



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 727/2015

In the matter between:

JOSHUA BUKHOSI MKHONTA

Plaintiff

And

SINCEPHETELO MOTOR VEHICLE

ACCIDENT FUND

Defendant

Neutral Citation: *Joshua Bukhosi Mkhonta v Sincephetelo Motor Vehicle Accident Fund (727/2015) [2022] SZHC 295 (16 December 2022)*

CORAM:

N.M. MASEKO J

FOR THE PLAINTIFF:

Mr. S. Dlamini

FOR THE DEFENDANT:

Mr. S.M. Masuku

DATES OF HEARING: 08/10/2018, 05/12/2018, 19/08/2019, 10/09/2019, 17/09/2019, 19/09/2019, 17/10/2019,

10/12/2021: Filing of Plaintiff's submissions

17/08/2022: Filing of Defendant's submissions

DATE OF DELIVERY: 16/12/2022

Preamble:

Law of Delict: Negligent driving and contravention of The Road Traffic Act 2007 – Doctrine of sudden emergency where the defendant found himself faced with an oncoming car on his lane driven by the plaintiff.

Held: That the plaintiff failed to prevent a collision when he was and should, with exercise of reasonable care, have been in a position to do so, and consequently his claim for damages under the Aquilian action is hereby dismissed.

JUDGMENT

MASEKO J

[1] On the 20th May 2015, the Plaintiff sued out a Combined Summons against the Defendant for damages arising out of a motor vehicle collision between the Plaintiff's motor vehicle and a motor vehicle insured by the Defendant along the MR 103 public road near the Sibane Hotel on the 28th April 2013.

[2] It is common cause that the motor vehicle which was driven by the said Sydney Vusumango Kunene was insured by the defendant and it's registered as ESD 915 BM, and the Plaintiff's motor vehicle is registered as CSD 547 BH.

[3] At para 5 of the Plaintiff's particulars of claim, he states as follows:-

[5] The said accident was caused solely by the negligence of the driver Sydney Vusumango Kunene, of the vehicle referred to in paragraph 3 in one or more of the following respects:-

5.1 He failed to keep a proper look out thus the vehicle collided with an oncoming vehicle;

5.2 He failed to keep the vehicle under proper control;

5.3 He travelled at an excessive speed under the circumstances;

5.4 He failed to timeously apply the brakes;

5.5 He failed to avoid the accident when by the exercise of reasonable care he could and should have done so.

[6] As a result of the accident the Plaintiff suffered damages amounting to E288 750-11 (Emalangeneni Two Hundred and Eighty-Eight Thousand Seven Hundred and Fifty and Eleven cents) made up as follows:-

(a)	Loss of earning from date of accident	E 30 000-00
(b)	Estimated future loss of earnings	E 60 000-00
(c)	Hospital expenses	E 48 750-11
(d)	Permanent disability plus pain and suffering	E150 000-00

TOTAL **E288 750-11**

[4] The Plaintiff also states that he has complied with the provisions of The Motor Vehicle Accident Fund Act of 1991, but despite demand the Defendant refuses to pay.

[5] On the 2nd October 2018, the Plaintiff filed his amended particulars of claim as follows:-

(a)	Loss of earnings from date of accident	E 30 000-00
(b)	Estimated future loss of earnings	E 60 000-00
(c)	Hospital expenses	E216 151-13
(d)	Permanent disability plus pain and suffering	E300 000-00

TOTAL **E606 151-13**

[6] It is common cause that when the Plaintiff amended his particulars of claim on the 2nd October 2018, the Defendant had already filed its Plea on the 5th June 2015 in the following manner:-

“1. SPECIAL PLEA

1.1 The Defendant pleads specifically that it is not obliged to compensate Plaintiff in regard to his claim as set out in the particulars of claim or at all for the reason that Plaintiff's claim was not submitted to the Defendant to supply it with

sufficient information to enable it to meet Plaintiff's case. This is in contravention of Section 16 (1) and (2) of the Motor Vehicles Act No. 13 of 1991;

- 1.2 Plaintiff has failed to appraise Defendant in the statutory prescribed fashion, of his intention to claim compensation before issuing his summons in that he has not submitted a claim against the Defendant;*

Wherefore, the Defendant prays that Plaintiff's claim be dismissed with costs:

2. MERITS

In the alternative, the Special Plea is dismissed by the Honourable Court, the Defendant pleads over the merits as follows:

- 2.1 At paragraphs 1 and 2*

The contents hereof are admitted.

- 2.2 Ad paragraphs 3 and 4*

Defendant has no knowledge of the allegations herein contained, does not admit same and puts the Plaintiff to strict proof thereof.

- 2.3 Ad paragraph 5*

2.3.1 The Defendant denies that the said Sydney Vusumango Kunene negligent as alleged or otherwise.

2.3.2 In the alternative to 2.3.1 and in the event the Court should find and hold that the said Sydney Vusumango Kunene was negligent (which is denied) then the Defendant denies that his negligence was the cause of the collision;

2.3.3 In the alternative to 2.3.1 and 2.3.2 and should the Court find that the said Sydney Vusumango Kunene was negligent and such that negligence was the cause of the

collision (which is denied) the Defendant pleads that the Plaintiff was also negligent and that his negligence contributed to the causing of the collision in one or more of the following aspects:-

- 2.3.3.1 he failed to keep a proper look out;*
- 2.3.3.2 he drove his vehicle at an excessive speed in the circumstances;*
- 2.3.3.3 he failed to exercise and maintain proper control of the vehicle he was driving;*
- 2.3.3.4 he encroached into the opposite lane in the face of oncoming traffic;*
- 2.3.3.5 he failed to prevent a collision when he was and should, with exercise of reasonable care, have been in a position to do so.*

2.4 Ad paragraph 6

The Defendant has no knowledge of the allegations herein contained, does not admit same and puts the Plaintiff to the proof thereof.

2.5 Ad paragraph 7

2.5.1 The contents hereof are denied and Plaintiff is put to strict proof thereof;

2.5.2 The Defendant specifically denies that the Plaintiff has complied with the provisions of The Motor Vehicle Fund Act 1991. Defendant states that the Plaintiff's claim was not submitted to the Defendant to provide it with sufficient information to enable it to meet Plaintiff's

case. This is in contravention of Section 16 (1) and (2) of the said Act;

2.5.3 Plaintiff has failed to appraise Defendant in the statutory prescribed fashion, of his intention to claim compensation before issuing summons.”

