

# **IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 3445 /06**

In the matter between:

**SENZO GONDWE**

**PLAINTIFF**

v

**THE SWAZILAND MOTOR VEHICLE  
ACCIDENTS FUND**

**DEFENDANT**

CORAM

FOR THE PLAINTIFF FOR

Q.M. MABUZA -J ADVOCATE N. KADES  
SC INSTRUCTED BY MR. MANDA OF  
MABUZA ATTORNEYS ADVOCATE J.M.  
van der WALT INSTRUCTED BY MR. S.  
MASUKU OF MAPHANGA HOWE  
MASUKU NSIBANDE

THE DEFENDANT

JUDGMENT 20/11 /2009

[1] The Plaintiff was severely injured in a motor vehicle accident that occurred on the 17<sup>th</sup> April 2005 along the Tshaneni-Mliba Public road at or near Mpala Ranch. He

was a non-fare paying passenger in a motor vehicle SD 585 which overturned.

[2] He issued summons against the Motor Vehicle Accident Fund (MVA) for compensation in the total amount of E5,903,099.42 (Five million nine hundred and three thousand and ninety nine Emalangeneni, fourty two cents). He alleges therein that the overturning of SD 685 KN was caused by the negligent driving of a blue Toyota Hilux whose registration letters, numbers and the driver/owner were not identified.

[3] He has set out in the summons various particulars of negligence.

[4] He further alleges that as a result of the overturning of the vehicle and the alleged acts or omissions of the unidentified driver of the unidentified vehicle the Plaintiff sustained injuries when the motor vehicle in which he was a passenger overturned while trying to avoid a collision with the unidentified vehicle.

[5] As a result he suffered the following bodily injuries;

**fracture of the pelvis, rupture of the bladder, sigmoid colon injury, rupture of the ureter, rupture of the rectum, severe pelvis trauma and major injuries to the bladder and urethra.**

There is no need for me to set out in detail the treatment he underwent as well as his present and future circumstances; they are well documented in his particulars of claim. It does

not take the mind of an Einstein to imagine the horror of his life now and forever while he remains alive.

[6] In response to the Plaintiffs claim the Defendant has raised a special plea; namely, that it is not obliged to compensate the Plaintiff because the Plaintiff has failed to comply with the provisions of the Motor Vehicle Accident Regulation of 1992 as read with the Motor Vehicle Act 13 of 1991 in the following respects:

**1.1 In particular Plaintiff has failed to comply with Regulation (4) (1) (a) (ii), (iii) and (iv) in so far as:**

**1.1.1 No evidence has been produced to the satisfaction of the Defendant or at all, proving that the claimant took all reasonable steps to identify the owner or driver of the unidentified motor vehicle;**

**1.1.2 The Plaintiff has failed to show that its inability to establish the particulars and requirements to prove liability in terms of section 10 of the Motor Vehicle**

**Accidents Act is not due to any act or omission on his part;**

**1.1.3 No evidence has been produced to the satisfaction of the Defendant or at all that the unidentified motor vehicle (including anything on in or attached to it) came into physical contact with the Plaintiff or the vehicle in which he was conveyed or any other object which directly or indirectly caused or contributed to the injury allegedly sustained by the Plaintiff.**

[7] In his replication the Plaintiff has pleaded that Regulations 4 (l)(a)(ii) and (iii) and (iv); and 4 (i)(b) of the Motor Vehicle Act Regulations 1992 promulgated in terms of section 1 of

the Motor Vehicle Act 13 of 1991 are all ***ultra vires*** the provisions of the empowering Act and accordingly prays for an order declaring the aforesaid Regulations ***ultra vires***.

