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SIMON M. NKAMBULE Applicant

vs

SWAZILAND MOTOR VEHICLE ACCIDENT FUND Respondent

Case No. 31/1997

Coram S.W. Sapire A C J

For Applicant L. Khumalo

For Respondent H. Currie

Judgment

(9/10/97)

The plaintiff is the father and natural guardian of 3 minor children. Their mother who was the plaintiff's wife, was killed in a motor accident which took place on 20th November 1995 between 8 and 9 in the morning at or near Sibebe Park on the road between Mbabane and Mbuluzi High School.

It is common cause that the Motor Vehicle Accident Act No. 30 of 1991 was applicable to this accident and that the defendant is liable to compensate the plaintiff in his capacity as guardian of his minor children, for the loss of support they have suffered should it be shown that the driver of the bus was negligent and that such negligence was the sole or a contributory cause of the collision.

It has been agreed that the question of negligence only be decided at this stage, and that the other aspects of the case would either be agreed upon or later brought before the Court for decision.

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The plaintiff's wife, to whom I will refer as the deceased, who was the mother of the minor children on whose behalf the claim is made, was on 25th November 1995 travelling along the Pine Valley Road towards the Mbuluzi School where she had been employed as a teacher. Her direction of travel was therefore from West to East. A bus driven by one John Mncina was approaching from the opposite direction, that is from East to West.

The road holds dangers for modern traffic. It descends over a length of some kilometres from the eastern slopes of a hill overlooking Mbabane following a line approximately parallel to the Mbuluzi River, and the contours of the terrain.. The accident took place on this road approximately opposite the western side of Sibebe Rock.

The road at the scene of the accident and indeed for most of its length is narrow not exceeding 7 paces in width. The road is used not only by private motor cars but by heavier commercial and public transport vehicles including delivery vans and buses. Vehicles of this nature because of their dimensions take up practically the whole of their side of the road. Even private cars have little room for manoeuvre. The difficulties in driving on this road are increased by the fact that there are a number of turns and curves as the road transcends the mountain side. These curves are so sharp that

approaching traffic cannot be seen until the vehicles are almost upon each other.

These observations as to road conditions were made in the course of an inspection in loco and confirmed by the driver of the bus.

Photographs have been taken of the scene of the accident, and have become exhibits. They are helpful in appreciating the evidence of the witnesses to the accident.

The inspection in loco was held, of which an agreed memorandum forms part of the record. A Police plan had been produced in evidence for further assistance in describing various aspects of what occurred.

There are two opposing versions as to the cause of the accident. The plaintiffs version is that the deceased approached the curve of the road as it passes the gate to a property belonging to Mr. Eyeington. She must have noticed a bus approaching from the opposite direction was straddling the centre white line, and thus on its wrong side of the road in the deceased's line of travel. This placed her in an impossible position. To the left of the road there is hardly any shoulder at all so that it was not possible to avoid a collision by drawing further to the left. I do not see how the right hand side offered any better evasive action.. Appreciating the danger in which she perceived herself to be she made a decision in the heat of the moment to turn to her right to pass the vehicle on her incorrect side of the road. Simultaneously the bus regained its correct side of the road and a collision took place just outside the gate of Mr. Eyeington's

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property.

Evidence to this effect was given by Mr. Phakathi who was a passenger in the same bus who sat three rows of benches behind the driver, but on the left hand side. He claims to have had a clear view of the road ahead to have been paying close attention to the driving of the bus driver. He saw the driver attempt to cut the corner, at about a bridge some short distance from the Eyeington gate. By "cutting the corner" he explained he intended to convey that the bus driver did not follow the curve of the road, but crossed over to the right hand side of the road in order to straighten his line of travel so as to avoid slowing down and losing momentum immediately before commencing his climb of the ascent curving to the right, which lay immediately ahead.

He says that the driver while cutting the corner, saw the approach of the vehicle in which the deceased was driving, and attempted to avoid the collision by regaining the left hand side of the road completely..

Tragically, the deceased, had taken the view, that in order to avoid the collision she was obliged to cross over to her incorrect side of the road. The bus and the deceased's bakkie collided with fatal results for the deceased, close to the access point of the Eyeington property to the road. This was of course on the deceased's wrong side of the road.

The witness Phakathi was impressive. His memory of the events was clear and sharp. He expressed himself well and with confidence, and came through cross examination unscathed The importance of his evidence is that it accounts for and explains the deceased's presence on the wrong side of the road as being as a result of negligence on the part of the bus driver.

