



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No: 800/04

In the matter between:

SWAZILAND ROYAL INSURANCE CORPORATION

PLAINTIFF

and

SIKELELA DLAMINI

DEFENDANT

Neutral Citation : Swaziland Royal Insurance Corporation v Sikelela Dlamini
(800/04) [2016] SZHC 245 (15 DECEMBER 2016)

Coram : MABUZA J

Delivered : 15 DECEMBER 2016

SUMMARY

**Civil Law – Claim for damages sustained on motor vehicle upon collision –
Motor vehicle insured by Plaintiff - Application of the doctrine of subrogation.**

JUDGMENT

MABUZA –J

- [1] When this matter was called on the 19th October 2015 the Plaintiff's attorney Mr. S. Dlamini was present and the Defendant's attorney Mr. O. Nzima was absent. Mr. Dlamini informed the Court that he had caused a notice of set down for hearing on the 19th October 2015 at 9.30 a.m. to be served and filed. He had addressed the notice of set down to Nzima Associates c/o S.V. Mdladla Associates. The latter are Mr. Nzima's correspondent attorneys in Mbabane.
- [2] The Court was shown the notice of set down which was dated the 9th October 2015. It showed that service was effected on the correspondent attorneys on the 9th October 2015 at 12:17 hours.
- [3] The Defendant's name was called out three times outside Court by the Court orderly but there was no response.

- [4] The Court ordered the trial to proceed in view of the matter been an old one.
- [5] After the Plaintiff's main witness had finished leading evidence, Mr. Nzima appeared. After the customary apologies, he informed the Court that he had withdrawn from the case because his client was unable to pay him.
- [6] I ordered that the matter proceed to finality. Mr. Dlamini applied for the striking out of the defence and I so ordered.
- [7] The Plaintiff is described as SWAZILAND ROYAL INSURANCE CORPORATION a body corporate established by the Kings Order in Council No. 32 of 1973, carrying on business of insurers with its principal place of business at Lilunga House, Gilfillan Street, Mbabane.
- [8] The Defendant is described as SIKELELA DLAMINI, an adult Swazi male whose full and further particulars are to the Plaintiff unknown save that he is currently subcontracted to Du Van Developers in a construction project at Morris' place directly opposite Phondo Royal Residence in the District of Manzini.

[9] The Plaintiff sued out a summons of damages against the Defendant in which it claims payment of the sum of E62,534.94 (Sixty two thousand five hundred and thirty four Emalangeni ninety four cents) interest thereon at the rate of 9% per annum a *tempora morae* from the date of judgment to the date of final payment and costs of suit.

[10] The particulars are that at all material times hereto, and in particular on the 19th February 2003, the Plaintiff was the comprehensive insurer to Jacoba Van Der Walt to whom Plaintiff was liable for compensation in terms of an insurance policy taken out by the said Jacoba Van Der Walt with the Plaintiff on motor vehicle 002 PGT GP, being a 1998 Land Rover TD 190 under Policy No. 039081.

[11] On or about the 19th February 2003, at about 1705 hrs along the MR 103 road at or near Cuddle Puddle Hotsprings at Zulwini, a collision occurred between motor vehicle 002 PGT GP and NV 18755.

[12] At the time of the accident motor vehicle bearing registration letters and numbers 002 PGT GP was driven by the said Jacoba Van Der Walt. The vehicle bearing registration number NV 18755 was being driven by the

Defendant who was the owner of the said motor vehicle and/or the risk bearer thereof.

[13] It is further stated that the accident was caused solely by the negligence of the Defendant in one or more of the following respects:

- (a) He failed to keep a proper look out;
- (b) He failed to keep his motor vehicle under proper control;
- (c) He failed to apply brakes timeously or at all to avoid the accident.
- (d) He drove on his incorrect side of the road thereby smashing into the Plaintiff's insured motor vehicle notwithstanding that the latter drove on her correct side of the road.
- (e) He failed to avoid the accident when by exercise of the due care and caution he could and should have done so.
- (f) He travelled at a speed which was excessive in the circumstances.

[14] As a result of the said motor collision, the Plaintiff's vehicle sustained damages in the sum of E62,534.94 (Sixty two thousand five hundred and thirty four Emalangeneni ninety four cents) being the costs of repairs, alternatively

being the fair reasonable and necessary repair and associated costs for the damage occasioned to the insured's motor vehicle made up as follows:

Net claim	-	50,451.65
Excess fee	-	11,161.29
Assessors fees	-	432.00
Towing charges	-	490.00
Total	-	<u>E62,534.94</u>

[15] The Plaintiff has in terms of the insurance policy between itself and the said Jacoba Van Der Walt fully indemnified the latter for the aforesaid damage.

