

In the High Court of Swaziland

Civ. Case No. 1169/90

In the matter between:

Kalafata (Pty) Ltd. T/A Kalafata
Restaurant

Plaintiff

and

Atlas Motors (Pty) Limited

Defendant

CORAM:

Hull, C.J.

FOR PLAINTIFF

Mr. Flynn

FOR DEFENDANT

Mr. Currie

Judgment (Liability)

(22/11/93)

The plaintiff operates a restaurant in the industrial estate on the southerly side of Mbabane. The premises are situated on the side of a hill, immediately above the road. They share a common boundary with the defendant's business premises, on the north side. Immediately behind and above the restaurant is a funeral service, and higher up behind that are business premises that used to be those of Mbabane Engineering Company Limited.

The hill is fairly steep. To explain the present dispute, it is necessary to describe briefly the arrangements that existed, at the times to which the dispute relates, for the drainage of rainwater from the various premises.

A high, fairly long building on the defendant's property forms, in the upper north portion, the physical boundary of

the plaintiff's land. On the plaintiff's side an open drain runs down the boundary. At the top end, it is some distance away from the defendant's wall, but as it runs down the hill it gradually curves in. At the lower corner of the defendant's building, the open drain is close to the wall. There it empties into a large catchpit. These last two aspects can be seen in photograph 5 in Exhibit D1 and in closer detail in photograph 9 in that Exhibit.

In contrast, photographs 1 and 7 in the exhibit show the open drain at different points as it rises up the hill. These indicate its increasing distance from the defendant's wall.

The catchpit has two outlets. The lower one carries water back on to the defendant's property, on the lower side of its building. The higher one carries water downwards towards the road. Both of them, for the purposes of this case, carry water away from the properties to be disposed of elsewhere.

The open drain which leads rainwater into the large catchpit receives water from the defendant's roof. There is a dispute, which is central to this case and to which I will return, as to how it did so at the times to which the case relates. It also receives water from a ground pipe that discharges into it from the defendant's premises in the upper north corner of the plaintiff's land, two ground pipes above the drain which discharge water from the former engineering premises, and the roof of a lean-to on the northern side of the funeral premises.

The restaurant is built into an excavation in the hill in such a way that the rear wall of the building is hard against the excavated bank, and extends only a short distance above ground level. The roof of the restaurant slopes down toward the rear. This can be seen in photograph 5 in Exhibit D1. The photograph is taken looking down

towards the road. It also shows the lower end of the defendant's wall, as well as the lower end of the open drain that I have already mentioned, as it reaches the large catchpit.

Another shallower drain runs along the back of the restaurant. It runs the full length of the rear wall, but roughly half way along there is something of a ridge or a high point. The effect of that is that water which falls off the roof to the south of that high point is carried away to the south, as is water falling on the funeral premises to the southerly side of the ridge.

The water which runs off the northern part of the restaurant roof to the rear of that building is carried to the north in the drain, which then turns east parallel to the lower end of the other open drain, and drops steeply down to a smaller catchpit, which is below and to the south of the large catchpit.

The course of this smaller drain and the smaller catchpit can be seen in photograph 1 in Exhibit D2 and in photographs 5, 6, 13, 14, 15 and 7 in Exhibit D1.

It can be seen from these photographs that as the smaller open drain comes around from the rear of the restaurant, it passes above and around a flight of open steps that run up the north side of the restaurant, and then descends to the small catchpit on the northern side of the steps.

The smaller open drain also receives rainwater from the roofs and the land of the funeral premises lying to the north side of the high point or ridge, at the rear of the restaurant, that I have referred to.

At the bottom of the steps, the restaurant has an open storage yard enclosed by meshed wire. This can be seen in photograph 17, in Exhibit D1.

It is not in dispute that during heavy rains on 12th January 1990 and again on 2nd April 1990, the plaintiff's restaurant was flooded by rain water that entered a door within the open enclosure, and then passed through an inside storeroom and the kitchen into the lower restaurant, with the water level reaching the height of a person's knee. I do not think it is really in dispute either that as a result of these two floods, the plaintiff suffered damage in the ways and to the extent described by its managing director in her evidence.

