



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal Case No. 68/20

HELD IN MBABANE

In the matter between:

RICHARD PHAHLANE DLAMINI

Appellant

And

PATRICK NHLANHLA MASEKO

Respondent

Neutral citation: *Richard Phahlane Dlamini and Patrick Nhlanhla Maseko*
(68/20) [SZSC] 17 [2021] (9th August, 2021)

Coram: M.J. DLAMINI JA
R.J. CLOETE JA
S.B. MAPHALALA JA

Heard: 2nd June, 2021

Delivered: 9th August, 2021

Summary: *Civil law - Appeal - In action for damages arising from a collusion between Respondent 's motor vehicle and Appellant ox - Appellant raised a defence that Respondent was reckless and was therefore negligent- Court a quo ruled in favour of Respondent - On appeal the Supreme Court rules that this is a classical example of contributory negligence where each party contributed to damage - Therefore the appeal is dismissed - Each party to pay his own costs.*

JUDGMENT

S.B. MAPHALALA JA

[1] Serving before this Court is an appeal by the Appellant against the judgment delivered by the Learned Judge M. Fakudze in the High Court on the 29 September, 2020. In the said judgment the Learned Judge of the High Court made the following orders:

- a. **The Plaintiff is entitled to payment of the sum of E84,849.99 less E4000.00 that was paid by the Plaintiff;**

- b. Payment of interest at the rate of 9% at *tempore morae* from the 11th April, 2013 to date of final payment; and
- c. Costs of suit at an ordinary scale.

[2] The Respondent (the present Appellant) being aggrieved with the above orders filed and Appeal before this Court on 4 (four) grounds of appeal to the following:

1. The court *a quo* erred in fact and in law holding that the Appellant was liable to the Respondent in sum of E84 849.99 less E4000,00 that was paid by the Plaintiff (Appellant herein) when a defence of negligence and reckless driving was put against the Respondent.
2. The court *a quo* erred in fact and in law observing and concluding that the road was curvy where the accident occurred when no sketch plan of the accident scene was presented to court and no inspection in loco was conducted.

3. **The court *a quo* erred in law and in fact in strictly finding for the Respondent on the basis of section 77(1) of the Road Traffic Act, 2007 in isolation from section 77(3) of the Act and when Respondent failed to observe and abide by section 58(1) of the Road Traffic Act, 2007.**

4. **The court *a quo* erred in fact in law concluding that Respondent was exercising caution by swerving to the right lane avoiding a herd of cattle that had just finished crossing the road on the left, when such conclusion is not supported by evidence.**

THE BACKGROUND

[3] The cause of action between the parties is found at paragraph 4, 5 and 6 of the Particulars of Claim by the Respondent (who was Plaintiff in the court *a quo*) to be that on or about the 11th April, 2013 and at or near Ntabamhloshane area along MR 8 public road in the Manzini District, a motor vehicle registered RSD 579 AH and driven by the Plaintiff knocked down to death an ox belonging to the Defendant (the present Appellant). The collision of Plaintiff's motor vehicle with the ox belonging to the

Defendant caused extensive

damage to the Plaintiffs motor vehicle. That the said accident was caused exclusively by the negligence of the Defendant who was negligent in one or more respects mentioned in paragraphs 5.2 to 5.7 of the Particulars of Claim.

[4] The Defendant filed a Plea to the Plaintiff's Particulars of Claim raising a Special Plea and on the merits thereof and stated at paragraph 3 the following:

3.1 **It is denied in particular that the accident was caused exclusively by the negligence of the Defendant.**

3.2 **The Defendant avers that in as much as his ox had strayed, it did not cause the accident with Plaintiff's motor vehicle but it is Plaintiff who drove recklessly and negligent in the circumstances in that:**

3.2.1 **He (Plaintiff) found cattle on the road which were unattended at night and took wrong/ unjust avoiding actions by swerving the car to the opposite lane to hit the Defendant's ox.**

3.2.2 He failed to apply brakes timeously and avoid the accident, as another reasonable driver could have done and prevented the accident.

3.2.3 He was speeding (driving above the permitted 60km/hour in that road) and failed to maintain his lane (road side) and hit the Defendant's ox on the opposite lane.

THE SUMMARY OF THE FACTS

[5] The trial commenced before **Fakudze J** on the 31 October 2019, in the High Court where the Plaintiff (who is the Respondent in the present case, called three witnesses to prove his case. PW1 being the Respondent in the present case on appeal who testified before that court that he was driving at a speed between 60 km to 70 km.

[6] PW1 testified in the court *a quo* that his motor vehicle's lighting system was on the bright mode and lit-up a distance of 100 metres but he could not see a beast on the opposite lane when he was able to see cattle that were on other side of the road on the left. He testified that the ox was black whereas PW2 testified that it was brindle and white.

[7] PW1 testified further that having seen the cattle outside the road on the left he changed lanes to the opposite lane and bumped into the ox where as PW2 told the court that PW1 hit the ox on the centre lane as the point of impact identified located by men (police at place of accident), however, PW1 never submitted for such in his evidence.

