IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No. 51/2019

HELD AT MBABANE
In the matter between:

SUKATI DUDU TAKHONA **Appellant**

and

MING-CHANG CHIU **Respondent**

Neutral Citation: *Sukati Dudu Takhona v. Ming-Chang Chiu* (51/2019) [2020] *SZSC 04* (07/04/2020)

Coram: **DR. B.J. ODOKI JA**
S.P. DLAMINI JA AND
M.J. DLAMINI JA

Heard: 19 MARCH 2020.

Delivered: 07 APRIL 2020.

SUMMARY: *Negligence – Traffic motor accident – Whether Appellant guilty of negligent driving – Whether Respondent was guilty of contributory negligence – Applicability of principle of ex turpi causa non oritur actio – Whether best evidence rule breached – Whether plea of guilty to a criminal charge can be relied on as proof of negligence in civil action – Whether quantum of damages proved – Decision by the Court a quo that Appellant was negligent and Respondent was not guilty of contributory negligence upheld – Principle of ex turpi causa non oritur actio abandoned – Respondent failed to prove damages of E74,018.50 but proved damages of E10.000 – Appeal partially successful – Respondent awarded E10.000 of suit with interest and costs.*

JUDGMENT

DR. B.J. ODOKI– JA

[1] This is an appeal against the decision of the High Court allowing the Respondent's claim in negligence and awarding him E74,018.50 in damages, with interest and costs.

THE BACKGROUND

[2] The brief facts of the case were that on or about 26th November 2016 at around 7:00 a.m. the Respondent's motor vehicle a Mercedes Benz registration No. NSD 448 AL, was involved in a motor vehicle accident at Mangozeni along

the Central Distributor Road in Manzini in the District of Manzini. The Respondent's motor vehicle was being driven by a certain Bebis Glicerio Sergis when it was bumped into by a motor vehicle, Toyota Noah, registration No. FSD 406 CM, driven by the Appellant's driver.

[3] At the time of the accident the Respondent's motor vehicle was driving towards Mavuso Trade Centre from Nazarene traffic lights. The Appellant was driving from Mthunyelelwa, Fairview joining the Central Distributor Road to the Mavuso Trade Centre. The Appellant failed to observe the stop sign mandating her to stop and give way to the Respondent.

[4] In his claim, the Respondent alleged that the Appellant was negligent in the one or more of the following respects:

(a) She failed to keep a proper look out;

(b) She failed to apply brakes timeously or at all, and

(c) She drove the motor vehicle on excessive speed and failed to abide by the rules of the road.

[5] The Respondent claimed damages amounting to E74,018.50 made up from the following invoices:

(a) E600.00 (six hundred Emalangeni) for towing service by Moses Motsa.

(b) E10.000 (ten thousand Emalangeni) from Ishmael Investments (Pty) Ltd.

(c) E63,418.50 (sixty three thousand four hundred and eighteen fifty cents) for exclusive repairs and spares fitted at Stucky Motors in Piet Retief in the Republic of South Africa.

[6] The Appellant denied bumping into the Respondent's motor vehicle or failing to observe a stop sign mandating her to stop. The Appellant claimed that the Respondent's motor vehicle hit her vehicle in the rear right side hence damaging her motor vehicle on the rear side yet the Respondent's vehicle was damaged on the front.

[7] The Police Road Traffic Accident Report stated that the driver of motor vehicle FSD 406 CM drove negligently and knocked motor vehicle NSD 448 AL. The Report indicated that the driver of motor vehicle FSD 406 CM contributed much to the occurrence of the accident in that she drove without due care and attention, she failed to give way to a motor vehicle on the right of way, and she failed to avoid an accident which a reasonable driver would have avoided.

[8] The Appellant was issued with a summons to appear before the Manzini Magistrate Court on 12 December 2016 where she was convicted on her own plea of guilty and sentenced to a four months imprisonment or E500.00 fine.

[9] The Court *a quo* found that the Plaintiff/Respondent had proved his claim that the Defendant/Appellant was guilty of negligence. The Court also came to the conclusion that the Plaintiff/Respondent had proved his claim of E74,018.50 as damages with interest of 9% per annum and costs of the suit, and awarded the same to him.

THE GROUNDS OF APPEAL

[10] The Appellant has now appealed to this Court on the following grounds of appeal:

1. The Court *a quo* erred in law in failing to dismiss the Plaintiff's action based on *ex turpi causa non oritur actio* legal principle, notwithstanding the admission by the Plaintiff and the admission of the driver of the Plaintiff's motor vehicle that the Plaintiff knowingly authorised an unqualified and unlicensed driver in terms of the Road Traffic Act 2007 to drive his motor vehicle.

2. The Court *a quo* erred in law and in fact in holding that the Appellant was negligent when in fact the Appellant entered the intersection after having obeyed and having had due regard to all the necessary traffic rules applicable to entering an intersection.

