

THE HIGH COURT OF SWAZILAND

MAUREEN TSHABALALA

Plaintiff

And

GRINAKE L. T. A. EARTHWORKS (SWAZILAND)

Defendant

Civil Case No. 2005/2002

Coram S.B. MAPHALALA - J

For the Plaintiff MR. P. DUNSEITH

For the Defendant MR. H. CURRIE

JUDGMENT

(15/08/2003)

Introduction.

This matter relates to a collision which took place on the 22nd March 2001, at Sikhuleni area between the Plaintiffs bus and a truck belonging to the Defendant. The court is called upon to find out who was liable in the circumstances.

The parties.

The Plaintiff, is an adult Swazi married woman of Matsapha, duly assisted by her husband in so far as need be in these proceedings in his capacity as a publica metrix.

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The Defendant is Grinaker L. T. A. Earthworks (Swaziland), a company duly registered with limited liability according to the laws of Swaziland and having its principal place of business at Hluti area, district, Swaziland.

The causa

The plaintiff alleges in her Particulars of Claim that on or about the 22nd March 2001, and at Sikhuleni area, Plaintiff's bus a MAN (1995 model) white and blue in colour bearing registration SD 801 VM was involved in a road traffic accident, whereby it slipped and overturned.

The accident aforesaid was caused solely by the negligence of the Defendants employees, whose full and further particulars are to the Plaintiff unknown, who were at all material times acting during the course and scope of their employment by the Defendant, more particularly in that:

- 5.1. They obstructed the road without giving reasonable warning to road users;
- 5.2. They engaged in road works without giving reasonable warning to road users;
- 5.3. They applied water to the road surface rendering such surface slippery, without giving reasonable

warning to road users;

5.4. The driver of the Defendant's diesel truck moved onto its wrong side of the road without prior warning, and obstructed the Plaintiff's vehicle as it was about to overtake;

5.5. They caused the accident when by the exercise of reasonable care it could have been avoided.

The Plaintiff alleges that at the time of the accident aforesaid, the bus was making an average income of E1, 000-00 (one thousand emalangeni) per day and the bus was cut of business from the 22nd March 2001, until the 25th October 2001.

As a result of the accident the Plaintiff suffered damages in the sum of E244, 000-00 for which she holds the Defendant vicariously liable. Notwithstanding due demand having been made, the Defendant refused and or fails to pay to the Plaintiff the said sum of E244, 000-00. The Plaintiff sues for the said amount with interest at the rate of 9% per annum and costs of suit.

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The defence.

The Defendant in its plea to the Plaintiff's amended Particulars of Claim denies that the accident was caused solely by the negligence of the Defendant's employees in any of the said respects as alleged by the Plaintiff or at all. The Defendant denies that the road was obstructed without giving reasonable warning to road users and states that adequate warning signs were erected, clearly visible to road users indicating that the road construction was taking place.

The Defendant admits that it applied water to the road surface of the deviation road but states that this was done on a regular basis to prevent dust so that visibility would not be adversely affected for road users and to keep the road surface firm. Such watering on a regular basis was well known to the driver of the Plaintiff's bus and that the said driver had been warned on previous occasions not to travel at an excessive speed on the said deviation. The Defendant further denies that the surface of the said deviation was rendered abnormally slippery for road users driving with due care and attention, and at a reasonable speed having regard to the deviation in question. The Defendant further alleges that the driver of Plaintiff's motor vehicle should not have attempted to overtake the Defendant's diesel truck.

Alternatively, the Defendant contends that if found that there was negligence on the part of its employees, and that as such negligence was a cause of the accident in question, the Defendant pleads that the said Joe Ginindza, acting in the course and scope of his employment as aforesaid, was also negligent so that the provisions of the Apportionment of Damages Act would apply.

