

IN THE HIGH COURT OF SWAZILAND

CASE NO. 2395/07

HELD AT MBABANE

BETWEEN SANDILE

MBULI...

PLAINTIFF

AND

MOTOR VEHICLE ACCIDENTS FUND...

DEFENDANT

CORAM

AGYEMANG J

FDR THE PLAINTIFF:

S. C. DLAMINI ESQ.

FDR THE DEFENDANT:

S. MASUKU ESQ.

DATED THE 11TH DAY OF DECEMBER 2009

JUDGMENT

The plaintiff in this action has sued the defendant for the following reliefs:

1. Payment of the sum of E300.000;
2. Interest on the amount, at 9% *a tempora mora* from the date of judgment until the date of final payment;
3. Costs of suit;
4. Further or other relief.

The plaintiff herein is an adult male of Swaziland. The defendant is the statutory organisation tasked under the Motor Vehicle Accident Act 13 of 1991, with the compensation of persons involved in motor accidents. The matters of common cause are that on the 10th of September 2005, the plaintiff and one Francis Mkhulu Banda (hereafter referred to as "the insured") were in charge of vehicles travelling at Matsapha in opposite directions. They were involved in a motor accident. The plaintiff was in charge of a motor vehicle with Registration No. SD 106 LS while the insured was in charge of a motor vehicle with Registration No. SD 745 DN. The two vehicles were damaged. The plaintiff and his passenger were both injured and were admitted at the Nazarene Hospital to which they were taken by officers of the Fire Service and where they received treatment. The plaintiff in this action has alleged that the accident was caused by the negligence of the insured. He pleaded the following as the particulars of the negligence of the insured. In that:

1. He drove too fast under the circumstances prevailing;
2. He failed to keep his vehicle under proper control;
3. He failed to keep a proper look-out;
4. He failed to avoid a collision when by the exercise of reasonable care, he could, and should have done so. It was the evidence of the plaintiff that around 6:45 pm on 10th September 2005, a clear but dark night, he had just left his work place about a distance of four to five kilometres from Swazi Wire at Matsapha Industrial and was travelling with a

passenger on his vehicle Registration No. SD 106 LS, along the Swazi Wire road. He alleged that before he reached a gentle curve, a vehicle approaching from the opposite direction at top speed emerged with bright headlamps. He recounted that he had been travelling at sixty kilometres per hour (in compliance with a road sign on his side of the road indicating that speed limit) in his lane. He alleged that when he saw the bright lights of the approaching vehicle, he reduced his speed, yet by reason of the bright lights of the approaching vehicle, the two vehicles suddenly collided with each other. The plaintiff testified that the collision occurred in his lane and that following it he fell unconscious and was taken to the Nazarene Hospital where he regained consciousness and remained on admission for about two weeks. He alleged that his vehicle was damaged at the fender on the driver's side but that he never saw the damage to the insured's vehicle because of his unconscious state following the accident. The plaintiff's case was supported by a witness who had been his passenger at the time of the accident. According to this witness who sought to corroborate the version of the plaintiff, the accident occurred on a clear, dark night, between 6:30 pm and 7:00 pm, along a flat road with a fifty kilometres per hour (50 kmph), speed limit sign. This was before the plaintiff got to a gentle curve along the road they were travelling. He testified that the plaintiff was moving at medium speed in his lane when the collision occurred and that the collision occurred in the plaintiff's lane. He also alleged that the collision was caused by the bright lights of the approaching vehicle, and that following the collision, the plaintiff's vehicle lost control, overturned, and ended up on its side, in the centre of the road. The collision caused damage to both vehicles, the plaintiff's he alleged to be on its side lamp whilst the other vehicle's was at its rear. He, as well as the plaintiff were injured and were taken to the Nazarene Hospital by Fire Service personnel. Passers-by he said, also assisted them and helped to put the plaintiff's vehicle back on the road on its wheels before they moved it to the side of the road. In its pleading, the defendant denied the allegation of negligence

against the insured and in the alternative, pleaded that where a finding of negligence was made against him, that the court should find that it was not the cause of the accident. In a further alternative, the defendant pleaded the contributory negligence of the plaintiff as follows, in that:

1. He failed to keep a proper look-out;
2. He drove his vehicle at an excessive speed without regard to the circumstances and condition of the road;
3. He failed to avoid the collision when by the exercise of due care and skill, he could, and should have done so;
4. He drove his vehicle without proper regard to the road markings and signs as well as the rules of the road;
5. He unlawfully encroached on to the opposite lane into the line of oncoming traffic.

