IN THE HIGH COURT OF SWAZILAND

CIV. CASE 730/85

In the matter of :

ANDREO NEOFITOU Plaintiff

and

SWAZILAND ROYAL INSURANCE

CORPORATION Defendant

CORAM: HANNAH, C.J.

FOR THE PLAINTIFF: MR. DUNSEITH

FOR THE DEFENDANT: MR. CURRIE

JUDGMENT

(Deliwerd 30/6/86)

Hannah, C.J.

The plaintiff claims damages for personal injuries allen allegedly sustained as a result of a collision between a Toyota HighAce combi driven by himself and a bus which at the material time was insured by the defendant pursuant to Section 8 of the Compulsory Motor Vehicle Insurance Order No. 47 of 1973.

The plaintiff gave his evidence in English, a language in which he is less than fluent, and at times it was difficult to follow his account of what occurred. However, as I understand him what he says happened on 22nd September 1983 was as follows. Between 7p.m. and 8p.m. he was driving his combi along the Mbabane to Oshoek road in the direction of Oshoek. Sitting next to him on the front passenger seat were as his common law wife and his two children.

It was dark and he was driving on headlights. At a point when he was driving downhill and the road ahead of him was straight he observed an approaching vehicle move to his side of the road. This vehicle had "big" lights and continued

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towards him on his side of the road. He flashed his lights but the driver of the other vehicle appeared to take no notice. To his left was a mountain and no room to pull off the road and as there were other vehicles approaching on their correct side of the road there was no opportunity to pull over to his right. He decreased his speed and when the other vehicle was almost upon him, the other approaching vehicles having then passed, he swerved to his right but the nearside of the combi caught the other vehicle. Although the plaintiff was able to keep the combi upright on the road he was thrown about in the cab and as a result suffered certain injuries.

On alighting from the combi the plaintiff was able to ascertain that the vehicle with which he had collided was a large bus. By that time it too was stationary. He spoke to the driver who then ran off but he returned after the police had arrived at the scene. A certain amount of evidence was devoted to the bus driver's behaviour after the accident but I do not find it of any assistance in determining this case.

The plaintiff's wife gave a similar account of the accident. The only difference in her evidence of any real

significance is that it is her recollection that the bus was parked completely on the road after the accident. The Plaintiff said he did not notice its position.

Another witness called by the plaintiff was Jabulane Khumalo. He was cross-examined as to his connection with the Plaintiff and I am satisfied that he can be regarded as an independent witness. His evidence, however, does not take: matters much further. He was waiting in a bus shelter for a bus to take him in the same direction which the plaintiff
was travelling. He said that he saw the bus approaching

from his left on its wrong side of the road and the combi coming from his right. He said he saw the lights on the combi being flashed and its speed being reduced and when the combi reached the bus it swerved to its right. He then heard the sound of a collision. Instead of going to investigate he ran off fearful that there might be dead bodies.

There is a distinct possibility that parts of Khumalo's evidence may be hased on reconstruction rather than actual observation. At one point in cross-examination he said that he had not noticed the vehicles before hearing the sound of the collision. Later he reverted to the account he had i given in his evidence-in-chief. Also, while initially rejecting the suggestion that the bus was stationary at the time of collision he later conceded that he could not really say whether the bus was moving or not.

Police Constable Simelane attended the scene of the accident and his evidence is important in one particular respect. He said that upon arrival at the scene he found the bus parked on its wrong side of the road pointing towards Mbabane with its left nearside wheels on the edge of the tarred surface and its offside wheels off the road on the verge. Although neither bus nor combi was impeding the flow of the traffic the bus was, the constable said, too close to the road and it became necessary for a brother officer to direct the traffic. After an unfortunate incident in which this other police officer was knocked down by a passing motorist it was decided to move the bus toa safer point further up the road. One consequence of all this was that no sketch plan was drawn-.

One other witness called by the plaintiff was the person who repaired his vehicle. He was called to testify to a conversation which he allegedly had with the proprietor of the

bus during which, it is alleged, an admission of liability was made. Mr. Currie for the defendant objected to this evidence on the grounds that it was hearsay and, as such, not admissible against the defendant. Mr. Dunseith for the plaintiff, submitted that an admission made by the owner of an insured vehicle is admissible against the insurer as he has an identity of interest. Neither attorney was able to refer me to any authority on the matter and it was agreed that the evidence should be received de hene esse and a ruling given later. This I now do.