[8] I set out hereunder the stated provisions of the Regulations:

**"Liability for damage caused by unidentified vehicle.**

**4. (i) The liability of the MVA Fund under the Act in respect of claims for bodily injury or death arising from the driving of a motor vehicle of which neither the owner's nor the driver's identity can be established, hereinafter referred to as the "Unidentified motor vehicle", shall be subject to the following conditions:**

**(a) no liability shall be incurred by the MVA Fund unless -**

- (i) the bodily injury or death arose from the negligent or unlawful driving of the unidentified motor vehicle and proof thereof to the satisfaction of the MVA Fund is produced;**
- (ii) evidence is produced to the satisfaction of the MVA Fund proving that the claimant took all reasonable steps to identify the owner or driver of the unidentified motor vehicle;**
- (iii) the claimant's inability to obtain judgment in terms of section 10 of the Act is not due to any act or omission on his part; and**
- (iv) evidence is produced to the satisfaction of the MVA Fund that the unidentified motor vehicle (including anything on, in or attached to it) came into physical contact with the injured or deceased person or with any other**

**person, vehicle, conveyance or any other object or objects which directly or indirectly caused or contributed to the injury or death;**

**(b) the liability of the MVA Fund to compensate any person or persons or any third party or parties, irrespective of the number of persons or parties based on a claim arising out of the same occurrence shall not exceed an amount of E5,000 in respect of any one person or E50,000 in respect of any number of persons;"**

[9] Basically the Defendant is contending that the Plaintiff cannot claim any compensation from the Defendant and uses the above regulations to support its contention. The Defendant further argues that any fund is entitled to protection against fraudulent or non-verifiable claims and it could never have been the intention of the Legislature to compel the Fund to make payments from public funding to possibly non-deserving claimants purely on the basis that they plead ignorance of the identity of the driver/owner responsible.

[10] The Defendant further states that where the identity of the vehicle/driver/owner responsible for the death or the injury is known a fund would have access to the alleged wrongdoer's version, and may be able to successfully resist a claim on the basis of that version. The Fund would also have a right of recourse against the wrongdoer.

[11] Therefore they argue, the express limitations and exclusions of the fund's liability pertain only to instances where the identity of the driver/owner is known (see sections 11 and 1 of the MVA Act).

[12] The Plaintiff on the other hand argues that section 4 (a) of the Motor Vehicle Accident Act states that the Motor Vehicle

Accident Fund shall have the power to investigate or settle claims referred to it in section (1) arising from the driving of a motor vehicle (my underlining). This section it is argued does not talk about "hit and runs." Thus concludes Counsel for the Plaintiff that this section gives a claimant the right to claim even if he or she could not identify the driver/owner/vehicle. Mr. Kades takes the argument further that it is not only fraudsters who are unable to identify the driver but ordinary claimants who have been knocked unconscious during an accident.

[13] Mr. Kades further directed the court to the following provisions: section 4 (d) of the Act which states that:

**"The MVA Fund shall utilize its funds for any purpose connected with or resulting from the exercise of its powers or the performance of its duties."**

### **Liability of Motor Vehicle Accident Fund:**

Section 10 (1) provides:

**"The Motor Vehicle Accident Fund shall, subject to the provisions of this Act and to such conditions as may be prescribed, be utilised for the purposes of compensating any injured person... for any loss or damage which the third party has suffered as a result of:**

1.1.3                   **any bodily injury to himself;**

1.1.4                   **the death of any bodily injury to any person; which in either case is caused by or arises out of the driving of any motor vehicle by any other person at any place in Swaziland and the injury or death is due to the negligence or other unlawful act of the person driving the motor vehicle (in this Act called "the driver") or of the owner of the motor vehicle or his servant in the execution of his duty."**

Section 18 of the Motor Vehicle Accident Act empowers the Minister to make regulations for the better carrying out of the purposes and provisions of this Act and in particular may make regulation with respect to ...

**(b) prescribing the powers and duties in connection with the administration of this Act which may be exercised or performed by such persons as the Minister may designate.**

[15] It is under section 18 that regulation 4 (1) (a) (i), (ii), (iii), (iv) and 4 (b) are promulgated, set about in paragraph 7 herein above.

[ 16] The Plaintiff's argument is that the above regulations are ***ultra vires*** the Minister's power as the Minister had no authority to abrogate the provisions of the Act. Nowhere does the Act empower the Minister to limit the purpose and object of the Act. The purpose of the Act is to compensate accident victims and not to obstruct them. The Minister so the argument goes cannot take away the right to be compensated and that the regulations aforementioned removes that right and are clearly ***ultra vires*** and must be so declared.