- [7] The parties thereafter filed their Discovery Affidavits respectively and a Pre-Trial Conference was held on the 1st September 2016 and the Registrar allocated a date of trial.
- [8] The Plaintiff himself testified as PW1 and two more witnesses testified in support of the Plaintiff's case. PW2 is Melusi Zox Dlamini, and PW3 is Mfundo Nhlabatsi.
- [9] The trial commenced on the 10th October 2018 and as stated above herein the Plaintiff himself testified as PW1. He testified that he is a pensioner and that on the 28th April 2013 he was driving his motor vehicle a Toyota Corolla with registration numbers CSD 547 BH along the Ezulwini-Mbabane public road described as MR 103, the time was around 2100hrs when he collided with another motor vehicle registered ESD 915 BM. He testified that he was from the Galp Filling Station direction and had just driven over the last road hump when he came across the aforesaid ESD 915 BM which was driving at high speed with its bright headlamps on,

and as the cars were about to pass each other the oncoming vehicle ESD 915 BM strayed on to his side of the road or lane and he tried to slow down so he could pass but instead there was a collision on his side of the road.

[10] PW1 testified that the speed limit on that zone is 60km/h and he thinks at that time he was driving at 40km/h because his side of the road had many humps and traffic circles. He testified that he had driven for about fifty (50) metres from the last hump hence his vehicle was still driving at low speed.

[11] PW1 testified and said **“perhaps one may mention that my side of the road had those obstacles and speed humps, traffic circle as opposed to the Ezulwini bound lane which has no such obstacles.”**

[12] He testified that the first person to arrive was PW2 and he pleaded with him to pull him out of the car in fear of the car catching fire due to the heavy impact, and PW2 tried pulling him out with the help of other people and he then passed out, before the arrival of the police.

[13] PW1 testified that he was charged for negligent driving, however, the matter never took off at the Magistrate’s Court. He testified that the driver

of ESD 915 BM failed to keep a proper lookout and drove at an excessive speed and also failed to apply his brakes due to the speed. Further that the aforesaid driver also strayed on to his lane thereby causing the accident. He testified further that the accident was reported to the Defendant.

[14] PW1 was subjected to a lengthy cross-examination by Mr. S. Masuku for the Defendant. PW1 insisted that the accident occurred about 50 metres from the humps and not at or near Sibane Hotel, and it was put to him that even his own **“particulars of claim”** state clearly that the accident occurred near Sibane Hotel.

[15] It was further put to PW1 that police report also corroborate the particulars of claim that the accident occurred near Sibane Hotel and PW1 responded that the particulars of claim were prepared by his lawyer who relied on the police report.

[16] Mr. Masuku also put the statement of PW3 Mpendulo Nhlabatsi where PW3 had stated that when he arrived at the scene of the accident the (PW3) found the cars in the centre of the road near Sibane Hotel. PW1 insisted

that the accident scene was closer to Galp than Sibane about fifty (50) metres from the humps.

[17] It was further put to PW1 that the point of impact is between 100m and 150m from the humps towards the end of the guard rails from Sibane direction and PW1 insisted that the impact occurred not more than 50m from the humps. It was further put to PW1 that he had encroached the solid line onto the oncoming lane and caused the accident, and PW1 denied that contention.

[18] PW2 is Melusi Dlamini who testified that on the 28th April 2013 between 2100hrs and 2200hrs he was driving from Sibane Hotel, and as he was about to join the main road, a van drove past him at high speed towards Corner Plaza and he thereafter joined the main road and followed the van which collided with an oncoming motor vehicle from Corner Plaza. He testified that after the collision the van remained in the centre of the road whilst the Plaintiff's car was pushed onto the far left of the Plaintiff's lane facing Mvutshini direction. He testified that the accident occurred about 50m from the Galp Filling Station.

[19] He testified that he was the first to arrive at the scene and rushed to assist the Plaintiff who was trapped in his motor vehicle, and that the Plaintiff asked that he pull him out of the car before it burns. He testified that the accident did not happen near Sibane Hotel and also disagreed with the police report which stated that the Plaintiff was driving on the right side of the road facing the Sibane Hotel/Mvutshini direction.

[20] During cross- examination it was put to PW2 that the road leading to Galp has a gentle slope before you reach the humps and PW2 denied and insisted that the road is flat. PW2 testified further that even though he was the first to arrive at the scene and assisted the Plaintiff out of the car, he left immediately after the arrival of the police and the emergency personnel and stated further that he deposed to his affidavit only in July 2014 when he was invited by the Plaintiff's attorneys. He was also cross-examined on whether he knew the Plaintiff before the accident, and he responded that he did not know the defendant but only met him for the first time in Court when he had come to testify in this matter. He also reiterated that it was DW1 who was at fault as he swerved to plaintiff's lane.

[21] PW3 is Mfundo Nhlabatsi the employee of Galp Filling Station at Ezulwini. He testified that when the accident occurred around 2000hrs-2100hrs he

was on night shift. They heard a loud band when the collision occurred and he went to the scene of the accident to inspect the accident.

[22] He testified that the accident occurred between Galp and Sibane about the **length of a football pitch** from Galp Filling Station, and that the cars had both landed in the middle of the road, however he did not pay attention which car was on which side. The sedan was driving towards Sibane Hotel direction and the van driving towards Galp Filling Station direction when the accident occurred. He stated further that the driver of the sedan was trapped and there were people already pulling him out.

[23] PW3 was cross-examined by Mr. S. Masuku and he stated that the distance between Galp Filling Station and the accident scene was about 150m. He insisted further that the motor vehicles were in the middle of the road. PW3 also testified that there are guard rails on both sides of the road about 60m from the last hump from the Galp Filling Station direction.

[24] He testified further that there is a slope towards the guard rails and that there is a pipe underneath and then the road raises (steeply) as you proceed towards Sibane Hotel.

DEFENCE CASE

[25] The Defendant led the evidence of four (4) witnesses.

