

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 290/2015

In the matter between:-

DUMSILE SIMELANE

Applicant

AND

NHLANHLA SHONGWE

1st Respondent

**THE PRINCIPAL SECRETARY – MINISTRY
OF PUBLIC WORKS AND TRANSPORT**

2nd Respondent

ACCOUNTANT GENERAL

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral citation *Dumsile Simelane vs Nhlanhla Shongwe & Others 290/2015*
[2020] SZIC 51 (05 May, 2020)

Coram:

N.NKONYANE, J
(Sitting with G. Ndzinisa and S. Mvubu Nominated
Members of the Court)

LABOUR LAW---Employee claiming compensation for goods that allegedly got lost and some damaged when transported from previous duty station to her homestead---Claim based on delict causing

pecuniary loss---Duty of care on the part of the driver of truck---Burden of proof on the Applicant to prove negligence on the part of the driver---Vicarious liability of the employer for the negligent conduct of the employee acting in the course and within the scope of his duties.

Held---The burden of proof was on the Applicant to prove that the 1st Respondent was negligent on that day and did not observe the degree of care that would have been observed in similar circumstances by a diligens paterfamilias. Applicant failed to discharge the burden. Application dismissed accordingly.

JUDGEMENT
05/05/2020

1. The Applicant is an adult married female of Mbabane, Mpolonjeni area, in the Hhohho Region. She is a civil servant and is currently employed as an Accountant in the Ministry of Education and Training.
2. Prior to her appointment to the current position, the Applicant was employed on a contract basis as an Assistant Accountant and was stationed at Tshaneni Revenue Office.
3. After the expiration of the initial employment contract, the Applicant received a letter that was informing her to vacate the house that she was occupying and to allow the incoming officer to occupy the house. The

Applicant presented that letter to the Government Stores Personnel so that a truck could be released to go and collect her belongings from Tshaneni.

4. At the Government Stores, the Applicant was told that she should come back on the 01st February 2010. She did so and she was allocated a truck that was driven by the 1st Respondent to go and fetch her household items from Tshaneni. The 1st Respondent was with two other male assistant employees, being RW2, Zweli Dlamini and a certain Mantini Nhlabatsi who is now deceased.
5. On the way back from Tshaneni, the Applicant claims that some of her goods fell from the truck around Luve area. The Applicant also claims that the rain fell along the way and some of her household items were soaked and got damaged and had to take these for repairs.
6. The Applicant thus instituted the present legal proceedings and is claiming that she suffered damages in the sum of E62, 000.00 as the result of the loss of the goods and also repair of the refrigerator and TV stand.
7. The Applicant alleges that she suffered damages as the result of the 1st Respondent's negligence who was acting within the scope and course of his

employment. The Applicant claims that the 1st Respondent was negligent because;

7.1 *he drove the truck recklessly such that some of the items fell from the moving truck.*

7.2 *he did not keep a proper look out of the items that the truck was carrying, if he did, he would have seen the items falling off the moving motor vehicle.*

7.3 *he did not take due care and failed to provide a piece of canvas to cover the Applicant's items, if the items were covered, they would not have been damaged by the rain.*

7.4 *he did not bother to go back and look for the lost items.*

8. The Respondents denied liability to the Applicant's claim. In their reply the Respondents stated that the Applicant's property was delivered in good condition at Mpolonjeni and the Applicant did not complain about any damaged items when the items were off-loaded at Mpolonjeni at the Applicant's marital home.

9. **THE EVIDENCE LED IN COURT:-**

The Applicant told the Court that there were three passengers in the truck that was driven by the 1st Respondent. It was herself, RW2 and Mantini Nhlabatsi.

She said they left the Government Stores premises just after eight o'clock in the morning. She said along the route, the 1st Respondent made a detour and drove the truck to his homestead at Bhudla. She said they spent about an hour at the 1st Respondent's homestead, after which they continued with the trip to Tshaneni. Upon arrival the Applicant's goods were loaded onto the truck and the truck left using the Mandlangempisi route.

10. When the truck was at Luve area, the Applicant said one of the men noticed that there was a space in the truck and alerted the driver. The driver stopped the truck and they all went to inspect the luggage and they noticed that there was a bundle of clothes that was missing. The Applicant requested the driver to turn back the truck in order to look for the missing items, the driver did not oblige as he feared that the fuel would run out before they reached the next Government filling station at Matsapha CTA.