It was the evidence of the insured that on the day of the accident, a day in September 2005, he was in charge of a motor vehicle with Registration No. SD 745 DN, travelling from Malkerns to Matsapha Prisons where he lived. He recounted that he used the route through Nedbank and First National Bank and moved towards Matsapha City Air. That route he said, passed in front of Swazi Wire. This is a route he used often as his family did its shopping at the Matsapha Shopping Complex. He alleged that it was between 6:20 pm and 6:40 pm, a clear night, not so dark he would need bright lights so that although he had his headlamps on, he was using dim lights. He alleged that, he had just moved about fifty meters to sixty metres away from a stop sign into a curve and was travelling in his lane when an Isuzu 4x4 vehicle (which he later found was driven by the plaintiff herein), came into his lane on the curve and failing to negotiate the curve, collided suddenly with his vehicle travelling in its lane. He alleged that the plaintiffs vehicle had been moving at top speed and that, when he saw the plaintiff, the latter was about ten metres away and that after he got out of the car he realised that it had been three to four

minutes after he saw the emerging vehicle that the accident occurred. He noticed a speed limit sign which read fifty kilometres per hour (50 kmph), and that there were road markings (broken lines) there. He alleged the plaintiff's speed to have been such that he sensed danger and swerved to the left to avoid a head-on collision. In spite of his efforts, the plaintiff's vehicle hit his on the side, to the rear of his vehicle and pushed it off the road to the left. The plaintiff's vehicle which had veered off its lane into the insured driver's, overturned and rested on its roof at the insured's side of the road, about ten metres to the fence belonging to Swazi Railways. He testified that the accident occurred at the side of the road, on his side, near the Swazi Wire billboard next to the Swazi Railways fence. He recounted also that when after the collision he came out of his car, he found the driver's side of his vehicle, the front and back doors, damaged. His vehicle he said, was subsequently declared a write-off by garages from where he sought quotations for repairs. After the accident, he joined passers-by to get the unconscious plaintiff from his vehicle. He was emphatic that the accident was caused by the high speed of the plaintiff who failed to negotiate the curve on the road and veered onto his lane.

The defendant's case was supported by the Police Officer who investigated the accident. According to this witness, he received a report that an accident had occurred between Land Development and Swazi Wire and was called to the scene. He testified that he went to the scene with another officer shortly afterwards, at around 7:00pm and that he found these: that there had indeed been a collision; that the insured's car was parked on the side of the road facing its correct route and that it had been damaged at the right side towards the back of the passenger door. The plaintiff's car however, he described as lying on the fence of Swaziland National Maize Corporation on the insured's side of the road with damage to its right fender. He testified that because it was not a head-on collision, he could not determine the point of impact for which reason he recommended that the case docket be closed. Describing the scene, he alleged that it was about forty

metres from the curve and that it was dark when they arrived there. He testified also that the general speed limit in that area was fifty kilometres per hour (50 kmph), and that the insured's vehicle had come from the direction of a stop sign about seventy metres from the accident scene. He testified also that a vehicle coming from the insured's direction would not see a car approaching from the opposite direction.

At the close of the pleadings, the following stood out as issues to be determined:

1. Whether or not the insured drove his vehicle negligently;
2. Whether or not the negligence of the insured caused the accident;
3. Whether or not the plaintiff was contributorily negligent;
4. Whether or not the plaintiff is entitled to his claim.

In proof of the allegation of negligence, the plaintiff pleaded certain particulars set out before now. The evidence led by the plaintiff was that on a dark night, the insured, while the plaintiff was travelling at a moderate speed of 60 kmph, emerged with bright lights and moved at top speed; there was then a sudden collision between their two vehicles in the plaintiff's lane and that the resultant position of the plaintiff's vehicle was at the centre of the road. While the plaintiff and his witness corroborated their respective versions, the defendant denied the allegations. The witness for the defendant although not an eyewitness, testified as to what his investigations revealed. From the mere fact of his lack of involvement, his task as an investigator, it seems to me that his version of events ought, to be the preferred one since it was less likely to be biased. But beyond this, I observed the demeanour of this witness and noted the consistency and attention to detail in his evidence and I am persuaded that he was a credible witness on whose evidence I would place credit. Although this witness testified that he could not determine the point of impact, he described the resultant positions of the vehicle as: the insured's parked and facing its correct route whilst the plaintiffs was leaning against a wall, outside the road but on the side of the insured. It is trite learning that the point of impact can be prima facie