DW1 is Sydney Vusumango Masango, a soldier in the Army. He testified that on the 28th April 2013 during the night he was driving a red Toyota Double Cab bakkie motor vehicle towards Midway Ezulwini, and that when he was passing the main entrance to Sibane Hotel he saw headlights approaching from the Midway direction and warned those with him in the car to look forward as the approaching car was driving on their lane. He said they realised that the car was driving on their lane coming straight to them and his passengers advised him to switch lanes onto the right lane and he advised them that as driver the traffic laws prohibited him from driving on the right lane.

[26] He testified that he approached the guardrails, and as he was about to finish them the motor vehicles collided. He said immediately after the collision he went out of the vehicle and inspected himself of any injuries, and discovered that he hit the steering wheel. He testified that he also asked his passengers of any injuries and they all had minor injuries due to bumping into the car during the impact. He testified that they then inspected the other car and found that it was driven by PW1 of Mvutshini, and at that moment a BMW driven by a soldier from the Mvutshini direction arrived at the scene and he is the one who informed them that

the Toyota Corolla was driven by Babe Mkhonta (PW1) of Mvutshini. He testified that the BMW was the first to arrive at the scene and he then asked them to assist him in getting PW1 from the Corolla as he was trapped and also suspected that the Corolla may catch fire. They got PW1 out of the car and laid him on the ground and at that time a 977 Land cruiser Ambulance arrived and attended to PW1.

[27] He testified further that the vehicles collided on his lane as he was driving towards Midway about 40m to 50m from the beginning of the guardrails from the Sibane Hotel direction and that the collision occurred just as the guardrails end. He denied that he was the sole cause of the accident and also that he drove at an excessive speed and that he failed to apply his brakes timeously because of the excessive speed.

[28] He testified that the police came and found PW1 already placed on the ground. He testified further that the motor vehicle he was driving was slightly damaged on the front whereas the Corolla was badly damaged at the front as well. He testified further that he recorded a statement on another day as he was traumatized that day.

[35] DW3 is 4517 Constable Sihle Dlamini, a police officer based in the Traffic Department at Lobamba Police Station. He testified that on the 28th April 2013 at around 2115hrs he received a traffic accident report which happened near Sibane Hotel. He was in the company of 4670 Constable Mduduzi Nkonyane and they attended the accident scene. He had been attached to the traffic department since the year 2003. He stated that when they arrived at the accident scene next to Sibane Hotel, they found the two vehicles involved in the accident, a Toyota Corolla registration No. CSD 547 BH driven by PW1 and a maroon Toyota Hilux bakkie registration No. ESD 915 BM driven by DW1. The vehicles were still affixed to one another **“front-to-front”** and were on the lane towards Corner Plaza. This was a head-on collision, the Toyota Hilux was coming from Mvutshini direction and the Toyota Corolla was coming from the Midway direction towards Mvutshini. He stated that the vehicles were on the left lane i.e. on the side of the Toyota bakkie which was enroute to Midway/Galp Filling Station/Corner Plaza.

[36] DW3 testified that they arrived shortly after the paramedics. He instructed his colleague Constable Nkonyane to control the traffic whilst he prepared the accident sketch plan and did the markings and eventually the motor vehicles were removed to ease the flow of traffic.

[37] He testified that the point of impact was in the centre of the lane to Corner Plaza and that is a solid line zone on the part of the Toyota bakkie. He testified further that the cars rested on the lane to Corner Plaza. They found the two drivers at the scene and were being attended by the 977 paramedics and were inside the ambulance.

[38] DW3 testified that their investigations, oral evidence and the physical evidence at the scene was that PW1 was the cause of the accident. He narrated the visible traffic signs on the night of the accident in that locality, being:-

- (i) Solid line.
- (ii) No overtaking sign.
- (iii) Road was surrounded by guardrails.

[39] He testified further that there were debris on the road caused by rain. He stated that the distance from the point of impact and the speed humps towards Galp Filling Station is approximately 100m to 150m, and from Sibane Hotel to the point of impact is about 70m to 80m, where there are the guardrails on the bakkie's left side. He testified that the bakkie was damaged on the front, being the grill, bumper and headlamps. The Corolla was also damaged on the bumper, grill and some parts on the front.

[40] DW3 further testified on the motor vehicle KSD 486 AH which arrived when they were still attending the accident scene. The car was driven by Neville Barbosa who claimed that the Plaintiff (PW1) had side-swiped his motor vehicle at the traffic circle next to the Galp Filling Station and did not stop hence he made a U-turn and followed him. That docket was investigated by Officer Nkonyane.

[41] DW3 testified that PW1 made only one appearance at the Magistrate's Court on the 7th October 2014 and the case has been pending ever since.

[42] On the 17th September 2019 an ***inspection in loco*** was thereafter conducted at the scene of the accident at Ezulwini along MR 103 between Galp Filling Station and Sibane Hotel. DW3 testified and showed the Court all the places of interest within the scene of the accident and within the vicinity. He led the Court to the point of impact and it corresponded with his earlier evidence and description of the accident. He showed the Court the guard rails on the left hand side of the road leading to Galp Filling Station on the left lane where both vehicles landed after the collision. His testimony corresponded with the Sketch Plan **Exhibit "E"**. He also took the Court to the two speed humps, one from the Galp Filling Station direction and the other from the Sibane Hotel direction.

[43] DW3 was extensively cross-examined by Mr. Dlamini. He was asked about the position of the guardrails and he confirmed that they haven't changed since the accident.

[44] Since this was during the **inspection in loco**, Mr. Dlamini for the Plaintiff applied for leave to have his client PW1 identify the point of impact, and Mr. Masuku did not have any objection. I granted leave to Mr. Dlamini to lead his client, he was sworn in and indeed PW1 pointed to a spot on the left lane towards Sibane Hotel and said that was the point of impact and that both vehicles collided in the centre-line position and this is where there was an **"oil spill"**. He stated that the vehicles landed on the left side of the road leading to Sibane Hotel on his side of the road.

[45] Mr. Masuku cross-examined PW1 as follows during the **inspection in loco**:-

Q: *How many days did you spend in hospital?*

A: *30 days, I was admitted on 28/04/2013 and discharged on 29 or 30 May 2013.*

Q: *How did you identify the point of impact after 30 days in hospital?*

A: *When the accident occurred Melusi Zox Dlamini called my daughter who knew that I had medical aid cover and she took me to the scene*

and showed me the oil spill on the road and told me it was from that accident.