[8] PW2, Sergeant Sibandze, the police officer who attended the scene, testified that he drew a sketch plan of the accident but failed to tender the said plan such as part of his evidence. Further PW2 failed to produce and tender the glass debris allegedly proving the said point of impact on the centre line of the road.

[9] PW1 called another witness Lucky Enock Maseko, the motor vehicle examiner.

[10] The Defendant who is the Appellant in the present case was the only witness who gave evidence in his defence. He testified under oath that on the 11th April, 2013 he was going home to Manzini, and at Ntabamhloshane a cow had been hit by a motor vehicle. He stopped and observed what happened. The

motor vehicle was damaged on the right side. No one was injured. He then left. On the following day a Police Officer came to this homestead and told him that a cow had been hit by the motor vehicle. He went to the spot and found that the cow belonged to him. That it had been lost. The police told him that he must talk to the owner of the motor vehicle. He met the Respondent who required a sum of E4000.00. He testified that he gave him the amount.

THE SUBMISSIONS

[11) Counsel for the parties appeared before this court on the 2nd June 2021 advancing their arguments in this appeal. At the commencement of those arguments both parties had filed Applications for condonation in terms of the Rules of Court. This Court after hearing arguments of the Appellant Counsel for the late filing of the Bundle of Authorities this Court found that he had satisfied all the requirements for such an applications for condonation. However, in respect of the Respondent the Court found Respondent Counsel has not satisfied such requirements and the Court forthwith dismissed Respondent's Application. However in the interests of justice the Court allowed Counsel for the Respondent to advance arguments on the papers filed on behalf of the Respondent.

(i) **Appellant's arguments**

[12] On the first ground of appeal it is contended for the Appellant that the court *a quo's* finding that the Applicant is liable to pay the Respondent the sum of E84,849.00 in respect of damages arising from the collision between the Respondent's motor vehicle and the Appellant's ox (cow) is a misdirection of law and not supported by the evidence.

[13] The Appellant contends that the Plaintiff (Respondent herein) pleaded that the collision of his motor vehicle with the Defendant's ox was caused exclusively by Defendant's negligence in one or more of the following respects:

- i. **At all material times the Defendant was the owner of the ox that was knocked down by the Plaintiff's motor vehicle and identified by ear tag number 267-1213.**
11. **Defendant failed to lock up the ox and /or make sure that it was safely secured.**
- iii. **Defendant failed to restrain his ox from straying on to the public road.**

- iv. **Defendant permitted the ox to be in the vicinity of the public road unattended at night on the day in question.**

- v. **Defendant owed a duty to take reasonable precautionary measures to contain or restrain the ox from straying into the public road at night and as such negligent conduct provided the ox with the opportunity to stray into the public road and caused damage to the Plaintiffs motor vehicle.**

[14] On the above facts in paragraph [7] above the Appellant contends that it is the Respondent who was negligent and reckless in his driving and caused the accident on 11th April, 2013 in that he drove at a higher speed than the permitted 60km/hour on that part of MR 8 public road, he failed to keep a proper and reasonable lookout; he failed to reduce speed and apply brakes, he changed lanes for the wrong reasons when no cattle were on his lane of the road. Nowhere in his testimony does the Respondent say there was cattle on his lane (left lane of the road).

[15] Further submissions are canvassed by the Appellant's Counsel at paragraphs 2.3 and 2.4 of his Heads of Argument and I shall refer to various portions of the evidence as I proceed with my analysis later on.

[16] Counsel for the Appellant further advanced his arguments in respect of the subsequent grounds being ground 2, 3 and 4 of the ground, of appeal and I will referred to these arguments in my examination of each ground of appeal.

[17] Finally, in conclusion Counsel for the Appellant contends that having regard to the above arguments the trial court misdirected itself thus erred in law and in fact in finding for the Respondent who contravened the Road Traffic Act without justification.

(ii) **Respondent's arguments**

[18] The main argument canvassed by the Respondent is that the grounds upon which the Applicant seeks to have this court set aside the judgment of the court *a quo* have no merit and are simply a strategy to avoid liability and frustrate the Respondent in the process.

[19] It is contended for the Respondent that the Appellant seeks to make a case which was not raised in the court *a quo*. That it is trite law that a litigant must make a case in his maiden court proceedings. Counsel for the Respondent then proceeded to deal with each ground of appeal one after the other.

[20] On the first ground it is contended on behalf of the Respondent that the court *a quo* did not err in finding that the negligence is attributable to the Appellant, in that he allowed his ox to stray into the road. Further arguments are advanced in paragraphs 7.3 to 7.4 of paragraph 7 of the Heads of Arguments of the Respondents.

[21] The Respondent further dealt with the subsequent grounds of appeal in paragraphs 8 to 10 of the Heads of Argument. Respondent cited a number of decided cases in connection with the issue of the ox belonging to the Appellant (see **O'Callaghan NO vs Chaplin 1972** as at page 310 to the following legal principle:

"the owner of a domestic animal is guilty should the animal cause any damage without the owner being at fault".

13.2 The court *a quo* was correct in finding that the accident was as a result of the negligence of the Defendant by allowing his ox to stray on to the public road.