3. The Court *a quo* erred procedurally in law in holding that the Plaintiff proved the damages allegedly suffered when in fact the Plaintiff failed to adduce all the necessary evidence to prove the damages including

failure to adduce pictures of the damages allegedly suffered, and the mechanics who allegedly repaired the vehicle.

4. The Court *a quo* erred in law by not applying the best evidence rule by relying on hearsay evidence in respect of proof of the quantum of damages.

5. The Court *a quo* erred in law by not applying the best evidence rule and holding that the Appellant failed to cross three lanes notwithstanding that no accident sketch plan was produced to establish the point of impact.

6. The Court *a quo* erred in fact and in law by holding that because the Appellant pleaded guilty to the charge of negligent driving in criminal proceedings relating to the accident, such a plea is conclusive evidence of the Appellant's negligence in a civil suit for damages.

THE ARGUMENTS OF THE PARTIES

[11] At the hearing of the appeal learned Counsel for the Appellant abandoned the first ground of appeal dealing with the principle of *ex turpi causa non oritur actio* as he had indicated in the Court *a quo* that he was satisfied with the driving competence of the Respondent's driver.

[12] On the second ground of appeal Counsel for the Appellant submitted that the Respondent failed to prove that the Appellant's driver was negligent. It was the contention of the Counsel for the Appellant that the Respondent failed to

prove that the former's driver failed to keep proper look out and that the accident was reasonably foreseeable. Counsel also argued that the Respondent ought to have produced a sketch plan of the accident to show how the accident occurred and the damage caused. Counsel further pointed out that there was no inspection in *loco* done, nor any pictures of the vehicles taken or produced.

[13] With regard to grounds three, four and five relating to proof of quantum of damages, the Appellant submitted that the Court *a quo* erred in relying on hearsay evidence instead of applying the best evidence rule by calling the mechanics who repaired the vehicle. It was his contention that special damages must not only be specifically pleaded, but must also be strictly proved.

[14] Counsel submitted further that an adverse inference should be drawn against the respondent for failing to call the witnesses who were available to testify on the veracity of the quotation or invoices. Counsel relied on the case of **Elgin Fireclays Ltd v Webb 1947 (4) 744 AD.**

[15] With regard to the additional repairs done in South Africa, Counsel argued that they were done six months after the accident when the motor vehicle was in a working and running condition, and therefore there was no correlation between the accident and the damages claimed for the repairs.

[16] On ground six, learned Counsel for the Appellant submitted that in civil proceedings evidence of a party who has previously been convicted of an offence arising out of the same facts is not admissible in civil proceedings. Counsel relied on the case of **Hollington v. F. Hewthorn & Co [1943] KB 587**. It was Counsel's contention that the Court *a quo* erred in holding that the Appellant was negligent simply because she pleaded guilty in criminal proceedings relating to the accident.

[17] On the other hand Counsel for the Respondent submitted that the Respondent's case was simply that the Appellant drove negligently when she joined the Central Distributor Road from the adjoining road. It was Counsel's contention that the evidence showed that there was a compulsory sign stop which the Appellant failed to adequately observe before joining the Central Distributor Road. Learned Counsel supported the finding of the Court *a quo* that the evidence demonstrated that the appellant took a risk which was poorly informed when she joined the Central Distributor Road and she was therefore negligent and sole cause of the accident. Counsel pointed that the Appellant produced three witnesses to prove his case.

[18] On the issue of failure to prove the quantum of damages, Counsel for the Respondent submitted that failure to call the mechanics who effected the repairs and failure to produce pictures of the damage was not enough to establish that there was failure to prove the damages sustained. It was Counsel's argument that the respondent had satisfied the standard of proof required in the present case because it established a reasonable degree of

probability as enunciated in the case of **Miller V Minister of Pensions [1947] 2 A11 E.R. 372.**

[19] Counsel submitted that the evidence presented consisted of the original copies of invoices and receipts of payments made to the towing company, the panel beating company and the mechanical repairs company. It was his contention that the evidence was not challenged in any material respect.

[20] The Respondent submitted that a plea of guilty amounts to unequivocal admission of the charge but is different from a finding of guilt by a Criminal Court after a trial. It was the respondent's contention that a plea of guilty in a criminal trial can be relied upon as an admission by the accused person.

[21] Lastly, the Respondent submitted that the Appellant did not plead contributory negligence, nor was there any evidence to support it.

THE ISSUES

[22] In view of the aforegoing, this appeal raises two issues namely:

(a) Whether Plaintiff/Respondent succeeded in establishing that the Appellant/Defendant drove her vehicle in negligent manner resulting in the collision between the motor vehicles.

(b) Whether Plaintiff/Respondent succeeded to establish that as a result of the collision he suffered damages in the sum of E74,018.50 (seventy four thousand and eighteen Emalangeni fifty cents) as a result of the damage to his motor vehicle.