In fact a minimal amount of research reveals that the question of the admissibility of an extra-judicial admission made by the driver of a car insured in terms of the South African equivalent of the Compulsory Motor Vehicle Insurance Order No.47 of 1973 was definitively dealt with by the Appellant Division of the Supreme Court of South Africa in Union and South-West Africa Insurance co. Ltd. v Quutanci. N.O. 1977(4) SA 410. I see no reason why such an admission made by the owner of an insured vehicle should not be governed by the same principles. In that case it was held that, in general, such an admission is not admissible against the registered insurer on the ground of privity or identity of interest or obligation. In the absence of some other ground of admissibility, such as the admission forming part of the res gestae or having been authorised by pre-appointment or reference or by subsequent adoption, the admission is not receivable in evidence at all. Such grounds do not exist in the case of the evidence upon which it is sought to rely in the present case and I therefore rule the evidence in question inadmissible.

Before coming to the account of the accident as given by the bus driver, Sipho Sitolo, it is useful to set out the results of an inspection in loco held during the trial. Approaching the point of the accident from Mbabane a driver is first confronted with a left hand bend. Having passed through this bend the driver will then see the road ahead descending fairly gently to a slight right hand bend and then continue downwards. During hours of daylight the view of the road surface beyond this latter bend is soon obscurred but because of the gradient the driver is still able to See traffic ascending the road beyond the bend. At night he would, of course, see only headlights.

The tarred surface of the road is only side enough to permit two vehicles to pass one another but as the driver approaches the slight right hand bend and the point of the accident some one hundred metres or so further on there is a gravel strip bordering the tarmac on the left side. Some twenty metres or so before the point of the accident this strip widens sufficiently to allow buses to pull in at a bus shelter and the strip then narrows again to a width of three to four paces at the actual point where the accident occurred. At this point the ground beyond the gravel strip falls away and it is unlikely that a driver, particularly at night, would drive close to that edge. On the opposite side of the road there is no space for a vehicle travelling from Oshoek towards Mbabane to pull off the road though sufficient space is available some one hundred metres further up the road. The view of a person sitting in the bus shelter towards Mbabane is severely restricted though such a person would have a good view of the accident spot.

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The bus driver said that he was driving from Oahoek to Mbabane and wanted to collect some keys from a house situated not far off the road on his right side near the point of the accident. As he approached this house he therefore drove across the road from left to right and pulled onto the verge on the opposite side where he stopped and hooted. He agreed that in September 1983 the verge was covered in grass and not bare gravel as it is today. As he crossed the road and indeed even up to the point when he pulled onto the opposite verge the road ahead of him was, he said, clear. However, he had not been stationary for long when the plaintiff's vehicle collided with the nearside of the bus's front bumper. In cross-examination he said that he heard the collision immediately after looking towards the house.

The bus driver disclaimed any responsibility for the accident saying that at the time of the collision his bus was completely off the tarred surface of the road. The only explanation advanced by him for the collision between the two vehicles was that the plaintiff appeared somewhat drunk. This allegation was not pleaded nor was it put to the plaintiff and it received no other support in the evidence adduced. I reject it. On the bus driver's account the plaintiff must have have driven his vehicle off the tarmac surface in order to collide with the parked bus.

There are three different accounts of the position of the bus after the accident. The plaintiff's wife describes it as being wholly on the tarred surface, the bus driver puts it entirely off the tarred surface and he police constable describes it as having its nearside wheels on the edge of the tarmac. The plaintiff says he did not notice its position and Khumalo was silent on the matter.

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I do not accept the bus driver's evidence that his vehicle was completely off the road. Firstly, he did not seem sure of its position himself indicating that it was off the tarred surface by at least a foot during the inspection and indicating about three centimetres when in the witness box. Secondly, I think it unlikely that he would have drawn the bus near to the edge of the verge furthest from the road as he would have had to do to get it completely off the road particularly having regard to the fact that the ground then falls away. Thirdly, the fact that the police found it necessary to control passing traffic indicates that they considered it to be hazard which it would not have been had it been completely off the road. Fourthly, had it been completely off the road when the collision occurred, as the bus driver contends it was, it seems to me unlikely that the accident would have occurred at all. Lastly, I prefer the evidence of the police constable to that of the bus driver.