[16] The said Jacoba Van Der Walt has in terms of the contract of insurance between herself and the Plaintiff subrogated all rights and claims that accrued to her as a consequence of the accident, to the Plaintiff herein, with particular reference to the excess fees in the sum of E11, 161.29 (Eleven thousand one hundred and sixty one Emalangeneni twenty nine cents)

[17] The Plaintiff states that despite demand, Defendant has failed, neglected and/or refused to make payment to the Plaintiff in the total sum of E62,534.94 or any sums whatsoever.

[18] In his plea the Defendant denied that the accident was caused by him and stated that it was caused by the Plaintiff's negligence in the following respects:

- (a) The driver of motor vehicle registered 002 PTG failed to keep a proper lookout.
- (b) She failed to apply brakes timeously or at all.
- (c) She failed to keep the motor vehicle under proper control.
- (d) She drove the motor vehicle without proper care and attention in the circumstances as the road was slippery.
- (e) She drove at a speed which was excessive in the circumstances.
- (f) She drove on the incorrect side of the road thereby causing the collision between the two motor vehicles.
- (g) She failed to avoid the accident when by exercise of due and reasonable care could and should have done so.

[19] The Defendant further denied that the damage sustained by the Plaintiff's vehicle amounted to E62,534.94 (Sixty two thousand five hundred and thirty four Emalangeneni ninety four cents) and that he was liable to the Plaintiff in that amount.

[20] In the alternative the Defendant pleaded contributory negligence and the application of the provisions of the Apportionment of Damages Act.

[21] To prove its claim the Plaintiff called Ms. Jacoba Van Der Walt to give evidence which she did after taking the oath.

[22] She testified that on the 19th February 2003, she was travelling on the Ezulwini road in a white Land Rover TD 190 short wheel base with registration 002 PGT GP. She stated that because it was raining her headlights were on. Visibility was good because the rains were not thick and dense. She was travelling from west to east away from Mbabane. Her speed was 45 km per hour.

[23] Her speed was regulated by the vehicle because it has a high ground clearance and does not have the road holding capacity of an ordinary town car. It also has large tyres which are dual purpose tyres for on road and off road driving. Because of that the tread of the tyres also differs from that of a town car.

[24] She stated that the vehicle has less traction on a smooth wet surface hence the low speed as it was already raining.

[25] She stated that the accident occurred just passed the craft shop known as Thandanani. There was a pool of water which had gathered where the road dipped. As she approached it, she noticed a blue Toyota motor vehicle approaching from the opposite direction on the other side of the pool of water. It did not slow down in order to negotiate the pool of water. It struck the water and shot across to her lane. It swerved back into its own lane and swerved back in her lane for the second time.

[26] Sensing danger she applied her brakes in a gentle tap and release style but did not slam them as there were cars following her car and she did not want to cause a pile up and also for the reasons stated above about the nature of her vehicle.

[27] When the blue Toyota struck hers she was almost stationery. It struck her vehicle on the right front corner with such force that her vehicle's nose swung approximately 45° to the right. That is when she came to a standstill in her lane. She could not go to the left because there was a steel barrier on the side

of the road and there were other motor vehicles coming from the opposite direction, passing the pool of water.

[28] She came out to inspect her vehicle and found that the bull bar had bent on the right hand side into the well of the front right wheel. The bull bar had twisted the body part of the car against the wheel and she could not move the wheel. She took photographs of the damaged motor vehicle and handed them in as part of her evidence. These are at page 6 of the bundle of documents.

[29] She noted that the blue Toyota had a South African registration, N.V. 18755 and that there were two men inside, a driver and passenger. It was damaged on its right front corner and right door.

[30] She telephoned the police and car emergency services. The occupants of the blue Toyota were removed by an ambulance. She was not injured.

[31] She says the usual paper work for the police report and insurance claim followed. She received a letter from the police stating that the driver of the blue Toyota was being charged for negligent driving. See page 2 of the bundle of documents.

[32] She stated that she noted the Defendant's plea whose contents are set out in paragraph 18 supra and she disagrees with these assertions and repeats her evidence.

[33] She says that as she could not drive her vehicle it was towed by Messrs Van Wyk Towing Services who charged her E490.00 (Four hundred and ninety Emalangeni) therefor. They had to use a flatbed for that purpose as her vehicle cannot be towed in the ordinary manner.