NEGLIGENCE

[23] While there was no sketch plan presented at the hearing nor was an inspection in *loco* done, there is sufficient evidence that the collision was as a result of the Appellant/Defendant's negligently driving her motor vehicle. The Investigating Officer had this to say regarding the collision:

> ***"While interviewing both drivers they both showed us the point of impact where the motor vehicles collided. It was on the passing lane which is the fast lane. On our investigation we found that the driver of the Toyota Noah failed to drive with due care and attention, we also found that she failed to take proper lookout before joining the road. She failed to avoid an accident which a reasonable driver could have avoided. We then charged the driver of the Toyota Noah with contravention of Section 8 of the Road Traffic Act number 6/2007 which is negligent driving. She was served with Summons and she appeared on the 12th of December 2016 in the Manzini Magistrate Court where she was found guilty and sentenced to a fine of E500.00 or four months imprisonment. That is all."***

[24] The Appellant/Defendant explained the collision in her evidence, as follows:

> ***"I recall that on that date I was driving to Nazarene Hospital because I am diabetic I was just going to check my sugar. I arrived at the main road, the Central Distributor Road and the road that goes to Central or Nazarene or Leites. There is a stop sign for drivers that are going to Leites or Nazarene and there is a yield sign that goes to the central road. When I was at the stop sign I noticed that there was a kombi to turn to the left and when it indicated it was before the speed hump and there was a Quantum and the Mercedes and they were before the speed hump. Seeing that they were before the speed hump I drove in the road because in my mind I thought they were slowing down on the speed hump so I could enter the Leites road going to Nazarene. When I entered the road and just when I finished crossing I heard a loud bang on the motor vehicle at the back and I got a shock as to what is happening and suddenly because I am a diabetic I think that shock was too much on me after the impact on the car then I just lost it.***
>
> ***When I woke up I was at Nazarene Hospital and around me were my daughter and my cousin. I asked them what happened and they told me I had an accident. My cousin told me that she was in the Quantum that was on the road going to central adjacent to the Mercedes. She saw the accident and she noticed that it was my car. She asked the driver to drop her off then she came immediately to the car and she called the ambulance. She is the one that called the ambulance. According to them the ambulance came before the Police came and it took me to hospital. While I was in the hospital they had assessed***

me and I think they were stabilizing my sugar I came to my senses. The doctor told me that the sugar level was too high and I would remain in hospital for a few hours."

[25] The grounds of appeal challenging the findings of the High Court that Appellant/Defendant drove her motor vehicle in a negligent manner and as a result caused the collision are without merit and stand to be dismissed. Furthermore, while Appellant sought to deny her negligence and impute negligence on the part of the Plaintiff/Respondent, no negligence or contributory negligence was established against the latter. In the circumstances, the findings of the High Court that Appellant/Defendant drove her motor vehicle in a negligent manner and as a result caused the collision were justified, and this Court sees no reason to interfere with them.

DAMAGES SUFFERED BY PLAINTIFF/RESPONDENT

[26] The Appellant/Defendant offered E10,000.00 (ten thousand Emalangeni) as compensation for the damage of Plaintiff/Respondent's vehicle. The latter did not reject the offer but said he needed to have a quotation done first. However, there is no evidence that Plaintiff/Respondent ever reverted to the Appellant/Defendant thereafter.

[27] Subsequently, the motor vehicle was attended to and fixed as per the following breakdowns according to Plaintiff/Defendant:

(a) Moses Motsa towing services = E600

(b) Ishmael Investments (Pty)Ltd = E10 000

(c) Stucky Motors Piet Retief = E63 418.50

[28] It appears that the towing expenses by Moses Motsa Towing Services and the costs for the external repairs for Ishmael Investments (Pty) Ltd totalling to E10.600 were not challenged by Appellant/Defendant.

[29] The costs for the internal repairs by Stucky Motors are contested by Appellant/Respondent. Regarding these repairs in the Court *a quo*, M. Dlamini J. at least on two separate occasions indicated that oral evidence would have to be led to prove the claim. However, this was ultimately never done and no satisfactory reason was given for the failure to do so. Therefore, the claim based on the repairs done by Stucky Motors was not proved before the High Court and must fail.

[30] Notwithstanding the finding of this Court that the claim by Stucky Motors was not proved before the High Court, it is still open to Plaintiff/Respondent to pursue this claim if there is a legally open avenue open for him to do so.

COURT ORDER

[31] In view of the aforegoing, the Court makes the following order:

1. That the appeal partially succeeds.

2. That the order of the High Court is set aside and replaced with the following order,

   "28.1 Plaintiff's cause of action partially succeeds;

   28.2 Defendant is ordered to pay the Plaintiff the following sums;

   2.1 E10.600;

   2.2 Interest therefore at the: rate at 9% at tempore morae and

   2.3 Costs of suit."

3. Appellant/Defendant is awarded costs of the appeal.

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

M.J. DLAMINI

JUSTICE OF APPEAL

For the Appellant: MR. M. TENGBEH

For the Respondent: MR. TSAMBOKHULU