I also prefer the evidence of the police officer to that given by the plaintiff's wife. He is an independent witness and although there is some margin for error having regard to the passage of time I do not consider the margin so great as to permit a description of the bus only having its nearside wheels on the tarred surface if in fact it had all its wheels on the road.

The plaintiff and his wife say that the bus was still in motion when the collision occurred while the bus driver says it was stationary. Khumalo appeared to be uncertain on this point though it seems that he has some kind of impression or recollection that it was still moving. So far as the plaintiff and his wife are concerned it is not really a matter of

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credibility because they could have had the impression the bus was moving when in fact it was not. However, looking at the circumstances generally, it seems to me more likely than not that it was still moving when the collision took place. If at the time when the plaintiff's combi reached the bus it was stationary in the position described by the police constable, whose evidence I have accepted, I think it likely that the plaintiff's vehicle would have just squeezed by. It seems to me, therefore, more probable that at the time of the collision the bus had not yet completed its passage across the road.

In my judgment, dealing with the matter on a balance of probabilities, what happened was this. The bus driver was intent upon stopping outside the house I have referred to and as there was no room to pull off the road on the left he proceeded across, to the other side. Whether he saw the ... plaintiff's vehicle approaching I do not know. If he did he may have thought that he had time to reach the point by the bus shelter where the verge is at its widest before that vehicle would reach him. He was wrong. By the time the plaintiff's vehicle reached him the nearside of the bus was still substanially on the road and the collision occurred. The momentum of the bus after the collision carried it further onto the verge to the position observed by the police constable.

Had the bus driver been more observant or had he estimated his speed relative to that of the plaintiff's vehicle more accurately I daresay he would/have executed the dangerous manouvre of crossing the road in the face of an oncoming vehicle. However, I am satisfied that he did do so and to drive in such a manner was plainly negligent. Even if the

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inferences I have drawn from the evidence are wrong and at the time of the collision the bus was stationary with its nearside jutting onto the road, to place a large vehicle in that position with headlights blazing at oncoming traffic created a dangerous hazard.

The only other issue which has to be considered is whether the defendant has made out its plea that the plaintiff was guilty of contributory negligence. Contributory negligence is pleaded in very bald terms but as I understand the defendant's case it is that faced with the hazard ahead the plaintiff should either have brought his vehicle to a complete halt or should have tried to pull off the road to his left.

In Cooper v Armstrong 1939 © P D 140 at page 148 Van den Heever J. said:

"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 after-acquired knowledge; to hold that, had he but taken such and such a 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."

I find this passage of the greatest assistance., The plaintiff was confronted with a most unusual and startling sight. At a distance of about one hundred and fifty yards ahead of

him a vehicle with its headlights on pulled across to his side of the road. He could have had little means of most knowing the speed of this vehicle and no means of knowing the intention of the driver. He could not move to his right because of other traffic and initially the verge on his left was too narrow to enable him to move completely off the road. As the verge widened the vehicle ahead began to pull over onto it. The plaintiff must have been totally confused and bewildered. Another man might have realised that the vehicle ahead was about to stop and would himself have pulled up. Had the plaintiff done this we now know in the light of after-acquired knowledge that the accident would have been avoided. But I do not consider that the plaintiff should be held to blame for failing to choose this particular course of action. He chose to reduce his speed and attempted to avoid the oncoming vehicle when the opportunity to move to his right presented itself. XXX Unfortunately, he was unable to execute such a manouvre a until it was too late. I mention here that I am satisfied that he did slow down because had he struck the bus at any speed I think it highly likely that his vehicle would have gone off the road.

In my judgment the defendant has failed to make out its plea of contributory negligence and, accordingly, I find the defendant to be wholly liable for any injury the plaintiff may have suffered. The parties have agreed that the question of damages should be dealt with as a separate issue at a later hearing and I therefore adjourn this trial for assessment of damages. Notice of set down of the resumed hearing must be served on the defendant's attorney not later than 27th September 1986.

N.R. HANNAH

CHIEF JUSTICE