

THE HIGH COURT OF SWAZILAND

NOKUTHULA GUMEDE

Plaintiff

F. & R. PANEL BEATERS & SPRAY PAINTERS (PTY) LTD.

Defendant

Civ. Trial No. 2655/1995

Coram

SAPIRE, CJ

For Plaintiff

Mr. P.R. Dunseith

For Defendant

Mr. L. Khumalo

JUDGMENT

(17/11/99)

This is an action in which plaintiff claims damages arising out of a collision between a kombi owned by the plaintiff and a motor bus owned by the defendant. The vehicles at the time of the accident were being driven by individuals other than the owners but it has been agreed that the relationship of the drivers to the owners is that of master and servant or agent so as to make the respective owners responsible for the acts of the drivers. The collision took place on the 12th October, 1995 at about 1720 hours and the scene of the collision was the road leading from Fonteyn to Mbabane. The plaintiff has alleged that the collision was due to the negligence of

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Simon Dlamini who was the driver of the bus and particulars of the negligence are furnished. The plaintiff claims that the kombi was damaged beyond repair and accordingly has suffered damages in the sum of E30 500.00. The defendant has filed a plea denying negligence on the part of the driver of the bus and in turn a counter-claim is made. The amount of the counter-claim is E18 500.00 which is alleged to be the damage to the bus. The trial proceeded over a period of a number of days and was vigorously fought on both sides.

When the case was called it was agreed that only the question of liability should be decided and that the question of damages would stand down for determination. Later the figures for damages were agreed.

The court attended an inspection in loco and my notes on what transpired there is part of the record and has been settled by me with counsel for both sides in chambers. A number of photographs were produced and these are exhibits in the case and where necessary reference thereto will be made.

The driver of plaintiff's vehicle attested to plaintiff's case. He described how at the time and place concerned he was driving towards Mbabane but with the intention of entering a private property on the left-hand side of the main road. In order to do this he had to execute a left turn and take the vehicle over the pavement and then through the gate into the private property. He says that prior to executing the left-hand turn he indicated his intention to do so. In order to execute the left turn through the break in the kerbing opposite the gate he took the vehicle to the right in order to give himself a more convenient angle by which to enter.

He says that whilst he was in the course of executing the lefthand turn, the bus, owned by the defendant, and driven by a driver employed by the defendant, came into collision with his vehicle from the rear and caused the damage in respect of which the claim is made.

This then was the plaintiff's account and this was the evidence led by the plaintiff. The driver of plaintiff's vehicle impressed me as a person who was in all honesty trying to recount what happened. The occurrence took place along time

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before the trial. His opportunity for observation especially in regard to the sections of the vehicles, which impacted on each other, was limited. The events related by him took place suddenly and unexpectedly. The observation of a witness in this situation is notoriously inaccurate. This must be said and borne in mind both in regard to plaintiff's witness and the defendant's witness. There is always the danger of the witnesses tending to reconstruct the events, imperfectly observed or remembered, in a manner which best accords with the minimum liability attributable to him.

It is common cause that the plaintiff's vehicle was struck in broad daylight by the defendant's vehicle, which was approaching from the rear. Prima facie in the absence of any explanation there would be responsibility for the accident on the driver of the following vehicle. See Motor Law Cooper Vol. 2 page 101 and cases there cited. There is no evidence on the plaintiff's version of there having been any sudden or unexpected movement. The plaintiff's witness says that he signaled his intention to turn left. The driver of the following vehicle observed this signal.

While the defendant maintains that at a stage, probably when the driver of the combi moved to the right to facilitate the sharp left hand turn the left hand tail flicker light which was the signal, stopped. The plaintiff's witness said that after the collision the flicker was still working. It is not necessary to determine which of these versions was correct. On both versions the driver of the kombi did in fact signal his intention to turn left, and the driver of defendant's vehicle observed this.

The evidence does not show or even suggested that the movement to right however great or however small it may have been in itself constituted an act of negligence. Nor can it be said that it was unnecessary or that it was unreasonable and dangerous for the plaintiff's driver to make such a manouvre. I find the plaintiff's witness to be credible and his account acceptable

He has been criticized, not unreasonably, in regard to his evidence that the defendant's vehicle initially came into collision with the rear of the combi causing it to slew to the left, and that there was a second impact on the left flank of the vehicle side. The plaintiff's driver maintained that certain marks on the bumper of the vehicle were consistent with this perception. In this he was probably inaccurate. I do not find

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however that his inaccuracy in this regard brands him as a lying witness. Firstly there is no reason why he should fabricate evidence of this nature which does not really advance the case of the plaintiff and I accept that what he says is an honest but inaccurate description of how the collision actually took place. On his evidence there is nothing which shows negligence on his part and the collision would have to be attributed to the failure of the defendant to avoid a collision having approached the vehicle from the rear with full sight of what was going on. In the light of this the defendant's version has to be examined.