[17] **No one shall be a judge in his own cause.**

The second argument advanced on behalf of the Plaintiff was that the ***maxim nemo iudex in sua causa*** applies to regulations 4 (i) (a) (i), (ii) and (iii). The argument being that these regulations provide for the Motor Vehicle Accident Fund to make the decision whether it is liable or not: by deciding its own liability it is being a judge in its own cause. The Fund is the arbiter and yet has an interest in the decision which is to determine its liability to make that very

decision. **See S v Malindi and Others** 1990 (1) SA 962 at 969 G-I

See also **De Lange v Smuts N.O and Others** 1998 (3) SA 785 at 835 F and 836C.

If I were to declare the impugned regulations invalid on this ground the entire workframe and operations of the MVA Fund would grind to a halt. A new mechanism would have to be put in place. This argument fails for this reason even though it is sound.

#### **Regulation 4 (1) (a) (iv)**

It was further contended on behalf of the Plaintiff that regulation 4 (1) (a) (iv) was similar to regulation: 2 (1) (d) which requires physical contact with the unidentified vehicle of the Road Accident Fund (RAF) Act 56 of 1996 in South Africa has been declared ultra vires by the Supreme Court of Appeal in the case of **Bezuidenhout v Road Accident Fund** 2003 (6) SA 61 SCA.

#### **Regulation (4) (1) b)**

It was submitted on behalf of the Plaintiff that the purpose of the Motor Vehicle Accident Act was to compensate accident victims and not to obstruct them. And that the limitation of E5,000.00 falls into the same category that the enabling of this Regulation which is **ultra vires** the empowering provisions of the Motor Vehicle Accident Act.

I am persuaded by Mr. Kade's arguments. It is my finding that the purpose and object of the Motor Vehicle Accident Act is to compensate victims of accidents arising from the driving of a motor vehicle in terms of section 10 of the Act. This section in my view gives the claimant the right to claim even if she or he could not identify the driver or owner or registration when the accident occurred. Suppose an accident victim were knocked unconscious



is she to be denied her right to claim against the Fund merely because due to her state of comatose she was unable to identify the driver of the motor vehicle that knocked her down? I think not. This in my view was not the intention of the Legislature when it promulgated the Motor Vehicle Act nor when it delegated the promulgation of the Motor Vehicle Accident Regulation to the Minister.

It is my further finding that the Motor Vehicle Regulations complained of are hereby declared *ultra vires* the Motor Vehicle Accident Act. There is further no express provision in the Motor Vehicle Accident Act limiting or excluding liability in the case of unidentified vehicle claims on the basis of lack of physical contact.

An apposite example is given by Vivier JA in the *Bezuindenhout* case at paragraph 17:


**"Assuming a case of well-evidenced and fully proved negligent driving of an unidentified vehicle, as one should do in considering the matter, the undifferentiated imposition of the requirement of physical contact may well be regarded as unreasonable. Postulate the case of the negligent driver of an unidentified vehicle swerving on to his incorrect side of the road, his vehicle just scraping one oncoming car, missing a second one altogether but forcing both these vehicles to leave the road in trying to avoid him. To exclude by regulation a claim for compensation in the one case but not in the other may well be said to be such unequal discrimination as to be invalid for unreasonableness since the intention could never have been to authorise it." (S v Mahlangu & Others 1986 (1) SA 135 (T) AT 144 B - 145 A).**

Consequently Regulation 4 (1) (a) (iv) which requires physical contact with the unidentified vehicle is hereby declared to be *ultra vires* the Minister's powers.

It is my further finding that the enabling Act does not empower the Minister to limit to E5,000.00 the amount in Regulation 4 (1) (b). This limitation in my view discriminates against the claimant therein as against a claimant injured in a contact vehicle. Regulation 4 (1) (b) is hereby declared to be **ultra vires**.

[24] In the event Regulation 4 (1) (a) (ii) and (iii) and 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992 issued in terms of section 18 of Act 13 of 1991 are hereby declared **ultra vires** and invalid.

[25] The special plea is dismissed with costs. Costs to include certified costs of Counsel.

  
**O.M. MABUZA -J**