The said Joe Ginindza was negligent in one or more of the following respects:

17.1. He travelled at a speed which in the circumstances excessive;

17.2. He failed to pay attention to the damp state of the road at the relevant time;

17.3. He failed to heed the condition of the said road at the relevant time well knowing that it had been watered to harden it and to settle the dust on it;

17.4. He failed to keep proper control over his vehicle in negotiating the said road;

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17.5. He attempted to overtake Defendant's diesel truck when he knew, or should have known, that it was unsafe to do so having regard to the width and condition of the deviation, and

17.6. He failed to avoid the accident when by the exercise of due care he could and should have done so".

Finally, the Defendant denies that the Plaintiff had suffered damages in the said sum of E244, 000-00 or in any sum whatsoever and further denies that the Defendant is vicariously liable, or liable on any basis whatsoever, for the payment of any sum of damages to the Plaintiff.

The evidence led for and against the action.

When the matter commenced Mr. Dunseith informed the court that the parties have agreed that the matter will proceed to prove liability and the question of the quantum of damages was left in abeyance.

The first witness called for the Plaintiff was 1570 Sergeant Ndlangamandla who was the head of the Traffic Section at Lavumisa Police Station at the relevant time. On the 22nd March 2001, he received a report of an accident which had occurred at an area called Esikhuleni. He proceeded to the scene of the accident. The officer described what he observed at the scene in great detail. The offshoot of his evidence is that when he got to the scene of the accident he found a bus bearing registration SD 801 VM had overturned. At the scene the road surface was wet and slippery as the soil in that area is like clay. On investigating further he established that a truck was involved in a collision with the bus. When he came to the scene the truck was parked about 250metres away from the scene of the accident. He interviewed both the driver of the bus and that of the Grinaker truck. He recorded a statement from the driver of the bus and one officer Constable Sikhondze recorded a statement from the driver of the truck. The witness further described the geography of the road that where the accident took place it was a deviation road from the Hluti/Lavumisa road. From the main road to the deviation the road it is uphill for a little distance and then turns to the left. There was also a corner from the right and from there the road is clear. Thereafter the road goes a little bit sloppy going downwards. There were bus stops

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along the road. The witness then went further to comment on the pictures of the scene taken. These pictures ran from exhibits "A" to "E".

The witness was cross-examined at some length by Mr. Currie for the Defendant.

The second witness for the Plaintiff was one PW2 Sibusiso Mahlalela. He was the conductor on the day in question on the bus called "Kweshamfana Bus Service" the bus which was involved in an accident with the Grinaker truck. He told the court that the bus would travel on that road in the morning and in the afternoon. The bus has been travelling in this deviation road for a week. He also described the geography of the road in similar terms as the officer PW1 Ndlangamandla. He said on the day of the accident the bus did not stop at Esikhuleni bus stop. There were some passengers they picked up at Themba bus stop. As they approached they saw a yellow Grinaker truck. The truck was watering the road. The driver of the truck tried to avoid the bus but it was slippery and the bus was also slipping from side to side and the driver could not control it. The yellow truck was in the middle of the road. The witness told the court that the road surface was wet and as the soil in that area was like clay it was slippery.

There were no warning signs towards where the accident took place. There were no signs warning that the road was wet. When they first saw the truck they were about 30 metres away. He could not estimate the speed of the bus. He told the court that the bus driver applied the brakes but the bus went on because the road was slippery. The truck tried to move to the right but it was also slippery. The truck ended up stopping on the right side of the road. It was not straight on the road but it almost occupied three quarters of the road. As the bus driver tried to control the bus it hit the back of the road and then it overturned. This witness told the court that it is not true that the bus was travelling at an excessive speed. According to his estimation the bus was travelling at 30km/h.

This witness was also cross-examined at length by counsel for the Defendant.