Q: For clarity and record you got that information from your daughter?

A: Yes, the oil spill proved --- but as for the point of impact I saw that when I was being pulled off the car as I feared it may catch fire.

Q: Is it information from your daughter or you observed it when you were coming out of the car?

A: During the accident I could not tell where the point of impact was, but when they pulled me out I saw the solid line and my daughter assisted me by showing me the oil spill which made me confirm that the accident happened on my side of the road.

Q: How were you able to identify the oil spill after 30 days?

A: I sought help from my daughter who showed me the oil spill from the accident.

Q: After an accident, the Fire Department would normally clean the road – are you aware if the Fire Department cleaned the scene?

A: I am not.

Mr. Masuku: That's all my Lord.

[46] The cross-examination of DW3 then resumed and Mr. Dlamini asked DW3 why he decided to keep the Sketch Plan **Exhibit "E"** separately from the docket and he explained that he kept it for safety as it could easily get lost when the docket is transmitted to the DPP's Chambers. He explained that the Sketch Plan **Exhibit "E"** and the Police Report **Exhibit "D"** were in the police safe for safe-keeping and pending trial proceedings. It was put to him that the document **Exhibit "E"** is doctored and he denied that and further stated that it's his practice to safeguard evidence which is to be presented before Court.

[47] It was put to him that Plaintiff's instructions were that the motor vehicles rested on the centre line and partly on his lane as confirmed by Melusi Dlamini (PW2) and Mfundo Nhlabatsi (PW3). DW3 reiterated his testimony that when he arrived at the accident scene both vehicles had rested on the lane towards Galp Filling Station i.e. on the lane of the Toyota bakkie driven by DW1.

[48] DW3 was cross-examined on the point of impact, it being put to him that the impact occurred in the centre line and that the Sketch Plan **Exhibit "E"** was misleading, but he reiterated that the Sketch Plan resembles the accurate posture of the scene of the accident. DW3 was also taken to task on the position of the cars and how they rested after accident in particular

that his sketch plan contradicted his testimony, and it was put to him that the sketch plan was fabricated to favour DW1 and he denied that contention that the sketch plan was fabricated.

[49] It was also put to DW3 that it is not true that Neville Barbosa came to the scene of the accident, however DW3 explained that Barbosa stopped his car after seeing that the Plaintiff was involved in an accident. It was further put to DW3 that neither the Plaintiff's witnesses nor Defendant's witnesses ever mentioned Barbosa, and DW3 explained that Barbosa came to report the accident to the police and not to inform the witnesses. He added that at the scene they usually request for witnesses but no one volunteered to come forward and record a statement and therefore, he said he was skeptical of these people who are now being witnesses for the Court.

[50] It was further put to him that Melusi Zox Dlamini was the first one to arrive at the scene, however, the witness stated that he knows Melusi Zox Dlamini very well and that he did not see the said Melusi Zox Dlamini at the scene on that day.

[51] DW4 is Jabulani Nkosinathi Dlamini, he testified that in April 2013 he was employed at Galp Filling Station, and on this date in question during the evening, a car approached from kaMchoza direction towards the Filling Station, and they thought it was to refuel and he tried to attend to it but it did not stop and proceeded straight towards the traffic circle whereupon it failed to negotiate the circle and collided with another car by side-swiping it on the driver's side. This car didn't stop and drove towards Mbabane direction and thereafter they heard a loud bang. The car was a navy-blue sedan, and DW4 testified that they immediately attended to the scene whereupon they recognized PW1 as he used to drive a truck which he used to carry crates of alcohol beverages as he was said to operate a liquor outlet in Manzini, and is a resident of Ezulwini, and he was trapped in the car.

[52] DW4 testified that after the first collision at the traffic circle, the Corolla did not stop, and they attended to the car which had been side-swiped by the Corolla, and as they were inspecting the damage on that car, they heard a loud bang and they then ran towards this loud bang and they eventually found out that the Corolla had collided with a bakkie, it was a head-on-collision on the landfill where there are guardrails on both sides. **The Corolla had not changed to its lane after it was channeled to drive on the oncoming lane from the first accident at the traffic circle, and**

the accident happened on the lane of the van after the first collision at the said traffic circle and it eventually collided with the van. Since the driver of the Corolla was trapped inside the car, the people from the van were trying to alight from the van as they had minor injuries.

[53] DW4 testified that they tried to open the door which was damaged and at that time another car arrived which looked like it was accompanying the van, and the driver asked the occupants of the van if they were injured or not, **“and at that stage we told them to concentrate on the trapped driver of the Corolla which had been causing chaos from the first accident at the traffic circle”.** He testified further that they together with the people from the van pulled him out and the ambulance and the police thereafter arrived. The driver of the Corolla was alone.

[54] He testified further that he knows Melusi Zox Dlamini very well as President of ACASWA who once worked at MTN and is in the entertainment industry. He testified that he did not see him at the scene of the accident when they were removing the driver of the Corolla who was trapped inside the vehicle. He testified that he knew PW2 so well because he used to provide transport to his child who used to attend crèche (pre-school) around 2011/2012.

[55] DW4 denied that Melusi Zox Dlamini is the first one who arrived at the scene and pulled out the injured Plaintiff, he insisted that they were the first ones to arrive at the scene to assist the injured driver and they were the ones who called the police and the 977 emergency personnel. He testified that the distance from the humps to the point of impact is approximately 150 metres.

[56] DW4 was cross-examined by Mr. Dlamini and he reiterated his evidence in chief.

[57] DW5 is 4670 Constable Mduduzi Nkonyane. He testified that he was based at Lobamba Police Station in the Traffic Department together with DW3. On the 28th April 2013 he attended the accident scene near Sibane Hotel. He corroborates DW3 in material respects in particular with the point of impact and the scene where the vehicles rested after the collision. He testified that he was involved in the measurements of the scene, and that the **Sketch Plan Exhibit "E"** and other crucial evidence was kept in the police safe to secure the evidence for trial. He maintained even during cross-examination that the Sketch Plan is not fabricated.

[58] DW5 testified further that he was the investigating officer of the Neville Barbosa where the suspect is the Plaintiff as well.