evidence of negligence. The Police Investigator said he could not determine the point of impact as it was a side swipe. It seems to me however that the resultant position of the plaintiffs vehicle alone gave the lie to his assertion that the plaintiff was travelling in his lane when the accident occurred, or that it occurred in his lane. Clearly, if the collision had occurred in his lane, a vehicle not overtaking from behind but coming from the opposite direction such as the insured's was, would push the plaintiffs vehicle which he said had slowed down, further onto the plaintiff's nearside, not to the opposite lane and out of it. Perhaps it was in recognition of this that the plaintiff was silent on the resultant position and his witness alleged it to have been in the centre of the road. The inability of the Police investigator to determine the point of impact for the purposes of a criminal investigation may not preclude this court from determining same however since this court in the exercise of its civil jurisdiction determines the proof of a matter on the lower standard of a balance of the probabilities and not on the proof beyond a reasonable doubt required in a criminal trial. Having regard to the scene of the accident immediately thereafter, as described by the Police Officer who corroborated the version of the insured with regard to that matter, it seems to me more probable than not that the point of impact was on the side where both vehicles were found, being the side on which the insured's vehicle travelled.

The allegation of excessive speed by the plaintiff also does not seem to find support in the resultant positions of the vehicles. The insured alleged that the speed limit was fifty kilometres per hour (50 kmph). This was corroborated by the Police investigator who said that although he did not see a road sign thereat, he knew, having patrolled that area as part of his duties, that the general speed limit in that area was fifty kilometres per hour (50 kmph). Even the witness for the plaintiff confirmed the existence of a fifty kilometre per hour (50 kmph) road sign although he said it faced the insured's direction rather than the plaintiff's.

It seems to me that the weight of evidence indicates on the preponderance of the probabilities, that the speed limit in that area was fifty kilometres per hour. Even if the plaintiff had been travelling at sixty kilometres as he alleged, he still would have been overspeeding in that area, yet it seems to me from the fact that his vehicle overturned and lay next to a fence on the opposite side of the road, that the plaintiff's speed was much more than the 60 (sixty) kmph he alleged. The plaintiff alleged that the insured moved at top speed and that when he saw him and the bright lights of his car, he slowed down just before the collision occurred. Yet it seems to me that the insured's story of moving at moderate speed and swerving to avoid a collision is more consistent with the resultant positions of the vehicles. The fact that the insured was travelling from the direction of a T-junction with a stop sign, and had negotiated a curve shortly thereafter would support the allegation of moderate speed. Beyond this, the fact that the Police investigator found his vehicle parked and facing its correct direction when he arrived at the scene shortly after the accident would also support the insured's story. Certainly, the insured whose car was parked and facing its correct direction after the accident appears to have been more in control of his speed than the plaintiff who was found on the opposite side, off the road and overturned. The plaintiff's witness testified that after the collision in the plaintiff's lane, the plaintiff lost control of his vehicle. But it seems to me that if he had been hit by the insured in his lane and had lost control in consequence, the plaintiff's vehicle would have been on his side of the road, even if pushed far to his nearside. It seems to me that the story of the insured that he swerved his vehicle when the plaintiff's car veered off its path into his and pushed him off appears believable and consistent with the position of his vehicle as found by the police investigator called to the scene shortly after the accident. The damage on the two vehicles also seems to support this version of events. By all accounts, the plaintiff's vehicle was damaged on the right fender on the driver's side whilst the insured's was towards the back door. This seems to

be consistent with the story of the plaintiff veering into the lane of the insured who swerved so that the latter's car was hit at the rear. The story of the plaintiff and his witness would suggest that the insured entered the plaintiff's lane with its rear after the front part of his vehicle had passed the plaintiff without hitting it and then hit the plaintiff's vehicle at the fender at the driver's side with his back door. The plaintiff's vehicle having been thus hit, then turned in a semi-circular motion, into the opposite lane and out of it until it leaned against a fence at that side of the road. It is certainly an improbable version having regard to the place of damage on the two vehicles.

