by a motor vehicle Toyota LDV registered HPB 674 NW, driven by Ngubeni Mfanafuthi a 40yearold man of Mankayane disconnected itself and collided with an oncoming motor vehicle Toyota quantum 652 BH driven by Kenneth Magagula (my own underlining)".

[30] The tone of the report is on active the active voice and first hand basis. The author here, appears to have made a conclusion of fact, that the trailer disconnected itself and collided with an oncoming motor vehicle. It is common cause that when the collision happened, 3723 inspector S Dlamini was not there, the second witness that gave evidence, Mr. Thembinkosi Dlamini stated clearly that the traffic police officers were called after the

[11] The Supreme Court of Appeal of South Africa in the matter of Masibulele Rautini Vs Passenger Rail Agency of South Africa Case No. 853/2020, defined hearsay evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

accident had happened. When the motor vehicles were already stationary. Therefore, this leads one to safely conclude that the police officer who authored this report could not have been present to justify him making an observation and a conclusion that it is the trailer that disconnected itself and collided with the Plaintiff's vehicle. It can only be assumed that he made this conclusions from what he was told by one of the people that were there. Unfortunately the report itself does not explain who told the police officer this version of events that he now projects as his own observations and conclusion. The evidential weight therefore of this version that the police officer makes when he was not personally there , cannot be relied on as a pointer to the fact that indeed the trailer disconnected itself before colliding with the quantum. I will therefore not place any evidential weight on this conclusion. It is unreliable as it was made by a person that was not there when the collision took place.

[31] I will now discern to also consider and evaluate the evidence of the Plaintiff's second witness Mr. Thembinkosi Dlamini to ascertain if its content is related to what extent it is related to all the elements of the claim to survive the absolution application[12]

[32] The main ingredient of the delictual act that is in dispute is the negligence of the Defendant

[33] PW2 Mr. Thembinkosi Dlamini told the Court that at the time when the

[12] As per Harms J.A in Gordon Lloyd Pag & Associates vs Reveira & Another 2001(1) 88 SCA where the test was spelt out the test was formulated being that a Plaintiff has to make out a *prema-facie* case in the sense that there is evidence related to all the elements of the claim to survive absolution, because without such evidence no Court could find for the Plaintiff.

collision happened, he was one of the three passengers in the Toyota quantum that was driven by Kenneth Magagula. The last thing that he remembers was the oncoming van that was driven by the Defendant approaching them from the opposite direction towards Buhleni. He continued to tell the Court that he was not paying much attention as he was obstructed by the seat in front of him as he was sitting in one of the back seats not on the front seat of the kombi. He thereafter heard a loud bang on the right side of the kombi. He continued to tell the Court that he was shocked as the quantum lost control up until it came to a stop.

[34] What he then subsequently saw after the kombi had stopped, not when the collision took place, was that the rear tyres were damaged. According to Mr. Dlamini, he then asked the driver what had happened. Again, the Court notes that he did not say he saw what had happened, but he asked the driver after the quantum had come to a standstill. The Court also observes that it was part of the evidence of this witness that he says so that during his examination in chief; At this time he gave this rendition, he had not even been subjected to cross examination. Therefore, the Court takes this version as voluntary, coming from him uncoerced.

[35] He continued to tell the Court that after the collision had taken place, it is then that he saw the trailer parked on the side of the road on its own, having been dislodged from the van which was towing it also parked in front of it. This according to the witness is when he saw the two vehicles. Which means he saw them after the trailer had dislodged from the bakkie. I may also highlight that it came out clearly from this witness that he did not see the process and the cause of the dislocation of the trailer from the bakkie. Let

alone the trailer veering off on its own to collide with the Toyota Quantum.

[36] He then told the Court a version of what he was then subsequently told by the driver, Mr. Thulani Magagula of what had happened. According to Mr. Dlamini, his colleague told him that the trailer dislocated from the van and went to collide with the Toyota quantum they were travelling in. This then begs the question, how then does the testimony of the Mr. Thembinkosi Dlamini demonstrate one of the elements of the Plaintiff's case, which is negligence? How does the Court ascertain the blameworthiness conduct which in the Plaintiff's particulars of claim is attributable to the Defendant? Being that it was the Defendant's trailer that dislodged whilst in motion and went on to collide with the quantum. The Plaintiff's second witness, never saw or witnessed this happening. His rendition is that which he was told by the driver.

[37] The evidence of PW2 Thembinkosi Dlamini suffers the same defect as the version of his employer (the Plaintiff). He also did not see how the collision happened, this is also the weakness of the other piece of evidence that is before Court, which is the police report. As I have already stated above the contents of the police report contain hearsay evidence as well .The police officer makes certain factual conclusions of how the collision happened, when he also came after the accident. It is therefore my observation that the version of the second witness in so far as he related to the Court a version that he was told by the driver, is clearly hearsay. It is in admissible in law .What is then left as evidence presented in Court thus far, that points to *prima- facie* negligent conduct by the Defendant?. Nothing, in so far as whose negligent conduct caused the accident.