[25] Finally, the Respondent prays for the dismissal of the appeal with costs at attorney and client scale.

(i) First ground

[26] On the first ground it is contended for the Appellant that the court *a quo* erred in fact and in law in holding that the Appellant was liable in the sum of E84,849.99 less (E4000.00) that was paid by the Plaintiff (Appellant herein) when a defence of negligence and . reckless driving was put against the Respondent. In this aspect it is contended for the Respondent as follows:

7.1 The court *a quo* did not err in finding that the negligence is attributable to the Defendant, in that he allowed his ox to stray onto the road;

7.2 The Respondent refuted the Appellant's ground of justification that was negligent and drove recklessly;

7.3 It is common cause that the accident took place at night around 19:15 hrs, the Appellant failed to prove that the Respondent was negligent beyond the balance of probabilities; and

7.4 This ground of appeal stands to fail as there is no merit.

[27] The Appellant submitted that it was the Respondent who was negligent and reckless in driving and caused the accident on the 11 April, 2013 in that he drove at a higher speed than the permitted 60 km_per hour on that part of MR 8 public road, failed to keep a proper and reasonable lookout; failed to reduce speed and apply brakes; he changed lanes for the wrong reasons where no cattle were on his lane of the road. That nowhere in his testimony did the Respondent say there were cattle on his lane (the left lane on the road).

[28] In answer to this ground of appeal the Respondent has stated that the court *a quo* did not error in finding that the negligence is attributable to the Defendant, in that he allowed his ox to stray into the road. The Respondent has also canvassed a number of arguments stated in paragraph [13] of this

judgment.

THE ANALYSIS

[29] in my assessment of the evidence led in the court *a quo* it appear to me that both parties contributed to the negligence which occurred that day.

[30] The Respondent (Plaintiff *a quo*) testified that it was already dark at about 19:15pm in the month of April 2013 at Jubela area on the Manzini - Siphofaneni public road (MRS) when accident happened. Respondent says he saw cattle on the left side of the road. The cattle were not on the road, that is, the left lane, where he was driving. On seeing the cattle respondent moved to the right lane, no doubt to ensure that he avoided any possibility of an accident involving the cattle on the left. As already mentioned, the time was between 19:00 and 19:30hrs. In the process, to ensure that he did not collide with any unnoticed animal on his lane respondent moved to the right lane, thereby collided with the black ox that must have been slowly following the cattle on the left. The Appellant says that the ox was his animal that had gone missing and he had been looking for it when the accident happened.

[31] Incidentally, and rather curiously, Appellant happened to drive-by soon after the accident while the ox was still at the scene of the accident, but somehow

Appellant did not realize the ox involved in the accident was his (lost) ox, even though he stopped at the scene. The scene of the accident is said to have been about 18km away from the home of the Appellant.

[32) On the evidence as shown above, both parties appear to have been negligent.

The Appellant, by allowing his animal to stray on the road resulting in the collision; and Respondent by not ensuring that his swerve to the right did not result in the accident. It is clear on the evidence that the Respondent miscalculated his move; his swerve to the right, proactive as it might have been, was not entirely justified as there was no animal actually on his lane. The Act prohibits vehicles to drive on the right lane in a public road. At the same time the Act prohibits animal owners to allow their animals to stray on a public road. The instances stated in section 58 (1) of the Act which permit a person to encroach on the right lane do not arise in this case. Further, the Respondent was not overtaking another vehicle or visible object on the left lane. Section 77, on the other hand, deals with animals on the road. The section prohibits a person leaving or permitting an animal to be or to stray on a public road, in which event, if an accident is caused hereby, the owner of the animal is normally liable for the accident caused regardless of negligence. If the animal had been on the left lane at the time of the accident, the

Appellant

would have been entirely responsible for the accident. As it happened, the Respondent cannot escape partial liability on account that the ox had strayed. To do that would allow many an animal owner to allow their animals to 'stray' and pose hazard on the highways. That the ox strayed and had been at large for some time cannot be a defence for obvious reasons. Many a negligent animal owner would so plead were such a defence viable/ permissible. The animal was not supposed to be on the public road just as the vehicle was not supposed to swerve to the right in the manner and circumstance described. In the result, both parties were negligent. To what extent each party was negligent or contributed to the accident, that was for the trial court to determine.

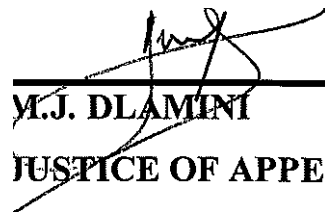
[33] It would appear to me that the present case is a classical example of contributory negligence where the Learned Authors **Cooper and Bamford** in their textbook **South African Motor Law (1965)** at page 257 state that at common law, if damage is caused through the negligence of both parties, neither can recover from the other (see **McKerron, The Law of Delict (5th ed.)** at page 58 thereof.

[34) In the result, for the afore-going reasons the appeal is dismissed and each party to pay its own costs.




S.B. MAPHALALA
JUSTICE OF APPEAL

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

I agree



L.J. CLOETE
JUSTICE OF APPEAL

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