11. When they were at Moneni area, they realized that it was raining around the Central Business Area of Manzini and the driver sought shelter at the Filling Station at Moneni. After the rain had stopped falling the driver proceeded with the journey until they reached Matsapha CTA where the truck was filled with fuel. After that, the driver drove on and when they were at Lozitha the Applicant's husband called and said it was raining in Mbabane. The Applicant said the rain started to fall when they were at Mnyamatsini area. The Applicant

said the 1st Respondent drove to the Government Stores to get a sail cloth or canvas to cover the goods. They found a wet and dirty canvas on the ground and they used it to cover the goods.

12. Upon reaching Mpolonjeni the goods were offloaded and after that the Applicant went to the police station together with the 1st Respondent to make a report. The police said they would run a public announcement over the radio and also conduct an investigation before making a formal police report of lost or missing items. The Applicant said her refrigerator and TV stand were damaged. She sent these items for repairs which cost her E6,500.00.
13. The Applicant instituted legal proceedings at the High Court under case number 3814/10 where she was claiming damages arising out of the negligence of the 1st Respondent's conduct. The High Court dismissed the application and upheld a special plea that was raised that the High Court did not have jurisdiction to entertain the application which was based on a claim arising at common law flowing from an employer/employee relationship.
14. During cross-examination the Applicant told the Court that the value she attached to the lost items was the purchase price of those items. She agreed that the purchase price had depreciated at the time that the items got lost. The Applicant also agreed that she currently was pursuing another lawsuit against

the Government concerning her demotion. She denied that she was fabricating because she was angry against the Government for having demoted her.

15. RW1, Nhlanhla Shongwe told the Court that he was the driver of the truck that went to fetch the Applicant's goods from Tshaneni on the 01st February 2010. He said whilst they were loading the goods, the Applicant got a call from someone who told her that it was raining in Mbabane. The Applicant asked him if he had brought something with which to cover the goods and RW1 said he did not bring any. RW1 said on the way back at Mcozini area, the Applicant said she did not see her two-piece that she had bought at Foschini. RW1 said he stopped the truck and they inspected the goods and they found that the ropes were still tightly fastened. RW1 said the Applicant showed him where the black plastic bag had been placed on the truck. The Applicant requested him to turn back to look for the lost items but RW1 refused on account of low fuel in the truck. When they were at Moneni, RW1 sought shelter at the filling station because there was rain that was approaching from Kakhoza direction. The rain did not reach Moneni however and upon seeing that it was over, RW1 drove the truck again until they reached the Applicant's marital home at Mpolonjeni.
16. RW1 said along the way from Moneni they never encountered any rain along the way until they reached Mpolonjeni. RW1 said the surface was wet at Mpolonjeni indicating that it had rained during the day. After off-loading the goods, they drove to the police station in Mbabane where the Applicant said

she wanted to report the lost two-piece to the police. After about a month the police called RW1 to report to the police station. RW1 said he only learnt on that day that there were a lot of items that were lost which were wrapped with a sheet. RW1 said the Applicant never mentioned to him when he stopped the truck along the way that there were also items that were wrapped with a sheet that were lost.

17. RW1 told the Court that along the way, the Applicant was complaining that she had worked for the Government for a long time on contract basis and that the Government now wanted to make her a Stores Lady at CTA which she regarded as a demotion. RW1 said the Applicant told them that she was going to challenge the Government and that she would have no problem doing that as she had connections in high places.
18. RW1 said he was vigilant on that day when executing his duties but did not see anything falling from the truck. He said he never made any detour at KaBhudla or stopped along the way at all when they were going to Tshaneni.
19. During cross-examination RW1 told the Court that his homestead is at Mafutseni not at KaBhudla. He denied that he detoured to his homestead on that day whilst they were travelling to Tshaneni. RW1 said it was the Applicant who told him that the two-piece suit was in a black plastic bag. RW1 denied that he filled the truck with fuel at Matsapha CTA. RW1 said after the stop at Moneni,

he drove straight to Mpolonjeni. RW1 said he never drove the truck to the Government Stores to get a sail cloth because there was no need for that as it was not raining. RW1 also said on that day he was driving at about 80 kilometres per hour.

20. RW2, Zweli Dlamini gave evidence that corroborated that of RW1. He told the Court that it never rained whilst they were transporting the Applicant's goods. He said they did not go to the Government Stores to get a canvas to cover the goods on the truck as it was not raining. He said they never detoured at KaBhudla in order to go to the 1st Respondent's homestead on that day.