The Defendant's apology after the accident

[38] The Plaintiff in its heads of arguments in opposition to the application for absolution from the instance, argues that the Court must take into account the totality of the Plaintiff's evidence. In particular, that the Defendant did not challenge the fact that after the collision, the Plaintiff spoke to the Defendant over the phone and the Defendant apologised to him for the accident. The parties subsequently met at Mr. Simelane's garage. During that meeting the Defendant apparently undertook to purchase the parts that were needed to repair Plaintiff's vehicle. The Defendant in fact purchased some parts, being the panels and the tail gate, some of which he bought in Johannesburg, South Africa. He went on to deliver those parts to the garage and they were fitted to the Plaintiff's vehicle.

[39] It is the argument of the Plaintiff that the Defendant was not cross examined on this aspect of the evidence. Therefore, the Court should find that his version of events in this regard was not disputed. To buttress his argument the Plaintiff cited the case of **Nomsa Maphalala v the National Commissioner of Police & Another Case 1838/15 SZHC 159** where her ladyship **M Dlamini J** restated the consequences of failing to dispute the evidence of a witness through cross examination.

[40] Although the Plaintiff does not say so in so many words, I interpret the argument to be that the Defendant owned up to be the cause of the accident by apologising. There is a problem with this reasoning in so far as the cause of action as set out in the particulars of claim is concerned. First, that is not

the case that the plaintiff has pleaded in his particulars of claim. The Plaintiff has not pleaded that as part of his cause of action is an admission by the Defendant that he was the one that was negligent. Second, even if the Court would take the version as proffered in the heads of arguments, which by the way is not a pleading, what the Plaintiff says is that, I quote from paragraph 3.1 at page 6 of the Heads of arguments

"The Defendant apologised to him for the accident".

Even in the heads of argument the Plaintiff does not state that the Defendant apologised for causing the accident.

[41] It is common cause that when an accident has happened it is the culture especially in our society as Swazis that even a stranger when passing by finding that an accident had happened they express their concern and pain for the occurrence of a calamity. It is therefore normal in the Swazi society to regret (kuncesitelana) after an accident had happened. Irrespective of who is to blame. I am therefore not persuaded that the fact that someone shows altruism then translate to an admission, especially of a delictual claim. More especially that of negligence as that is a legal question. It is therefore my finding that the failure by the Defendant to cross examine on the issue of the Defendant apologising does not take the matter any further for the Plaintiff. If this was part of the Defendant's case, then it must have been set out as an issue as part of his cause of action in the particulars of claim. A Plaintiff cannot establish a cause of action through the oral evidence of a witness during the trial proceedings when that issue was not pleaded in the particulars of claim. Neither in the heads of arguments.

Conclusion

[42] In light of the aforegoing, it is the Court's conclusion that in as much as the Plaintiff has been able to *prima-facie* demonstrate that he is the owner of the motor vehicle that got damaged. Also that he did incur some damages in the form of expenses of purchasing repair parts, paying labour, paying for the towing expenses. Further that his vehicle was out of business for a considerable time although the number of days are disputed by the Defendant. Actually, the Defendant argues that he failed to mitigate the duration after the mechanic had been arrested. However, the main ingredient of the cause of action that he has dismally failed even on a *prima- facie* basis to establish, is the negligent conduct of the Defendant.

[43] The Court must then consider, as was stated in **Marine Trade Insurance Company Ltd v Vanderschyff 1972 (1) SA 26 (A) 36 G- 38 A** which question was whether the Court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.

[44] The Court Ought not to be concerned with what someone else might think, it should rather be concerned with its own judgment and assessment, not that of another reasonable person or Court. For the Court must bring its own judgement to bear on the evidence adduced before it and decide whether the Plaintiff has at the close of his case made out a case such that the Court could or might find for the Plaintiff. Even in the absence of the Defendant's evidence at this stage. If the Court could find for the Plaintiff on that evidence, then the Defendant ought to be put to his defence. If not, then the granting of

absolution from the instance is inevitable.

[45] As I have already espoused the law above, the Plaintiff's evidence in its totality at this stage, must demonstrate the occurrence of all the elements of its case. In the matter at hand, the main element of the Plaintiff's case which is the attribution of negligence on the part of the Defendant, has not been made.

[46] The Court will therefore reach the inescapable conclusion that application for absolution from the instance is meritorious and it must succeed.

Costs

There is no reason for the Court to depart from the law that costs must follow the event.

Order

1. Application for absolution from the instance is hereby granted, the Plaintiff's claim against the Defendant is hereby dismissed.

2. The Plaintiff to pay costs of suit.

B.W. MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

FOR PLAINTIFF : *Mr. M. Magagula (Zonke Magagula & Company)*

FOR DEFENDANT: *Mr. S. Gumede (VZ Dlamini Attorneys)*