The third witness called on behalf of the Plaintiff was one PW3 Joseph Ginindza who was the driver of the bus on the day in question. He related at great length the

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sequence of events leading to the accident involving his bus and the Grinaker truck. He told the court that the accident took place at a place called Ekukhanyeni. From the incline he stopped to wait for a child who wanted to board the bus. There were some corners in the vicinity. When he started to travel down the slope he was travelling at 35km/h, The bus was engaged on gear no.2. It was not true that he was travelling at an excessive speed. The road conditions did not allow one to travel fast as it was slippery after being watered. He told the court that he could not have been travelling fast because he was carrying about 20+ people on board and had to negotiate two sharp corners in that area.

When he got to the sloppy place the road was wet and the bus began to slide from one side to the other. In front of him he saw a yellow truck. He saw it when he was near the truck that it was sprinkling water on the road surface. He tried to control the bus so that it does not go to the other side. But the road surface was slippery such that the wheels of his bus swerved to the right. The truck was moving and he followed it. He saw that the truck was moving in a zig-zag fashion across the road. He tried to brake but it was so slippery that the bus merely slid from one side to the other. Then he saw the bus being pulled away. The soil at the edge of the road gave way and the bus capsized. At that time the brakes of his bus had locked. Then the truck came to a stop and had blocked his way. It was on the right side of the road where it was blocking his way. This witness told the court that if the road was not slippery he would have controlled the bus. He further told the court that there were no warning signs warning road users that the road was slippery save for one sign which directed road users to take a certain turn.

Again the bus driver was cross-examined at great length by counsel for the Defendant.

Thereafter the Plaintiff closed her case. Mr. Currie then called DW1 Bruce Hagemann an employee of Grinaker. Mr. Hagemann at the time of the accident was a General Earthworking Foreman in charge of the construction of the road between Hluti and Lavumisa. He told the court that when the accident took place between the bus and the Grinaker truck he was about 600 to 800metres from the road. He knew this bus in that he had seen it three (3) days prior to the day of the accident. He had occasion to warn the bus driver of the said bus for speeding in this strip of the road.

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He told the court that construction workers on site had waved him down with red flags but the bus driver would on these occasions drive even faster in a 40km/h zone. On the day in question he witnessed the accident. He then together with his workers proceeded to the scene to render assistance to the passengers of the bus which had overturned. The witness went further to describe to the court the process of grading the road. This witness also commented on the photographs exhibited before court.

This witness was cross-examined at length by Mr. Dunseith for the Plaintiff.

The Defendant then called DW2 Thuthukani Canawe. He was also employed by the Defendant's company. He was the driver of the yellow Grinaker truck. He was driving the diesel truck which serviced machinery in the construction of the road by Defendant company. He drove on the deviation road when he saw ahead of him another truck belonging to Grinaker and that this truck was watering the road. When he got to the road it was wet. As he entered the deviation road it was slippery due to the watering which had occurred earlier on. He was travelling at about 20 to 30km/h. He applied his brakes but his truck slipped and he left his brakes. He applied his hand brake but the truck slipped to the right side of the road. It then stopped. As his truck was stationary he saw the bus coming towards where his truck was. The bus was travelling at a high speed and he could estimate its speed to be 80km/h. The bus was also experiencing the same problems as his truck and was slipping from side to side until he could not see it anymore. It had capsized. The witness told the court that it was not true that his truck was in the middle of the road. There was ample space on the right of the stationary truck. If the bus was travelling at a normal

speed it would have easily passed on the right side of the truck without any incident. This witness further told the court that after the bus capsized he heard DW1 Mr. Hagemann saying to the bus driver that he (Hagemann) had told him (bus driver) the previous day that he should not drive at such a high speed in that area. He told the court that they have been using the deviation road for about three (3) weeks and it was not true what the bus driver told the court that they have been using it for three (3) days.

This witness was also cross-examined at great length by Mr. Dunseith for the Plaintiff.