[34] Her vehicle was later repaired. Her insurers were the Swaziland Royal Insurance Corporation (SRIC) and the insurance number was 039081 over the landrover TD 190. Her vehicle was repaired at Capital Motors her service providers.

[35] She identified the invoice from Capital Motors which is at page 7 of the bundle of documents. The invoice reflects the following:

E61,612.00	repairs
-5,000.00	H/V excess
-6,161,00	excess basic
Total	<u>50,431.00</u>

- [36] She says that she paid E5,000.00 + E616.29 = E11,161.29 and SRIC paid E50,451.65 (Fifty thousand four hundred and fifty one Emalangeneni sixty five cents).
- [37] She confirmed the subrogation of her rights to the Plaintiff including the amount of E11,161.29 (Eleven thousand one hundred and sixty one Emalangeneni twenty nine cents) reflected supra. She saw the job card and the figures reflected therein as being correct.
- [38] Bongane Simelane (PW2) testified that he was a motor vehicle assessor and had twenty year's experience. That he was qualified in motor vehicle assessment and diagnostics. It is not the first time that Mr. Simelane has appeared before me in said capacity and consequently have no query with his qualifications as stated.
- [39] He testified that during March 2003 her practiced under the name Consortium Loss Adjustors where he was a co-director with a Mr. Nditiwepi. He received instructions from the Plaintiff to assess vehicle PGT 002 GP. His partner carried out the first part of the assessment and once repairs were underway the

garage, Capitol Motors discovered more damages on the vehicle. PW2 carried out the second part of the assessment.

[40] He notified the Plaintiff of the new assessment and asked them to add the figures to the first quotation. This was done and repairs were authorised. The assessment is at page 3 of the bundle of documents and is dated 7th March 2003.

[41] Tebogo Mohapeloa (PW3) testified that he was employed by the Plaintiff in the claims department. He confirmed that the insured was Miss Van de Walt. He was shown an invoice to the Plaintiff from Consortium Loss Adjusters for the amount of E432.00 (Four hundred and thirty two Emalangeneni). He confirmed that payment therefor was released on 18th March 2003. He was shown an invoice from Capital Motor Corporation for the amount of E50,451.65 (Fifty thousand four hundred and fifty one Emalangeneni sixty five cents). He recognised the invoice and confirmed that payment therefor was released on the 15th April 2003. He also confirmed that both payments were in respect of the Landrover Defender 90TDT 002 PGT GT belonging to Miss Van de Walt.

[42] He stated that the total costs of the repairs was E61,612.94 (Sixty one thousand six hundred and twelve Emalangeneni ninety four cents) less the excess came to E50,451.65 (Fifty thousand four hundred and fifty one Emalangeneni sixty five cents) which the Plaintiff paid.

[43] He was shown the invoice from Van Wyk's Breakdown Services (Pty) Ltd for the amount of E350.00 (Three hundred and fifty Emalangeneni). He confirmed that payment therefor was released on the 12th March 2003. That registration number of the motor vehicle that was towed was 002 PGT GP.

[44] He was shown the invoice from Van Wyk's Breakdown Services (Pty) Ltd for the amount of E440.00 (Four hundred and forty Emalangeneni). He confirmed that payment therefor was released on the 18th March 2003. It too reflects the registration of 002 PGT GP.

[45] PW3 confirmed that the Plaintiff wanted payment of E62,534.94 (Sixty two thousand five hundred and thirty four Emalangeneni) from the Defendant made up as follows:

Net claim	50,451.65
Excess fees	11,161.29

Assessor's fees	432.00
Towing charges	490.00
Total	<u>62,534.94</u>

[46] He testified that the total amount was paid by the Plaintiff to Capital Motors Corporation on the 15th April 2003. Upon recovery of the full amount the Plaintiff has to refund to Miss Van der Walt the amount of E11,161,29 that she contributed as the excess. After PW3 had concluded his evidence, the Plaintiff closed its case.

[47] I am satisfied that the Plaintiff has proved its case on a balance of probabilities. I hereby make the following order. The Defendant is ordered to pay to the Plaintiff:

- (a) The sum of E62,534.94 (Sixty two thousand five hundred and thirty four Emalangeneni ninety four cents).
- (b) Interest on the said sum of E62,534.94 (Sixty two thousand five hundred and four Emalangeneni ninety four cents) at the rate of 9% per annum with effect from the 15th December 2016 to date of final payment; and

(c) Costs of suit.

MABUZA -J
JUDGE OF THE HIGH COURT

For the Plaintiff : Mr. S. Dlamini
For the Defendant : No appearance