ANALYSIS OF THE EVIDENCE AND THE LAW

[59] It is common cause that in negligent driving cases resulting to the plaintiff suffering damages as a result of the negligent driving of the defendant which resulted to a collision, the said plaintiff is under a legal duty to establish and prove the following factors:

- (i) that the defendant owed a duty of care to the defendant
- (ii) that the defendant breached that duty of care
- (iii) that the breach of the duty of care by the defendant has caused injury to the plaintiff
- (iv) that the plaintiff has suffered damages.

[60] In *casu* the fundamental question which this Court must answer is whether in light and on the basis of the evidence led by the Plaintiff and Defendant, **has** the Plaintiff demonstrated on a balance of probabilities that the Defendant breached his duty of care and drove negligently and thereby caused the collision. This question can only be answered by a close scrutiny of the evidence of the witnesses.

[61] PW1 is the Plaintiff himself and I outlined his evidence above herein. During his testimony PW1 testified that DW1 encroached onto his lane and the collision thereafter occurred and both motor vehicles rested on his lane towards Mvutshini direction. His testimony is that the collision was caused solely by the negligence of DW1 who swerved on to his lane. He testified further that he was rescued by PW2 Melusi Zox Dlamini, and that after he had been removed from the vehicle he then passed out i.e. became unconscious.

[62] The evidence of PW1 is heavily contradicted by the evidence of DW1 who testified that PW1 was driving his motor vehicle with this headlights on bright mode and on his lane i.e. the lane towards Corner Plaza or Galp Filling Station as it were. The evidence of DW1 is that PW1 is the sole cause of the collision due to his negligent driving on his lane. The evidence of DW1 is corroborated by the evidence of the two police officers Constable Dlamini and Constable Nkonyane, who attended to the scene of the accident immediately upon its occurrence. Both officers testified that they found both vehicles rested on the lane towards Galp Filling Station. This is the correct lane for DW1 and the wrong lane for PW1.

[63] The evidence of these two officers also materially contradict the evidence of PW2 Melusi Dlamini who testified as an eye witness in this case, and to

the extent of stating before Court that the collision was caused solely by the negligent driving of DW1 who swerved onto the Plaintiff's lane and then the collision occurred **on the Plaintiff's lane**. PW2 also testified that he was the first to arrive at the scene and rescued the Plaintiff as there were fears that the Corolla (PW1's car) may catch fire.

[64] However, what is strange about the evidence of PW2 Melusi Dlamini is the following:

- (i) He did not record or volunteer a statement to the police on that day 28/04/2013 despite his claims that they found him at the accident scene (him there). **He testified that the police found him there and as soon as they started interviewing people he left.**
- (ii) DW3 Constable Sihle Thabiso Dlamini testified under cross-examination that PW2 Melusi Zox Dlamini was very well known to him, but that he did not see him on the scene of the accident on that day.
- (iii) DW4 Jabulani Nkosinathi Dlamini, who was employed by Galp Filling Station at the time, and was well known to Melusi Zox Dlamini, testified that they were the first to arrive at the scene and they pulled out the plaintiff from his motor vehicle with the assistance of the occupants of the Toyota bakkie. He

was emphatic that Melusi Zox Dlamini was not there and that the said Melusi was very well-known to him as he (DW4) had in the past years provided transport services to Melusi by transporting his child to a crèche (pre-school).

- (iv) DW4 himself testified that the two vehicles were all rested on the lane towards Galp Filling Station where the collision occurred contrary to what Melusi Zox Dlamini's testimony that the Toyota bakkie driven by DW1 was rested in the middle of the road whilst PW1's motor vehicle was rested on the far left of the lane towards Sibane Hotel/Mvutshini direction.
- (v) Further PW2 Melusi was emphatic in his evidence that the road from Sibane towards Galp Filling Station is straight and without a slope and steep, whereas the **inspection in loco** revealed that the road is not straight but there is a slope along the guardrails towards the accident scene in the Galp Filling Station/Corner Plaza direction.
- (vi) When PW2 was cross-examined by Mr. Masuku he emphatically stated that he did not know PW1 Mr. Mkhonta, but when Mr. Mkhonta testified at the scene he pointed to what he called an **"oil spill"** from the accident and upon cross-examination by Mr. Masuku, he (PW1) testified that he

was shown the **“oil spill”** by his daughter who had been called by PW2 after the accident.

- (vii) DW5 Constable Mduduzi Nkonyane testified that he knew PW2 Melusi Dlamini very well as a resident of Ezulwini, who once worked at Whispers and who also usually found at Ludzidzini where there is a tourist office and who now works at Tourism. He testified that he had known him for over 10 years, and that he did not find him at the scene on the 28th April 2013 when they went to attend to the accident.
- (viii) Both Officers Dlamini and Nkonyane found the motor vehicles involved in the collision having rested on the lane towards Galp Filling Station, and even the point of impact was found by the police to have been on the lane towards Galp Filling Station. This is the lane rightfully occupied by the Toyota bakkie driven by DW1. If the motor vehicle belonging to PW1 was rested on the far left of the Sibane Hotel/Mvutshini lane as per PW2’s testimony, then why and how was it found by the police who are neutral in these matters on the lane of the motor vehicle driven by DW1 i.e. on the Galp Filling Station/Midway/Corner Plaza direction remains a mystery of PW2’s evidence.

[65] The evidence of the police officers corroborated the evidence of DW1, DW2 and DW4. There was no plausible explanation advanced by PW2 Melusi Dlamini why he didn't record a statement when he claims to have witnessed the accident first hand. There is also no evidence advanced by the Plaintiff how the motor vehicles suddenly found themselves rested on the lane towards Galp Filling Station when PW2 Melusi Dlamini testified emphatically that the Toyota bakkie landed and rested in the centre of the road whilst **the Plaintiff's car was pushed further to the left and rested on the far left of the lane towards Mvutshini**. It is the failure of PW2 to record a statement to the police there and there at the scene immediately after the accident that is a mystery in PW2's testimony and consequently a mystery in the Plaintiff's case, and coupled with his subsequent communication with the Plaintiff's daughter which led to the identification of the so called **"oil spill"** as the point of impact by the Plaintiff upon his discharge from hospital after 30 days. I take note as well that during his evidence in chief and under cross-examination the Plaintiff never at any stage mentioned any oil spill. It is my view that this testimony is an afterthought which unfortunately affects the credibility of his evidence and his demeanor as a witness. PW2 is also linked by PW1 to this mysterious **"oil spill"**, and this too also affects the credibility of the evidence of PW2.