The issue in the case is to how these floods were caused. The plaintiff contends that the defendant negligently allowed rain water to overflow off its roof along its boundary with the plaintiff's land, and that this resulted in the flooding of the restaurant. It is saying, to put it another way, that if the defendant's roof had been properly guttered and provided with drain pipes (as the plaintiff says it now is), then neither of the floods would have occurred, that by failing to provide proper guttering and drainpipes, the defendant caused the floods, and that in not providing them, the defendant was negligent.

The plaintiff has the onus of proving that allegation on a balance of probabilities.

Two witnesses were called on its behalf.

Mrs. Hlatshwayo, the managing director, said that in 1990, stormwater from the defendant's roof ran off it into the large open drain on the property. Before the second flood, the roof was unguttered on that side. It overlapped the building significantly. She said that it extended to such a degree that the water that fell from it landed outside the drain. Her evidence in chief was that instead of running into the drain, the water ran down the ground ending up in her yard. By "yard" I understood her to refer to the area of the open enclosure. On 12th January it ran on from the

yard into the inside store room, causing the flooding. She estimated that it continued to run in from about 3.30 p.m. until about 6 p.m. On 2nd April, a similar flood occurred. Again the water flowed off the defendant's roof into the restaurant.

After the second flood she and her attorney met with a Mr. De Sousa, who is the defendant's financial manager. He inspected the side, concluded that the roof was overlapping the drain, so that the water fell beyond it, and undertook to repair it. Soon afterwards, the defendant had about half a meter trimmed off the roof. It installed a gutter along the length of the wall, with two down pipes. This gutter, and the down pipes, which Mrs. Hlatshwayo said were installed after the flooding, can be seen in photograph 14 of Exhibit D1. Photograph 1 in the exhibits shows the continuation of the guttering around the corner at the lower end of the building. Whereas it is flat against the wall on the southern side, it is in fact further out on the lower eastern side, being attached to the overhanging eave that is on that side. It can also be seen that it is only the end of the lower side that is at the corner that has this continuation of the guttering. The greater length of the eastern side is unguttered, and overhangs, as does the northerly side. The overhang on the northerly side is in fact quite extensive.

Mrs. Hlatshwayo testified that since the roof was guttered, no further floods had occurred. The down pipes lead the water into the drain. When the floods had occurred, it had not been possible for the water to run into the large catch pit. It ran outside it, taking a different route, and finding its way into the restaurant.

In cross-examination, she said that she had seen the water coming from the defendant's property into her storeroom and that it was the only water that did so.

Mr. Currie then questioned her as to whether her own drain often become clogged. She denied this and said that it was always kept clean. Counsel then showed her photographs 10 and 8 in Exhibit D1, which show debris and rubbish in the large catchpit and the water level a little way above the position of the grid in the pit, which is perhaps one third of the way down it. She agreed that that kind of thing sometimes happened but said that nevertheless someone would clear it.

Mrs. Hlatshwayo denied that water had come into her storeroom from the small catchpit, saying that only a small amount flooded down that drain.

In re-examination, she said that although the catchpits were normally cleaned daily, they were sometimes cleaned every second day, and that she had never seen them overflow as a result of being clogged.

The second witness for the plaintiff was Mrs. Lessiah Dlamini, who was an employee in charge of the restaurant.

She testified that on 12th January 1990, it had rained from about 2 or 2.30 p.m. until about 5.30 p.m. She said that when the water began to flow into the restaurant, she went outside to have a look at the source of the flooding. When she did so, she saw a large amount of water coming off the defendant's roof, and falling beyond the open drain leading to the large catchpit. It flowed towards the steps and on towards the door, i.e. to the storeroom.

In cross-examination, the witness said that the defendant's roof overlapped the larger open drain at the time of the flood, and that it had no guttering or down pipes.

She also said that the water from the restaurant's roof could easily be taken into the smaller catchpit, and that what she had seen was a big quantity of water falling from

the defendant's roof beyond the large open drain, on to the steps and then into the storeroom. She did not see it coming from any other source, but did not know, however, if there had been other sources because the rain had been very heavy.

In answer to a question that I put to her, Mrs. Dlamini said that she could not tell if the smaller catchpit was overflowing because of the large volume of water. She had not noticed water spilling over the bigger catchpit but only from the top, by which I understood her to be referring to water coming from the defendant's roof.