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The Defendant called its third and last witness DW3 Andrew Eden who was the Site Engineer at the material time. He told the court that he went to the scene of the accident after the event and he was in the company of the Project Manager one Trevor Groebler. He told the court that the construction of the road had been going on for three months. There were various signs on the road. There were signs showing that the speed limit in that stretch of the road was 40km/h, "no overtaking", sign, "loose gravel" sign, and "tipper truck" sign. All these signs were on the construction site at appropriate sections of the deviation road. There was, however no signs that the road was being watered. The witness also made comments on the photographs which had been exhibited.

He was also cross-examined by Mr. Dunseith. Thereafter the Defendant closed its case. At that stage Mr. Dunseith applied to lead a further witness in rebuttal. The purpose of this was to place the bus permit as part of the Plaintiff's case. Mr. Currie for the Defendant consented to this evidence. The Plaintiff was called to give evidence. She told the court that she was the owner of the bus. She presented the bus permit which was entered as exhibit "F". She testified that the bus left Lavumisa at 7.00am each morning to Manzini. It returned to Lavumisa from Manzini at 1.30pm. The bus was then kept at Lavumisa Police station overnight and the police kept the keys for safe keeping.

At the close of evidence the court entertained submissions by counsel. The Plaintiffs submissions.

Mr. Dunseith argued at great length in this matter. The first issue he raised is that the evidence of Mr. Hagemann cannot be the truth that it was the Plaintiff bus which he had flagged down previously for speeding. He was mistaken as to which bus because evidence before court is that Plaintiff bus passed the deviation road at 7.00am from Lavumisa to Manzini and would come back in the afternoon. Therefore, the suggestion that Plaintiff bus was travelling at an excessive speed is suspect in view of the fact that Mr. Hagemann may well have been referring to another bus. Furthermore, on this point Mr. Dunseith contended that the versions of Mr.

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Hagemann and the truck driver are materially different as to how the former administered the reprimand on the bus driver thus making it more doubtful.

Secondly, it is contended on behalf of the Plaintiff that she has established that the road in question was hazardous on the day in question after being watered by the Defendant's truck. The road surface was dangerously slippery to the extent that it was a hazard. The Plaintiffs evidence in this regard is to some extent supported by the evidence of the Defendant's own witnesses. The evidence of the truck driver is in point in this regard.

Thirdly, it is contended for the Plaintiff that it is common cause that the Defendant did not give warning to road users that they have rendered the road a hazard. Once the Plaintiff has established that the road had been rendered a hazard and that the Defendant has not warned road users of the hazard a prima facie case is made out. The burden of proof then shifts to the Defendant. In casu the, Defendant relies on the allegation that the bus driver drove at an excessive speed.

In this regard Mr. Dunseith argued that the evidence of the bus driver was not shaken that he was travelling at 30km/h and had engaged gear no. 2. The evidence of the bus driver is supported by that of

the bus conductor. Further, on this point Mr. Dunseith argued that the Plaintiff's evidence is supported by the simple geography of the area. The bus driver told the court and this was confirmed by Canawe that he stopped at a bus stop to collect some children. After this bus stop there are two corners before it reached the deviation incline where the road had been watered. The bus could not have reached a high speed from the bus stop to the incline a distance of about 120 metres. This was a heavy bus carrying about 30 passengers pulling away at 1st gear and has to negotiate two corners and that it was travelling at 80km/h is incredible in the circumstances.

Mr. Dunseith argued that the evidence of the truck driver Canawe was an afterthought in that: he said the bus was 120metres away but when 'he, stopped the bus was 150metres. It was put to him that he had gained 30metres and he agreed. This proved that he was travelling faster than the bus.

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On the evidence of Mr. Hagemann Mr. Dunseith contended that he was not asked in-chief about the speed of the bus as to whether the bus was travelling at an excessive speed. It was only in cross-examination that he said the bus was travelling at an excessive speed. Mr. Dunseith argued that the only reasonable inference which could be drawn from this is that when Mr. Currie consulted Mr. Hagemann the latter did not talk about the speed the bus was travelling.

The Defendant's submissions.