21. **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:**

The Applicant's cause of action is predicated on the principle of vicarious liability. In terms of this principle, a master or employer is liable for delict committed by his servant in the course of his employment. (See:- **L.H. Hoffman and D.T. Zeffert:- The South African Law of Evidence, 4th edition page 193**). The learned authors, **Van Jaarsveld and Van Eck: Principles of Labour Law, 2nd edition at pages 86-87** stated the requirements for vicarious liability as follows:-

“a) *Existence of an employer/employee relationship:*

The existence of an employer – employee relationship, that is, a contract of employment at the time of the commission of the wrongful act by the employee, is the primary requirement for the employer to be held liable to a third party.

b) *Commission of a Wrongful Act:*

An employer will only be responsible for the conduct of an employee towards a third party if the conduct satisfies the requisites for the commission of a wrongful act (delict) namely;

- i) An act or omission by the employee;*
- ii) Which was wrongful;*
- iii) Actual damage or personal injury must have been suffered by the third party;*
- iv) Which act or omission caused damage or personal injury to the third person and*
- v) Was committed in a willful or negligent manner.*

c) *Employee Must Have Acted in the Course of His Employment:*

An employer is not responsible towards a third party for the wrongful act of an employee unless it is proved that the delictual act of the employee was committed within the course of his employment.”

22. From the evidence led in Court, it was not in dispute that the 1st Respondent was a Government employee who was acting within the course of his employment when he drove the truck that was carrying the Applicant's household items on the 01st February 2010. The next question therefore is whether or not the 1st Respondent's conduct was negligent or wrongful in the manner that he executed his duties on that day. The burden of proof was on the Applicant to show on a balance of probabilities that the 1st Respondent's conduct was wrongful or negligent.
23. Conduct is wrongful or negligent if the actor does not observe that degree of care necessary in the circumstances. (See: **Wille G: Principles of South African Law, 5th edition page 486**).
24. The Applicant told the Court that the 1st Respondent was negligent because he did not look at the mirrors and also because he made a detour to his homestead at KaBhudla, which made the rainfall to catch up with the truck on the way

back. The Applicant denied that he did not use the rear-view mirrors. He told the Court that he was travelling at about 80km per hour. The Applicant also denied that he made a detour at KaBhudla. He denied that he has a homestead at KaBhudla. He told the Court that his homestead is at Mafutseni and denied that he drove via his homestead on that day. The 1st Respondent also denied that there was any rainfall that caught up with them at Mnyamatsini area on their way back from Tshaneni.

25. The 1st Respondent's evidence was corroborated by the evidence of RW2. RW2 told the Court that they never made any detour to KaBhudla or to the Government Stores on that day. RW2 also told the Court that there was never any rain that drenched the Applicant's goods causing them to be damaged.
26. The Applicant relied on the statement that she made to the police in which she listed the missing items as proof that those items got lost. The fact that the Applicant made a report to the police is not proof that the listed items got lost. It is simply proof that she did go to the police station to make the report. The Court is unable to believe the version of the Applicant because of the following reasons;
 - 26.1 If it is true that these items fell from the truck on that day, the Applicant failed to explain why she did not report to the nearest police station at Mliba or Mafutseni.

- 26.2 She also failed to report to the next nearest police station in Manzini or Matsapha.
- 26.3 She gave different versions about the place where the items fell from the truck. In Court she said it was around Luve area, whereas in her letter of demand to the 3rd Respondent, she said it was around Mafutseni.
- 26.4 The Applicant told the Court that the 1st Respondent made a detour to his homestead and spent about an hour there. The Applicant failed to disclose to the Court what the 1st Respondent was doing at his homestead for a whole hour whilst he was on duty. The Court finds it highly unlikely that the 1st Respondent could decide to commit misconduct in full view of three others civil servants that were with him in the truck.
- 26.5 If the 1st Respondent spent a whole hour at his homestead, he would have been doing something significant that the Applicant could not easily forget, yet the Applicant failed to say what the 1st Respondent was doing for the whole hour at his homestead.

27. The Court will accept the 1st Respondent's evidence that he never made a detour to his homestead on that day and that when the Applicant asked him to stop the truck, the Applicant told him about a two piece that she bought at Foschini which was in a black refuse bag was the item that was missing. The evidence of RW1 was corroborated by the evidence of RW2. RW1 said the Applicant never mentioned to them when he stopped the truck that the goods that fell from the truck were wrapped in a bed sheet. RW1 said he learnt about the bed sheet version at the police station and was surprised by that.
28. Even if the Court were wrong to come to the conclusion that the Applicant's version was unbelievable, still the Applicant failed to prove that the 1st Respondent was negligent. There was no evidence that the 1st Respondent was driving the truck recklessly or negligently on that day.
29. It was argued on behalf of the Applicant that the 1st Respondent was negligent in that he failed to use his mirrors as he failed to notice that there was luggage that had fallen which was only noticed by Mantini Nhlabatsi. Mantini Nhlabatsi was the assistant of the 1st Respondent. The evidence revealed that he was seated on the extreme left of the truck cab, next to the door. There was no evidence as to which side of the truck was the luggage was placed. The only reasonable conclusion is that it was placed on the left side of the truck if it was Mantini Nhlabatsi that noticed that some luggage had fallen from the truck. It is

only if there was evidence that the luggage that fell had been placed on the driver's side of the truck and the 1st Respondent failed to see it that it could be said that he was negligent in not noticing the luggage falling off from the truck. There was no such evidence.