For the defendant, Mr. Jose Rodriguez testified that he was the company's general manager, and had been with it for eighteen years. He testified that the guttering and down pipes on the south side of its building had been there for more than four years. He added that it was close to five or six years - and that they had definitely been there before 1990.

In cross-examination he said that Mr. De Sousa, as the financial manager, had been dealing directly with the plaintiff and attorneys. Mr. Rodriguez was aware that he had met with Mrs. Hlatshwayo and her attorney, but was not sure where. The general manager said that he was not aware that his company had agreed to repair its roof and gutters, and he did not think that such an arrangement had been made. He did however remember that there had been some discussion about repairs to the building as a result of a meeting between Mr. De Sousa and Mrs. Hlatshwayo, but there had never been any alterations afterwards, and nothing had been decided. The witness said that he was not familiar with the overlapping of the roof, and that he did not know anything about part of it having been cut off. He confirmed that Mr. De Sousa still worked for the defendant.

Mr. De Sousa was not called as a witness for the defence.

Mr. Bagshaw, an insurance assessor for the Swaziland Royal Insurance Corporation, produced and described the series of photographs he had taken which are contained in Exhibits D1, D2 and D3. He had taken them on different visits to the locality, after the two floods.

Referring to photograph 8 in Exhibit D1, he said that at the time the photograph was taken, the pit depicted was full of rubbish which was obstructing the flow of water. Photograph 9, which also depicted this, had been taken on a different day.

He also said that the photograph marked 3 in the second numerical sequence in Exhibit D1 showed the smaller catchpit full of debris.

Exhibit D2 included a series of photographs that he had taken after heavy rain had fallen in the late afternoon of 21st March 1991.

Photographs 2, 3 and 4 in this exhibit showed debris on the steps and photograph 5 showed the larger catchpit. Further photographs in this exhibit showed debris in the smaller catchpit on a later visit.

Exhibit D3 contained a series of photographs showing debris and silt in the drain, and in the small catchpit, and around them on a further visit.

The defendant also called Mr. Duncan Little, a civil engineer in private practice of many years standing, whose specialisation was public health or environmental engineering, including water engineering.

He testified that he had been asked to report on the rainwater falling around the plaintiff's premises with particular reference to the flow of water onto and off the property.

He described the system of drainage that I have already recounted, noting that because Mbabane Engineering Company Limited was built with impervious materials, the plaintiff's land accepted a run-off of almost 100 percent of the water falling there and draining into the plaintiff's property.

Mr. Little said that on his first visit, there had been a lot of waste material in the large catchpit. Waste material would tend to block its outlet and create a risk of overflowing.

He had calculated the capacity of the large catchpit to accept and drain rainwater. By his calculations, assuming a cloudburst of a severity that would be likely to occur only once in every hundred years, the volume of storm water flowing into the large catchpit would be smaller than its capacity to discharge water through its outlet. He also considered, on the basis of an educated estimate based on his experience rather than by precise calculation, that the smaller catchpit would also cope in these conditions with the water that fell into its catchment area. He considered that the amount of water that came off the defendant's roof was relatively small. In his evidence in chief, he thought that it was very unlikely that it could lead to knee-deep flooding in a store room.

Mr. Little also said that his conclusion assumed that the outlets were unblocked. He was saying, in effect, that they would not necessarily carry the water load if they were blocked.

In cross-examination, he said that he based his calculations in respect of the large catchpit on the premise that all the water from the defendant's roof would fall into the larger open drain. It would have done so, in his opinion, if the overhang had not exceeded 800 millimetres. If it extended further than that, the water could be directed somewhere

else. If there were a major downpour, in that event, it could go over the steps along with water from the funeral premises, but the quantity would be relatively small compared with the water from the funeral service and the restaurant roof. However, although the water from the defendant's roof might wet the floor of the restaurant, he did not think it would cause knee-deep flooding. Mr. Little said that he was prepared to concede that Mr. Flynn's hypothesis, i.e. the plaintiff's allegation, could have a contributory effect, but he thought it would be a relatively minor one.

Mr. Flynn then proceeded to elicit from the witness that he had thought that the flood had occurred in the restaurant's storeroom. He would need to know (but had not seen) the layout of the lower restaurant to decide whether it could be flooded. He had not taken that into his calculations.