The bus driver who testified for the defendant gave evidence of a different version. He claims that he drove the bus along the road in question. He related that he had picked up a passenger at a bus stop some 70 or 80 metres from the Eyeington gate. After picking up the passenger he drove down an incline which leads from the top of the rise where the bus stop is, to the bridge across the stream which runs alongside Mr. Eyeington's property. According to the driver of the bus he did not cross the white line in the middle of the road and he did not attempt to cut the corner. He says he kept

consistently to his side of the road and it was only when he was on the bridge that he noticed the vehicle in which the deceased was driving approaching on the wrong side of the road at high speed.

He says he then attempted to take the bus off the road on the left hand side in order to avoid the accident. He actually brought the bus to a stop, so he says, at the point of the impact with its front wheel on the verge, but nothing which he could have done could have avoided the collision.

On the account given by Mr. Phakathi the plaintiff claims that the deceased was put in an impossible position as the bus was approaching her straddling the white line thus loaming as an

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obstacle on her correct side of the road. What she did in the heat of the moment may or may not have been a wise thing to do. It is argued that there is little that she could have done to avoid the collision.

If this version is correct, that she may have taken a wrong decision in the heat of the moment it is not to be held against her. Support for this to be found in the case of Ntsale and Others vs Mutual and Federal Insurance Company Ltd 1996(2) SA184.

The central question and the decisive issue in this case is whether or not the driver of the bus attempted to cut the curve on the road.

There is little to choose between Mr. Phakathi and Mr. Mncina who was the driver of the bus as far as the manner in which they gave their testimony. Mncina like Phakathi gave his evidence in an acceptable manner, and was not damaged in cross examination Their versions do of course contradict each other on what is the essential question in the case.

The probabilities however favour the plaintiffs version. I have come to this conclusion for a number of reasons.

In the first place as I have already indicated this particular road was not constructed for the use of modern vehicles travelling at high speed and especially for vehicles larger than the normal passenger car. In order to follow the curve of the road the driver of the bus would have had at that point to have travelled very slowly indeed. If he had been travelling at a speed which would have enabled him to keep to the curve of the road without cutting the corner he is unlikely to have had sufficient momentum to commence the climb which faced him immediately after the bridge. The driver of the vehicle made it clear that in order to commence a climb of this nature from a standstill he would have had to use first gear. Yet he was travelling at the time of the collision in the third of five gears. This in turn suggests that at the speed he was travelling he would have been inclined to cut the curve.

The dangers of the road are increased by many potholes caused by the erosion of the tarmac especially at the edges. There is in fact such a pothole on the lefthand side of the road as seen by the bus driver ( which I noted at the inspection in loco, and which is discernable in the photographs of the scene),where the bus driver would have had to travel had he been following the curve in the road. It seems that there must have been some temptation to move to the right to avoid this depression and to straighten the path to facilitate the ascent from the stream in the

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third gear. The natural consequence of this would be to stray over the middle white line .

It seems unlikely that the deceased would have travelled at so great a speed so as to require her to swing out against the curve and thus find herself on the wrong side of the road. For her to have

straightened her path she would have tended to keep to her left.

I find that the plaintiffs explanation of the accident, more especially the cutting of the curve, enjoys a balance of probabilities in its favour. There is no need for me to apportion blame and indeed a lot of the blame may have to lie with those responsible for the upkeep of the road and those who chose to conduct public transport with heavy vehicles on an inadequately .and inappropriately constructed and maintained road. The collision could well be ascribed to a substantial extent to the deceased's panic reaction. But in the final analysis the bus driver's cutting of the curve, created, or brought about the situation in which the accident took place.

Mr. Currie for the defendant has argued that should I find both drivers were negligent to some greater or lesser extent that as this was a dependent's claim and the Apportionment of Damages Act does not apply, that I should find that the deceased driver had the last opportunity of avoiding the accident. On that ground he contended the plaintiffs claim should fail.

While I accept that the last opportunity rule may be of application in the circumstances of a dependant's claim, in the present case there is no evidence to suggest that either party had the last opportunity. On the evidence both drivers approached each other in such a manner that a collision was likely if not inevitable. Once one accepts that the driver of the bus did in all probability stray to the incorrect side of the road, and in this way create such an emergency and an impossible dilemma for the deceased there is no basis to find that any last opportunity existed or if there was a last opportunity that it was that of the deceased and she failed to take it.

I rule accordingly that the driver of the bus was to some extent negligent and that his negligence was the cause of or contributed to the occurrence of the accident.

S.W. SAPIRE

ACTING CHIEF JUSTICE