



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3617/2008

In the matter between

KHEHLA MASWAZI DLAMINI

Plaintiff

And

MOTOR VEHICLE ACCIDENTS FUND

Defendant

Neutral Citation: Khehla Maswazi Dlamini v Motor Vehicle Accidents Fund (3617/2008) [2012] SZHC 130 (18th June 2012)

Coram: Dlamini J;

Heard: 4th June 2012

Delivered: 18th June 2012

Action proceedings – combined summons – consideration of particulars of claim whether establishing cause of action – claim for damages arising from motor vehicle accident, essential particulars, circumstances that warrant order under Rule 21 and not Rule 23.

Summary: The plaintiff lodged action proceedings before this court for a claim of E750 610.00 damages occasioned by collision

of two motor vehicles in which he was a passenger in one of them. Defendant except to this claim on the basis that plaintiff's particulars of claim do not make out a cause of action which would enable him to plead.

[1] Plaintiff contends that on the 27th September 2005 around 1930 hours while a passenger, the motor vehicle he was on board was involved in an accident along Nhlangano/Mahamba public road. He submits that following the accident, he suffered physical injuries on his right femur which needed to be stapled in hospital. He spent a period of two months in hospital. Although he lodged a claim for compensation with defendant, the defendant has refused to accept liability.

[2] The total amount claimed is E750 610.00 inclusive of pain and suffering, medical expenses, estimated future medical expenses, physical and internal injuries which sum to permanent disability.

[3] Defendant has, however, raised an exception in terms of Rule 23 (1) subsequent to a Notice of Bar. The defendant states as follows:

"1.1 The Plaintiff has not made the necessary averment that the accident was caused by a motor vehicle collision driven by an insured driver;

1.2 Plaintiff has not given the name of the driver and/or owner of the motor vehicle alleged to have caused his injuries;

- 1.3 *There is no allegation as to which of the motor vehicles the plaintiff was a passenger;*
 - 1.4 *There is no allegation to the effect that the plaintiff, being a passenger in the motor vehicle, was being conveyed for reward, in the course of business, in the course of employment, or under circumstances other than those herein mentioned;*
 - 1.5 *There is no allegation in the particulars of claim that the collision was caused by the unlawful and/or negligent driving of a motor vehicle concerned, as well as an allegation stating in which respect such driving is alleged to be negligent and/or unlawful;*
 - 1.6 *There is no allegation that the plaintiff's injuries were caused by or arose from the unlawful and/or negligent driving of such motor vehicle or other unlawful or negligent act of the owner or driver of the motor vehicle concerned;*
 - 1.7 *There is no description of the nature and extent of the injuries suffered by the plaintiff which are alleged to give rise to the damages claimed.*
2. *In the absence of such averments as stated herein above, the defendant is not liable to compensate the plaintiff within the provisions of Section 10 (1) of the Motor Vehicle Accidents Act No. 13 of 1991".*

[4] The defendant's counsel during viva voce submissions referred this court to the Motor Vehicle Accident Act 1991 Section 10 (1) and 11. It was submitted that plaintiff's cause of action falls short of satisfying the requirement as set out in these sections.

[5] The two sections outlined the category of persons entitled to claim under the fund and the circumstances under which one may lodge a claim.

[6] The question in issue is whether the plaintiff's summons lack particularity in order to enable the defendant to plead.

[7] **H. B. Klopper** in **"The Law of Third Party Compensation" 2nd Edition at page 305** highlighted the essential allegations in a summons for a claim arising from motor vehicle collision. The learned author states:

- *"name of driver and/or owner of motor vehicle who is alleged to have caused the injuries or death;*
- *Where the plaintiff was a passenger an allegation to this effect as well as whether such conveyance was for reward, in the course of business and so forth, where the passenger was injured or killed by the sole negligence of the driver of the motor vehicle concerned;*
- *An allegation that a collision occurred and that the collision was caused by the unlawful and negligent driving of the motor vehicle concerned as well as an allegation stating in which respects such driving is alleged to be negligent;*
- *That as a direct result of the collision and the unlawful and negligent driving of the motor*

vehicle concerned the plaintiff was injured or his or her breadwinner was killed;

- *That the injuries or death was caused by or arose from the negligent driving of such motor vehicle or other unlawful act of the owner or driver of the motor vehicle concerned or the employee of the owner or driver in the performance of the employee's duties;*
- *A description of the nature and extent of the injuries suffered and the nature, effects and duration of the consequences of the injuries".*

[8] It is glaring that the above allegations have not been asserted in plaintiff's particulars of claim except for the last one which was asserted in part. Defendant's counsel conceded to this:

[9] Rule 23(1) reads

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6 (14)".

[10] From the above rule it is the position of our law that where a litigant fails to allege material facts which establish a cause of action (*facta probanda*), his action stands to be dismissed either partly or wholly.

[11] **Henochberg J. in Lockhat and Others v Minister of the Interior 1960 (3) S.A. 765** at 777 held:

“The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader?”