Mr. Little thought that in a severe storm, some of the water coming from the restaurant roof and the funeral premises would probably overflow on to the steps, i.e. from the drain leading to the smaller catchpit. At that point in his cross-examination, he also said that he thought a small amount of the water from the restaurant's roof would run the other way, i.e. to the south.

After Mr. Little had given his evidence, a second view of the site was taken. Thereafter he returned to the witness to confirm things he had indicated at that view. In answer to further questions by Mr. Flynn, he agreed that he had not realised earlier that the southern portion of the smaller open drain carried off almost half of the water from the restaurant roof, i.e. to the south.

Mr. Little thought that the defendant's guttering and pipes were probably about 6 or 7 years old, but said that they could have been put up in 1990 if, for example, they had not been adequately primed.

I understand the plaintiff's case, as it was put, to depend on the fact (if that is the case) that at the time of the floods the guttering and down pipes that are now on the south side of the defendant's building were not there. If they were in place, then as I understood it, the plaintiff would not contend that the defendant was negligent. Its position would be that the flooding would never have occurred because that gutter and the pipes would have coped (which was also the view of Mr. Little). It was because the roof extended so far beyond the wall of the building, and lacked any kind of guttering, that the floods did occur and, it is alleged, the defendant was negligent in failing to foresee this and to take steps to prevent it from happening.

Only three of the witnesses who were called were in a position to claim to be able to say whether the roof lacked guttering, and extended significantly beyond the south wall, before the flood.

Mrs. Hlatshwayo and Mrs. Dlamini both said that that was the case. They went further than this, and said that it was because of this that the water from the defendant's roof was dropped beyond the larger open drain. They asserted that they saw these things. Mr. Little's evidence was that if the gutter and down pipes had been in place, it would not have done so.

Mrs. Hlatshwayo also said that it was only after the flood, but soon afterwards, following her meeting with him, that Mr. De Sousa had the overhang cut back and the gutter and pipes installed.

Mr. Rodriguez said that the gutter and pipes were in place before the floods.

On consideration, for a combination of reasons, I have come to the view that I prefer the evidence of the plaintiff's

witnesses to that of Mr. Rodriguez as to whether the pipes and gutter were in place. I believe that the two women are probably telling the truth.

Neither of them appeared to me to be an evasive or otherwise unconvincing witness. They both described what they saw during the floods. None of the other witnesses actually observed the flooding as it occurred. Mrs. Hlatshwayo did describe in some detail the way in which the water came over the roof on to her land. Mrs. Dlamini described it as coming over the roof along the line of the roof.

The defendant's roof in fact slopes from north to south. It is a fairly large expanse of roof, and it appeared to me to be evident that allowing for a measure of spillage on each side, most of the water would run off towards the wall on the south side.

Although at the higher end the large open drain does curve away to the south, until it is a good distance from the wall, the lower part of the drain - for more than a third of its length, and perhaps as much as half of it - is very close to the wall. The roof would not have to extend out unduly - no more, I think that it does on the opposite northern face - to reach beyond the drain. It also appears to me that if it did so, then in very heavy rain, (as the women say happened, and as Mr. Little acknowledged as a possibility) if the overhang was far enough, the run-off from the roof along a significant portion of its length might well be deposited clear of the drain, and might then run down in the direction of the smaller open drain, beyond which lie immediately the steps.

It is, I think, a matter of common experience that flooding tends to occur during or as a result of heavy rain. The evidence of the witnesses in this case who saw the flooding was that the rain was heavy and prolonged at that time.

If Mr. Rodriguez' version is correct, then Mrs. Hlatshwayo and Mrs. Dlamini have made up their account that the defendant's roof used to extend, unguttered, beyond the large drain. At the risk, perhaps, of being misunderstood as to my views on the difference between the sexes, it does not strike me as the kind of scenario that a woman, even a business woman, would readily think of. That particular thought is no doubt something that I should entertain with a good deal of caution. On the other hand, Mr. Rodriguez did not deny, but on the contrary to a degree confirmed Mrs. Hlatshwayo's testimony that she met with Mr. De Sousa after the flood to discuss repairs to the defendant's roof.

Although there was a considerate gap between the time when Mrs. Hlatshwayo give her evidence in chief in which she testified as to those discussions, and her own cross-examination and the calling of the other witnesses in the case, Mr. De Sousa was not called to give evidence for the defendant, even though he was available to do so. With respect, I do not think it was incumbent on the plaintiff to call him.