Mr. Currie for the Defendant also argued at length au contraire. The first point raised by Mr. Currie is that the evidence presented to the court showed that there was ample signage that there was a road hazard in the said deviation road. The evidence of Mr. Hagemann was to the effect that watering of the road was taking place ahead. Further, that the police officer who gave evidence on behalf of the Plaintiff also mention that there were signs in that road i.e. that there was a sign that overtaking was prohibited. Secondly, it was contended on behalf of the Defendant that the bus driver was travelling at an excessive speed in the circumstances in that he failed to stop the bus whilst on the other hand the truck driver was able to stop the truck despite the fact that the road was slippery.

Thirdly, it was argued for the Defendant that the Plaintiff has failed to prove items 5.1. and 5.2 of the Particulars of Claim that they engaged in road works without giving reasonable warning to road users; and they applied water, to the road surface rendering such surface slippery, without giving reasonable warning to road users, respectively.

Finally, it was contended for the Defendant that in the event the court were to find that the Defendant was negligent in not putting signs on the road nevertheless the bus driver contributed to the negligence so that the provisions of the Appointment of Damages Act would apply.

The court's analysis and conclusion thereon.

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The evidence before court is that the bus stopped at a bus stop to collect some children. After this bus stop there were two corners before it reached the deviation incline where it was watered. In my view, at that point the bus could not have reached a high speed from the bus stop to the incline a distance of about 120metres. This was a heavy bus carrying 30 passengers pulling away at 1st gear and negotiating two corners. In my mind, the evidence of Canawe is suspect that the bus was travelling at 80km/h in the circumstances. The evidence that it was travelling at 30km/h is consistent with the geography of the road and the condition of the road. Mr. Hagemann's evidence on the speed of the bus was not convincing. The version by the bus driver and his conductor is more probable in the circumstances of this case.

Evidence showed that the truck was travelling at 30km/h and the driver could not control the truck as it was zig-zagging along the road. The heavier the vehicle the more it will slip. There was no friction on the road. There was no need for the bus to travel at an excessive speed because the truck driver has lost control of his vehicle. The truck driver did not have the handicap of a vehicle in front. He was able to zig -

zag along the road. The truck is designed for these roads yet the bus had normal wheels. The truck moved to the right and this compelled the bus driver to move to the left. The truck driver in terms of the law is supposed to have moved to the extreme left. In my view, it was not the excessive speed of the bus which caused the collision but the condition of the road and the fact that the truck had moved to the wrong side of the road.

Coming to the question of whether there were signs on the road warning road users that the road was being watered in my respectful view after assessing the evidence I come to the conclusion that there were no such signs. The evidence advanced by the Plaintiff on a balance of probabilities tends to support this view. The bus driver told the court that there were no such signs. The bus conductor also said the same thing. The evidence of Mr. Hagemann and Canawe did not carry the same credence as that of both the bus driver and his conductor. I agree in toto with the submissions made by Mr. Dunseith in this regard as to the weight to be attached to the various witnesses.

In my view the Plaintiff has established that the road in question was hazardous on the day in question after being watered by the Defendant's truck. The road surface was

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dangerously slippery to the extent that it was a hazard. The Plaintiff's evidence in this regard is to some extent supported by the evidence of the Defendant's own witnesses.

From the totality of the evidence it would appear to me that the truck was obstructing the side of the bus. According to Mckerron, Law of Delict (7th ED) at page 62 a person placed in a situation of imminent peril in consequence of another's negligence can not be held guilty of contributory negligence, merely because "in the agony of the moment" he failed to take the best course to avoid the danger. The only issue Defendant could rely on is if the court were to find that the bus was travelling at an excessive speed. The court in casu has found that the bus could not have been travelling at an excessive speed in the circumstances of the road and also on the basis of the Plaintiff's evidence.

In the result, the court enters judgment in favour of the Plaintiff with costs of suit.

S.B. MAPHALALA

JUDGE