[12] I bear in mind that the effect of an exception *“takes the claim or plea away from further consideration of the court and throws it out root and branch”* as propounded in **Ferreira Deep Ltd v Olver 1903 T.S. 86.**

[13] Any procedure which throws out of court or closes the door as it were against a litigant calls upon the court to exercise an extra degree of caution in assessing evidence presented to it, before granting the order in favour of the party that seeks it.

[14] It is wise therefore in such cases to adopt the same method as in **Barendse v Rattray 1917 T.P.D. 622 at 627** and enquire as to whether the failure to allege the particulars as highlighted by H.B Klopper *op. cit.* - paragraph 7 herein affects the *“nature, extent and grounds”* of plaintiff’s cause of action as envisaged by Rule 23. Asked differently, are the assertions as summarized under paragraph 7 above such that defendant cannot be in a position to ascertain plaintiff’s *“nature, extent and*

grounds for his cause of action to render defendant therefore unable to plead? If the answer is to the positive, then I shall be bound to accept defendant's application and dismiss the plaintiff's cause of action. However, if the reply is to the negative, this court may consider means of remedying the plaintiff's defect.

[15] Plaintiff asserts in his Particulars of claim:

- 4. On the 27th September 2005 at around 1930 hours along the Nhlanguano-Mahamba public road, the plaintiff was involved in a motor vehicle traffic accident whilst a passenger.*
- 5. The accident described above involved two motor vehicles registered SD 449 PO and SD 012 PM on which the plaintiff was a passenger.*
- 6. as a result of the accident, the plaintiff suffered physical injuries on his right femur which needed to be stapped in hospital*
- 7. The plaintiff was hospitalized for more than two months at Mbabane Government Hospital after the accident.*
- 8. The plaintiff thereafter lodged a compensation claim with the defendant during or around of August 2007.*
- 9. The defendant has excepted and or denied liability in compensating the plaintiff on the*

ground that the driver of the motor vehicle or which the plaintiff was a passenger overtook at an inopportune moment and encroached into the incorrect lane thus colliding with an oncoming motor vehicle.

10. *In denying liability in terms of a correspondence directed to the plaintiff dated the 10th April, 2008, the defendant stated that:*

“If any driver is to be apportioned with fault, then it ordinarily should be the driver of the vehicle in which the client (plaintiff) was a passenger”.

11. *The fact that the plaintiff was a passenger in a motor vehicle overtook at an inopportune moment does not make the plaintiff the person who caused the accident. In fact, the plaintiff had no way of foreseeing that the driver would so overtake.*

12. *The defendant refused to compensate the plaintiff in terms of the Motor Vehicle Accidents Act is thus wrongful and unlawful circumstances*

[16] I have already alluded that plaintiff has not at all alleged who was negligent or committed a wrongful act which resulted in a collision that caused him to sustain the injuries. From paragraphs 9, 10 and 11 of the particulars of claim, it is clear that plaintiff is not prepared to be drawn

into the argument of who amongst the drivers was wrongful and/or negligent. Unfortunately, this attitude by plaintiff works against his case, as already propounded by H.B. Klopper, *op. cit.* that it is one of the essential requirements in an action of this nature to state that as a result of the wrongful act and/or negligence, the plaintiff suffered damages to a specified amount. This allegation is important not only to inform the defendant, but to establish a causal link between the plaintiff's injuries and the act complained about.

[17] That as it may, I am still duty bound to enquire as to whether in the totality of the particulars of claim, can it be said that the plaintiff has failed to allege material facts so as to inform the other party of the case he is expected to answer. In so doing I am guided by the case of **Barendse** *supra*.

[18] It can be deduced from the particulars of claim that plaintiff's cause of action arises as a result of a collision occasioned between two motor-vehicles in one of which the plaintiff was a passenger. At his paragraph 13, plaintiff states that "*as a result of the accident described above he suffered damages...*"

[19] In **Barendse** *op. cit.* the court was seized with the question as to whether an exception could be upheld wherein the plaintiff, relying on a contract failed to assert whether the contract was written or oral, an essential declaration in our law in actions based on contract. The court dismissed the application for an exception on the basis that such an assertion did not go to the root of the action.

[20] *In casu*, it is my considered view that it cannot be said that plaintiff has failed to inform the defendant of the *nature, extent and ground* of his claim.

[21] The missing allegations as conceded by defendant's counsel and demonstrated above are not different from the *classicus* case of **Barendse** in that plaintiff's particulars lack details or precision such as the class of passenger, the addresses and type of drivers and who among the drivers was wrongful or negligent which does not however go to the core or root of the action in order to warrant this court to throw plaintiff's action.

[22] It is my considered view that the lacuna in plaintiff's particulars of claim can be easily cured by furnishing of further particulars as provided for in our procedure under Rule 21. The rationale for this procedure (Rule 21) is intended for a litigant who:

*"would be embarrassed in pleading or that he is **unable to understand fully and in details** the case sought to be made against him."* , as held in **Curtis-Sehell, Lloyd and Mathews v Koeppen, 1948(3) S.A. 1024** at 1028.

[23] In the circumstances, I enter the following orders:

1. Plaintiff is ordered to supply defendant with further particulars.
2. Plaintiff is ordered to pay costs.

JUDGE

For Plaintiff : N. M. Manana

For: Defendant: S. Masuku