[66] The apparent and paramount contradiction of PW2's evidence as outlined above also have a heavy negative effect on his evidence in general and the credibility thereof. The less said the better. It is difficult for this Court to appreciate the evidence of PW2 owing to the circumstances I have outlined above.

[67] The Plaintiff also did not call his daughter to explain before Court the nature of the conversation she had with PW2 when he called her and informed her about her father's involvement in the accident on the 28/04/2013 and how the **"oil spill"** came about to be identified on the Plaintiff's lane. PW2 himself did not take the Court into his confidence and disclose to the Court that he had a telephone conversation with the Plaintiff's daughter on the 28/04/2013 after the collision and even how he came to know about her contact details because under cross-examination by Mr. Masuku, **PW2 made it crystal clear that he didn't know Plaintiff before the accident but he only met him when he was due to appear before Court "about a week ago"** i.e. from the date of the commencement of the trial on the 9th October 2018.

[68] I must not be understood to say the failure by PW2 to provide a statement to the police precluded him from testifying, or that it made his evidence weak and not credible, that is not the position of the law. PW2 has a right

to provide a statement and equally has a right to refuse to provide a statement at all. The only problem arises when all the crucial witnesses deny having seen PW2 at the scene of the accident, when he claims to have witnessed the accident first hand and even rescued PW1 from the car which had trapped him. My sense tells me that he was at least under a moral duty and obligation to provide a statement to the police when his memory was still fresh, however, that did not happen. It is an indictment against the evidence of PW2 that DW3, DW4 and DW5 state clearly that they did not see him at the scene of the accident. It gets worse because DW4 states that he is the one who arrived first and found PW1 trapped in the car and persuaded the occupants of the Toyota bakkie to assist him pull out PW1 from his car, and they did that and placed him on the ground and thereafter the police arrived and shortly thereafter the Ambulance arrived as well. If PW2 had been at the scene surely DW4 would have seen him as he is well known to him, and also the police officers DW3 and DW5 respectively would have also seen him because they also know him very well. As I stated above herein that this is mystery in the evidence of PW2 which ultimately diminishes the credibility of PW1's testimony as well.

- [69] The other crucial weakness in the evidence of both PW1 and PW2 is their gospel and persistent testimony that the distance from the Galp Filling Station to where the collision occurred is fifty (50) metres. During the

inspection in loco it was clearly established that the distance was on average 150 metres and not the fifty (50) metres which both PW1 and PW2 were so sure about. There are guardrails where the accident occurred but PW2 denied that there are guardrails and that the road is **sloppy towards Galp Filling Station and a bit steepy towards Sibane Hotel/Mvutshini direction**. PW2 was so sure in his testimony that there are no guardrails and he insisted that the road is straight from Sibane Hotel to the Galp Filling Station, even under the careful cross-examination by Counsel for the Defendant PW2 was not shaken in his obvious mistaken testimony that the road was straight without any slope towards Galp Filling Station. Even PW3 Mfundo Nhlabatsi estimated the length of the distance from Galp Filling Station to the point of impact/accident scene to be about the size of a **“football pitch”** during his evidence in chief and under cross-examination by Counsel for the Defendant, he estimated the distance from Galp Filling Station to the accident scene to about 150 metres. This is in my view a reasonable estimate of the distance and not the 50 metres.

[70] PW3 described the road as having guardrails on both sides and that **“it slopes and then rises”**, and that there is a pipe underneath and also the place is like a **“ditchy area”**. Again it proves that the road is not straight as PW2 insisted in his testimony under cross-examination. I am therefore unable to appreciate the testimony of PW2 and unfortunately it is heavily

linked to PW1's testimony, and in my view, their evidence lacks credence to sustain the Plaintiff's burden of proof on a balance of probabilities.

[71] The evidence of PW3 is also fraught with material contradictions in so far as the point where the cars rested after the accident. In an Affidavit sworn to on the 30th July 2014, at paragraph 2 line 5, he stated as follows:-

“(2) ----Both vehicles were on the lane for vehicles travelling from Ezulwini to Mbabane. The driver of CSD 547 BH was trapped inside the vehicle. He was finally removed from the vehicle by members of the Emergency Preparedness Response Department and taken to hospital.”

[72] This Affidavit was filed in Court by the plaintiff's erstwhile attorneys S.C. Dlamini and Company on the 21st March 2017 and served on Defendant's Attorneys on the same day the 21st March 2017. The evidence of PW3 is contradicted by the evidence of DW4, his colleague, in so far as removing PW1 from his motor vehicle which had trapped him. The removal of PW1 from the wreckage of his car was performed by DW4 and the occupants of the Toyota bakkie and they placed him on the ground where the Ambulance found and he was then uplifted into the Ambulance.

[73] When PW3 testified in chief he did not want to commit himself about the side of the road where the motor vehicles eventually rested after the

collision. Instead his testimony is that both vehicles rested in the middle of the road after the collision and he did not take notice which vehicle was on which side whereas in his affidavit he stated that both vehicles rested on PW1's lane towards Mvutshini direction. It would be impossible for him not to take note of the fact that PW1's car rested on the far left of the lane towards Mvutshini, if one is to go by the evidence of PW2.

THE ACCIDENT INVOLVING NEVILLE BARBOSA

[74] It is difficult to deal with this matter without referring to the incident which allegedly involves Neville Barbosa. PW1 vehemently denied this accident under cross-examination by Mr. Masuku, and PW3 Mfundo Nhlabatsi also denied this accident whereas he claims to have been at the Galp Filling Station and actually attended to the accident scene involving PW1 and DW1. Surprisingly he makes no mention of DW4 his colleague, but instead states in his affidavit that PW1 was removed by the paramedics from his motor vehicle as he was trapped which is contrary to DW4's evidence that PW1 was removed by himself and the occupants of the Toyota bakkie. It must be noted as well that DW4 Jabulani Nkosinathi Dlamini testified that PW3 worked as a Cashier at the Galp Filling Station. It is highly possible therefore that he may have not been aware of the sideswiping accident at the traffic circle as he may have been inside the building at the time doing his duties as a cashier.