The defendant's driver gave an account of what happened and to some extent this account accords with what was said by the plaintiff's driver. The kombi was seen to have been driven along the Fonteyn road towards Mbabane, which is a substantial decline at the scene of the accident. There is approximately 200 or more metres from the scene of the accident a turnoff where the roads divide, one road carrying on to one portion of Fonteyn while the main road turns and leads to another portion of Fonteyn.

The driver of the defendant's bus says that he in the bus was following the kombi and he noticed at one stage that the kombi was signaling and intended to turn left. At this point it is common cause when and at the point the signal was given the defendant's driver knew that there are properties on the left-hand side of the road. There are no gates or entrances on the right-hand side of the road. In fact there is no reason for anybody to execute a full right-hand turn at that point. What the driver says, is that he observed that this car was about to turn left, and he slowed down because he realised that he may have to stop to let the driver complete the execution of the left-hand turn before he could proceed. He says that he then noticed that the car moved to the right and at the same time the flicker stopped flickering. It is his evidence that the kombi in fact came to a halt more or less in line with the entrance to the gate but completely on the right hand side of the road. The impression I have was that the kombi was said by him to have come to a halt with its right-hand wheels on the extreme right hand side of the road. This does not accord with what the driver of the kombi said and I must accept that on

the broad picture the kombi did go to the right-hand side of the road but was still straddling the centre white line. The driver of the bus says that when this occurred he got the impression that the driver of the kombi had manouvred his vehicle in this way in order to give him, the driver of the bus, the

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opportunity of passing on the left-hand side. He also said that he was confused by this apparently contradictory behaviour. The contradiction lies in the indication of the left-hand turn whereas movement to the right is executed. In any event the driver of the bus decided this was now an opportune moment to pass the stationary vehicle standing in the middle of the road and he accordingly accelerate. Only as he drew level with the kombi did it again resume movement, continuing the left-hand turn as a result of which there was a collision?

The vehicles, it is common cause, ended up parallel to each other at that point. What is significant also is that the bus left a trail of rubber in a form of brake marks and skid marks on the road for a considerable distance. These marks were still observable from photographs, which were taken. Although it is not possible from the length and position of the marks on the road alone to calculate the speed at which the driver of the bus must have been travelling, it is quite clear that could not stop the vehicle at least within the length of the brake marks and the following skid marks. This in itself indicates negligence on the part of the driver of the defendant vehicle. The negligence consists of failing to keep an observation of the vehicle in front of him and so regulate his driving so as to be able to meet any dangerous situation which may have arisen after he was warned of the intention to turn left. It was an act of rashness to attempt to overtake on the left in those circumstances. The length of the marks on the road is not consistent with the defendant's version. He claimed that he slowed down and then accelerated when he thought that the vehicle, which he was following, had stopped on the right-hand side of the road in order to leave him a passage. It is difficult to understand why there was any need to accelerate. That was the very thing he shouldn't have done if as he says he was confused. What he should have done was that he should have approached the vehicle in front of him with caution and at a sufficiently low speed to be able to react immediately to any misconception, which he may have had. This he did not do and for some reason he claims to have accelerated to a speed of such a nature that he could not stop within the distance indicated by the marks on the road. The driver of the bus should at no time have driven his bus, which is not a vehicle capable of as easy management as a sedan, at such a speed. He should have regulated his driving, so as to be able to stop without leaving marks like this on the road. He should have been able to bring his vehicle to a safe stop at any time.

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The defendant's account also has this improbability. If one accepts what the defendant says and that the plaintiff driver acted in such a way so as to give the impression that he was affording the defendant's driver an opportunity of passing on the left, if he did that why would he, being aware of the defendant's vehicle approaching from the rear, he then having done that suddenly and without warning move to the left into the path of the oncoming vehicle. In order to explain this the defendant's driver and the conductor both spoke of the plaintiff turning left in order to somehow avoid an oncoming vehicle from the other direction. A curious thing is that the existence of this third vehicle and any part it might have played in the scene was never put to the plaintiff driver and only emerged at the late stage of the evidence. This was rightly criticized by the plaintiff's attorney as some fabrication in order to meet the case. The importance of this improbability must not be overstressed, but it is a pointer to the weakness of the defendant's case. This has to be explained and without an explanation the defendant's version is an unlikely or at least a less likely account, than that of the plaintiff.

The conductor of the bus supported the defendant driver in the evidence he gave to some extent certain extent. There are important differences in their evidence but again it is hardly to be expected that two witnesses would be able to give completely matching account of the same event, which took place in this terrifying moment in exactly the same detail. On the other hand one has to guard against the tendency of witnesses to support each other and to have considered or conferred with. Each other of certain aspects of the evidence to which they testify. But without having to make the credibility findings on broad picture of the accident as presented by the evidence I can find no negligence on the part of the plaintiff's driver. All the negligence, which caused the accident, I find to be that of the driver of the defendant vehicle. In view of this there is no apportionment to be made and the damages will

have to be calculated on the basis of 100% negligence on the part of the defendant's driver.

S W Sapire CJ