The plaintiff alleged that the insured threw bright lights at him. The insured alleged that although his headlamps were on, it was not so dark that he would use bright lights. The plaintiff sought to substantiate this allegation by alleging that it was dark. I cannot help but note though, that although both the plaintiff and his witness alleged that it was dark at the time of the accident, they both acknowledged that it was a clear night. This gives credence to the insured's version that although lights were necessary, dim lights sufficed as being clear, visibility was adequate, rather than the plaintiff's version. Both the plaintiff and his witness testified that they gave statements to the Police right after they had recovered enough to give such. In this case where the only unexplained part is what caused the plaintiff to lose control, which he alleged was caused by the insured's bright lights, it seems to me that the statements given to the police at the time when the events were fresh in their minds, or the Police report produced in consequence, should have been tendered in this court to support the version put forward by the plaintiff. In the absence of such corroborative evidence, it remains a mere allegation from the plaintiff, and a witness whose evidence as aforesaid, was far from satisfactory. In the premises, I do not find it established on the preponderance of the probabilities that the insured

approached with bright lights which blinded the plaintiff and coupled with his alleged speed, led to the accident.

In an action based on negligence, it is essential that evidence be led in support of matters pleaded as the particulars of the negligence alleged. This is because negligence is a question of fact which must be proved on the balance of the probabilities. The evidence led by the plaintiff is that, two vehicles moving in opposite directions collided. That by itself raises no presumption of negligence, see: per **Scrutton LJ in McGowan v. Stott [1930] 143 LT 217 at 219** "...where both parties are moving and have a right to move, prima facie the mere fact that those moving bodies run into each other is not evidence of negligence".

The plaintiff who alleged the negligence of the insured to be the cause of the accident failed to lead evidence upon which an inference of negligence on the part of the defendant may be drawn. More particularly, the plaintiff failed to adduce evidence regarding the various particulars he set out in pleading, including that the defendant failed to keep a proper look-out. It is the evidence of both the plaintiff and the insured, that the accident happened suddenly. No evidence was led from which an inference could be made that the insured failed to keep a proper look-out instead, the insured gave unchallenged evidence as to how he swerved his vehicle onto the nearside of his lane to avoid a head-on collision. Nor was the plaintiff's allegation of excessive speed on the insured's part substantiated or demonstrated to be the cause of the collision. While high speed alone is not mark of negligence (although it may be a breach of the Highway Code where a speed limit is specified), yet a prudent driver would drive at a speed which would enable him have proper and effective control over his vehicle. While the totality of the evidence led suggests, having regard to the state of the plaintiff's vehicle and its resultant position after the accident, that the plaintiff whose vehicle left its lane, traversed the opposite lane and went off the road was moving at a speed beyond the 60 kmph he

alleged (which in itself was excessive in the area in which the accident occurred). The resultant position of the insured's vehicle suggests one who as he alleged, being alert, kept a proper look-out and had proper and effective control over his vehicle so that he could react quickly in face of danger to avoid a head-on collision. No inference of negligence of the insured may be thus made in the circumstance. The insured's version that the plaintiff failed to negotiate the curve was not supported by the evidence and indeed, the police officer who testified in support of the defendant's case negated same when he testified that the accident occurred around the Swazi Wire gate about forty metres from the curve. Even so, the insured's evidence that he swerved off the road in order to avoid a head-on collision is made believable by the damage on his rear door, and the fact that his car was found facing its correct route, parked beside the road on his side of the road. The evidence of the resultant positions of the vehicle and the damage to the vehicles seems to support the insured's version which is inconsistent with the allegation that, the insured failed to exercise due care and skill to avoid the collision as pleaded by the plaintiff.

Although such was pleaded as evidence of negligence, no evidence was led regarding the fact that road markings were not observed by the insured, and indeed the evidence led showed that it was the plaintiff who failed to observe the road sign reading 50 kmph as the speed limit for he admitted to driving at a speed of 60 kmph in a 50 kmph speed limit area.

It seems to me that on the whole the plaintiff failed to lead cogent evidence in substantiation of the matters he pleaded as the particulars of the insured's negligence or from which an inference of negligence may be made.

The defendant's plea in the further alternative, of contributory negligence needs no discussion in these circumstances as I have not found negligence proved against the insured.

The plaintiff's case therefore fails and is dismissed accordingly. Costs

A handwritten signature in black ink, appearing to read 'M. A. P. P.', written in a cursive style.

HIGH COURT
JUDGE

awarded to the defendant.