[75] Further the police officers DW3 officer Dlamini, the Investigating Officer herein and his partner DW5 Officer Nkonyane who is the Investigating Officer of the Neville Barbosa case, testified that when they were attending to the accident scene, there came Barbosa driving his car and also laid a complaint of negligent driving against PW1 which allegedly occurred at the traffic circle next to the Galp Filling Station, where PW1 allegedly failed to control his motor vehicle, the Corolla and sideswiped Barbosa's car and further did not stop after the said collision.

[76] The evidence of DW4 Jabulani Nkosinathi Dlamini clearly explains this incident when he states that after failing to negotiate the traffic circle PW1 collided with Barbosa's vehicle and then drove towards the Mbabane direction (i.e. Sibane Hotel/Mvutshini) on the wrong lane of oncoming traffic towards Galp Filling Station and shortly thereafter they heard a loud band and rushed to check only to find that PW1's car was now involved in a head on collision with the vehicle driven by DW1 on DW1's lane, and that the cars rested on the lane for the traffic bound to Galp Filling Station/Corner Plaza direction.

[77] It is common cause that the police opened a Road Traffic Accident docket and PW1 was charged with the following contraventions of The Road Traffic Act 6/2007:-

- Count 1 - Negligent Driving and colliding with ESD 015 BM, DW1's vehicle.
- Count 2 - Negligent Driving and colliding with KSD 496 AH Neville Barbosa's collision at traffic circle next to Galp Filling Station.
- Count 3 - Failing to stop after accident with Barbosa.
- Count 4 - Failing to ascertain nature of damage in Barbosa's vehicle.

[78] Barbosa's statement was recorded on the same day of the accident, being 28th April 2013 at about 2200hrs at Midway i.e. at or near Galp Filling Station. I am alive to the fact that as at the commencement of this trial the case against PW1 had not started. Further I must point out that I am not pronouncing any guilt or innocence on PW1 in respect of the Barbosa case. There is no way by which this Court can ignore the evidence that has been led to prove the existence of the Barbosa accident and how they are related with the accident involving the motor vehicle driven by DW1.

[79] The crucial factor about the Barbosa case is that it heavily affects the credibility of PW1 and PW3's evidence because they both vehemently

denied the Barbosa sideswiping accident. It is impossible to imagine that the evidence of DW3 and DW5 (the police officers) and DW4 the Galp Filling Station employee is a fabrication against PW1 when he was even charged for the said collision. Counsel for the Defendant cross-examined PW1 on the Barbosa incident and he vehemently denied same. It is impossible to appreciate PW1's denial of this accident owing to the massive and credible evidence of DW3, DW5 and DW4 as highlighted above. There is a case pending against PW1 for the four Counts I referred to above, and until a Court makes a pronouncement of guilt or innocence the charges of the Road Traffic Act Contraventions remain pending.

- [80] It is common cause that negligent driving occurs when drivers of motor vehicles fail to use reasonable care while operating the said motor vehicles, which conduct can lead to personal injuries to other people and/or damage to one or more motor vehicles. In *casu* the vehement denial by PW1 of the alleged collision with Neville Barbosa's motor vehicle at the traffic circle is without merit. I do not by any stretch of imagination declare that PW1 was negligent, but it's a fact that he was charged with negligent driving in respect of Barbosa's car, and he never mentioned that in his evidence in chief nor even mention that he was charged for Barbosa's accident, and that the case was pending, instead he vehemently denied the Barbosa accident and only mentioned the charge of the collision with

DW1's vehicle, the Toyota bakkie. DW1 himself testified under cross-examination that after the collision there arrived a Quantum minibus and the driver informed them that PW1 had collided with another motor vehicle at the traffic circle next to the Galp Filling Station. Even though the driver of the Quantum minibus was never called to testify, however such evidence corroborates the evidence of DW3, DW4 and DW5 about the presence and existence of the Barbosa case.

- [81] Counsel for the Plaintiff made an issue of what he perceived as contradiction of the Sketch Plan **Exhibit "E"** and the testimony of Officer Sihle Dlamini, the author of the sketch plan. It is my view that the contradictions, if any, do not go into the root of the matter. For example, the sketch plan does not contradict the evidence of Officer Dlamini DW3, Officer Nkonyane DW5, DW1, DW2, and DW4. The point of impact and where the cars rested after the collision is proven by these witnesses from their credible and cogent evidence and I have no reason to disbelieve their evidence which corroborates each other in material respects. It is common cause that in every case there are discrepancies in the evidence as people perceive events differently, and I could see that these witnesses were not giving false and tailored evidence but the evidence of what each one of them saw and witnessed on the night in question to the best of their abilities.

[82] The same does not go for the plaintiff's case owing to the challenges I have pointed out in the plaintiff's case where the evidence of his witnesses is in my considered view no credible, and thus it is extremely difficult to rely on their evidence including the evidence of the plaintiff himself.

[83] In the case of **Mohau Jafta Sekhokho v The State [2010] ZAGPPHC 103** Goodey AJ stated the following at paras 3.5:-

'It should further be kept in mind that W.E. Cooper (MOTOR LAW P90) set out the legal position as follows:-

"[1] Sudden Emergency

(a) Underlying principle

A driver (it is self-evident) who is suddenly confronted with an unexpected danger may, and probably will, act differently from a driver who does not have to act without much time to make a decision, and on the spur of the moment he may do something which causes the very collision he is anxious to avoid.

Understandably the Court accept that:

"Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for circumstances of their position"

See: Union Government v Buur 1914 AD 273 @ 286.

This principle has been elevated into the so called doctrine of sudden emergency, which has been formulated as follows:

“A man who, by another’s want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.”

(b) Reasonable Care:

A driver who is faced with a sudden emergency is required to exercise reasonable care and use reasonable skills to avoid the imminent danger. He is required to take such steps as a reasonable careful man would fairly be expected to take in the circumstances, as Wessel CJ said:

“One man may react very quickly to what he sees and takes in, whilst another man maybe slower. We must consider what an ordinary reasonable man would have done. Culpa is not to be imputed to a man merely because another person would have realised more promptly and acted more quickly. Where many have to make up their mind how to act in a second or in a fraction of a second, one may think this course better whilst another man pretend that it is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if a justifiable error of judgment he does not choose the best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa.”