30. In any event, Mantini Nhlabatsi was the 1st Respondent's assistant. When he noticed that there was something amiss in the truck, he told the driver to stop and the driver stopped immediately. Mantini Nhlabatsi was executing his duty as part of the crew that was dispatched by the Government Stores to go and fetch the Applicant's goods from Tshaneni. The Court is unable to understand how it could be said that the driver was negligent if he stopped the truck immediately upon being told by his assistant to stop the truck because he had noticed that some luggage had fallen off from the truck. The 1st Respondent acted reasonably by bringing the truck to a halt immediately after he was told that there was a problem.

31. Upon being alerted that some luggage had fallen off from the truck, the 1st Respondent immediately stopped the truck. It is only if the 1st Respondent ignored the call to stop the truck that it could be said that he acted negligently or recklessly by ignoring his assistant's warning. It was also argued that the 1st Respondent was negligent in that he refused to go back to look for the lost

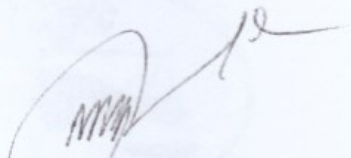
items. The 1st Respondent explained to the Applicant and to the Court why he did not accede to the request to go back. He said the fuel in the tank was low and the next CTA fuel depot was Matsapha and was afraid that the truck might not reach Matsapha if he had to drive back. There was no evidence, nor was it suggested that the 1st Respondent's explanation was unreasonable in the circumstances.

32. It was also argued that the 1st Respondent was negligent in that he failed to provide cover for the Applicant's goods to save them from damage by the rain. As already pointed out, the Court accepts the Respondents' version that there was no rainfall that they encountered along the way on that day. As proof that the refrigerator was damaged, the Applicant relied on Annexure 5 of the Applicant's Bundle of Documents. This document is an Invoice/Delivery Note dated 26th April 2010. If the Applicant's refrigerator was damaged by rain on the 01st February 2010, the Applicant failed to explain to the Court why did she take it for repairs about three months later.
33. None of the parties addressed themselves to the maxim that says *res ipsa loquitur* in Court or in their heads of argument.
34. The Applicant said she bought the refrigerator for E3, 000.00. She did not tell the Court as to when did she buy it. She stated during cross examination that the price of E3, 000.00 stated in her papers was the purchase price of the item

and she agreed that the value of the refrigerator had depreciated at the time that it was damaged. The Applicant failed to lead evidence of any person who deals with sale or repair of refrigerators or the evidence of a dealer in clothes and household appliances. From the evidence before the Court, it cannot be said that the Applicant was able to prove that she was entitled to the payment of damages amounting to the sum of E62, 000.00.

35. From the evidence led before the Court, the Applicant failed to advance her case persuasively. The present application is not an application for determination of an unresolved dispute where the Applicant claims that she was unfairly dismissed. In such cases the burden is on the employer to prove that the dismissal was for a fair reason. **(See:- Section 42 (2) of The Employment Act number 5 of 1980** as amended). The present application is one for pecuniary loss sustained by the Applicant based on the alleged negligent conduct of the 1st Respondent. The onus of proof was therefore, on the Applicant to prove negligence on the part of the 1st Respondent. From the totality of the evidence led before the Court, the Court is unable to come to the conclusion that she was able to successfully discharge the onus of proof that rested on her.
36. Even if, therefore, the loss or damage of the goods could be attributed to the 1st Respondent, there was no sufficient or credible evidence to substantiate the quantum claimed by the Applicant.

37. From the totality of the evidence before the Court, the Applicant failed to advance her case persuasively and also failed to lead any corroborative evidence on the important aspects of the case, that is whether it did rain and that the rain caused the damage on her goods, and also lead evidence on the value of the lost or damaged goods to justify the quantum claimed.
38. In the circumstances of this case, the Court will make the following order;
- a) *The Applicant's application is dismissed.*
 - b) *There is no order as to costs.*
39. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. C. Bhembe
(Attorney from Bhembe & Nyoni Attorneys)

For Respondents: Ms. N. Xaba
(Attorney from The Attorney-General's-
Chambers).