See: SAR v Symington 1935 AD 37 at 45.

[84] The circumstances and principles discussed herein above by Goodey AJ in Mohau Jafta case (*supra*) as regards the doctrines of Sudden Emergency and Reasonable Care are precisely what DW1 was confronted with in *casu*. His testimony was that he saw PW1's oncoming car driving in his lane and alerted his passengers who advised him to change lanes to avoid the collision, but he advised them that the road traffic laws did not permit him to do that, and that the vehicles then collided as Plaintiff was trying to drive back to his lane but it was already too late and the collision occurred. DW1 stated further that on his left side there were the guardrails and the collision occurred just before the guardrails ended.

[85] I have no doubt in my mind and having conducted an inspection in loco that DW1 was faced with a sudden emergency which was not of his own making and further that his actions do not amount to culpa. He avoided switching to PW1's lane rightfully so, because it would have resulted to the collision on that side, and his explanation on why he shifted to that lane would highly likely be rejected, and further since that is a busy route, there is a possibility that many vehicles could have been involved in the accident.

[86] There is no doubt in my mind that DW1 was faced with a situation of sudden emergency and not of his own making but because of the negligent

conduct of the Plaintiff by driving his vehicle on DW1's lane. He had no choice but to maintain his lane and hope that the plaintiff would cross over to his lane, but it was not to be.

[87] In their Book titled *SOUTH AFRICAN MOTOR LAW* Cooper and Bamford published by Juta & Company Ltd 1965 at pages 269-271 states as follows when dealing with the doctrine of sudden emergency in motor vehicle accidents or collision, and I quote:-

“The defence of sudden emergency has been stated as follows:-

“A man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.”

The doctrine of sudden emergency applies where a person's conduct is prima facie negligent. In such a case the doctrine is applied to excuse or negative the apparent negligence. But the doctrine is not confined to a case where a person has been negligent, it also applies when an emergency has been created by the negligence of a third person or by an act of God. The doctrine of sudden emergency has often been applied in motor collisions cases. It has, for example, been held that a driver was faced with a sudden emergency:-

- (a) When an approaching vehicle remained on its incorrect side of the road until a collision appeared imminent or inevitable;***
- (b) When a pedestrian ran behind a stationery vehicle in front of the driver's overtaking vehicle;***
- (c) When a sudden and unexpected mechanical defect developed in the driver's vehicle; and***

(d) When the back door of a vehicle suddenly opened and a pedestrian screamed.

While a person is not negligent if on the spur of the moment, or by mistake, he does something which caused the very collision he is anxious to avoid, not every unexpected occurrence constitutes a sudden emergency, nor is every act committed in a critical situation necessarily excusable. The doctrine should not be pushed too far. At all times a person is required to take reasonable care and use reasonable skill. The steps expected from him are such as 'a reasonably careful man would fairly be expected to take in the circumstances; and conduct will not be excused which 'even in the critical stage' is not reasonable. So in a number of cases where a driver travelling on his correct side of the road on seeing a vehicle approaching on its incorrect side of the road crossed over on to this incorrect side of the road at a time when the approaching vehicle was returning to its correct side of the road, the Court held that the former had acted unreasonably and was negligent. But a driver's conduct - as Innes CJ pointed out in Solomon & Another v Musset & Bright, Ltd 1926 AD 427 - must not be judged in the light of subsequent events but by the standard of what a reasonable would have done at the time Van der Heever J (as he then was) put the position as follows:-

"Where a plaintiff is put in jeopardy by the unexpected and patently wrongful conduct of the defendant, it seems to me irrational meticulously to examine his reactions in the placid atmosphere of the Court in the light of the after-acquired knowledge; to hold that has he taken such and such step, the accident would have been avoided, and that consequently he was also negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others"

driving his motor vehicle on the wrong lane of oncoming traffic and thereby collided with the motor vehicle driven by DW1 Vusumango Kunene.

[90] There is no sufficient evidence on the plaintiff's case why he alleges that DW1 did not exercise reasonable care when the evidence reveals that the accident or collision occurred on his (DW1) lane towards the Galp Filling Station because the Plaintiff (PW1) drove on the wrong lane and eventually caused the collision with DW1's vehicle.

[91] In the circumstances it is my considered view that the Plaintiff has failed to prove the essential elements for a claim in delict for patrimonial loss caused through the negligent driving of a motor vehicle based on the Aquilian action. These essential elements which the plaintiff has failed to prove are outlined in a text titled *DELICTUAL LIABILITY IN MOTOR LAW* published by **Juta & Co Ltd 1996 at page 5** as follows:-

- “(b) that the defendant was at fault;***
- (c) that the plaintiff suffered patrimonial loss, and***
- (d) that the defendant's conduct caused the loss.”***

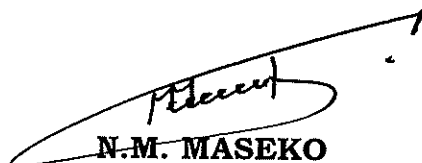
[92] The evidence led by both parties clearly indicates that it is the Plaintiff's negligent conduct in driving on DW1's lane which was unlawful and

thereby caused the accident,. It must be borne in mind that, in its Plea, the Defendant pleaded that the collision was caused by the negligent driving of the Plaintiff himself, and I am persuaded that the collision was solely caused by the negligent conduct of the Plaintiff. He encroached into the opposite lane in the face of oncoming traffic, and consequently failed to prevent the collision when he was and should, with the exercise of reasonable care, have been in a position to do so.

[93] I have deliberately not dealt with the provisions of the Motor Vehicle Accident Fund, because in my view the plaintiff's case against the defendant as the insurer of the motor vehicle driven by DW1 had failed to meet or discharge the burden of proof, being on a balance of probabilities. Further, even though the defendant had advanced a Special Plea such plea was not pursued by both parties during the trial before me.

[94] In the premises, I hereby hand down the following order:-

1. The Plaintiff's claim as contained in the Combined Summons dated the 20th May 2015 is hereby dismissed with costs.


N.M. MASEKO
JUDGE