On Mr. Rodriguez' own account, the guttering and down pipes had not always been in place. He himself put their installation on the other side of the floods - but not too far removed from them. Mr. Bagshaw did refer to them as appearing to be very old (or in those terms), but on the general manager's version they were not old in any case. Mr. Little acknowledged the possibility that they could have been installed in 1990, notwithstanding their apparent corrosion.

I do think that the failure of the defendant to call Mr. De Sousa does weigh in the plaintiff's favour. Accepting that Mr. Rodriguez is a person who does know when the guttering and down pipes were installed, he was not by his own account someone who could assist in this case by saying what Mr. De Sousa did or did not agree to. Mr. Rodriguez is the general manager of the defendant. The plaintiff's assertion that

Mr. De Sousa acknowledged that the roof was the problem, and had it repaired, has been known to the defendant for a considerable time. In those circumstances, I do not find Mr. Rodriguez' apparent lack of positive information about what Mr. De Sousa (his financial manager) discussed very convincing at all. I do not find it easy to understand, either, why Mr. De Sousa was not called as a witness for the defendant, unless the reason is that he would have found himself unable to deny on oath Mrs. Hlatshwayo's version of events.

For all of those reasons, I conclude that Mrs. Hlatshwayo and Mrs. Dlamini were probably telling the truth when they testified that at the time of the floods, the defendant's roof extended beyond the large drain (at least for a significant length of it) without guttering or down pipes - and that they were probably telling the truth when they said that the water from the defendant's roof fell beyond the large drain on the days in question.

It was not in issue in this case that if the defendant had allowed its roof to overhang the large drain in that way, without guttering and drain pipes, then it was in breach of its duty of care to the plaintiff.

There is nevertheless still a question as to whether the plaintiff has proved that the flooding of the restaurant occurred in consequence of the defendant's breach of that duty - in other words, whether the discharge of water from the defendant's roof in fact was the cause of the flooding. The plaintiff has the burden of proving this, in itself, in order to succeed.

In this respect, the defendant has put in issue whether or not the greater volume of the water coming on to the plaintiff's premises came from the former premises of Mbabane Engineering Company Limited, which water caused the flooding.

It has also put in issue whether or not the real cause of the flooding was the plaintiff's own negligence in allowing the drainage channels and the catchpits to become blocked by debris.

In addition, it has put in issue whether in any event the plaintiff's negligence in failing to keep the drains and catchpits free contributed to the flooding.

The plaintiff's evidence, from the two women who testified on its behalf, was that the water coming off the defendant's roof passed down on to the steps and from there into the restaurant, causing the floods. Mr. Little acknowledged that this was a possibility. Not having seen the layout of the restaurant, he was not in a position to deny that flooding to the extent described by the women could have occurred in that way. Mrs. Hlatshwayo also testified that since the installation of the gutter and down pipes, the plaintiff's premises had not been flooded. Mr. Bagshaw testified that there were very heavy rains in 1991 which had led him to take further photographs.

On that evidence, subject to the issues raised by the defendant on this question of causation, there is in my view prima facie evidence that the floods in the restaurant were caused by water coming from the defendant's roof.

There is no evidence that raises a live issue that the flooding may have been caused by water coming from the Mbabane Engineering Company Limited.

There is no direct evidence that at the time of each of the floods, the plaintiff had allowed the drains and the catchpits to become blocked. Mrs. Hlatshwayo denied that it allowed this to happen.

The defendant's plea that this caused or contributed to the flooding depends on inferences to be drawn from observations

made by Mr. Bagshaw, and to a degree by Mr. Little, on their visits to the site after the floods; on their evidence that at times the catchpits, and in some measure the drains, in fact had debris in them; on Mr. Bagshaw's evidence, and from the photographs produced by him, that in the case of the larger catchpit there was at times a considerable amount of debris that caused water to gather in the catchpit above the grid; and on Mr. Little's evidence that debris could affect the ability of the catchpits to cope with the run-off.

The inference that I am invited to draw is that if that were the case after the floods, then it may well also have been so before each of them - and that bearing in mind the onus of proof, the plaintiff has not, having regard to these facts, shown that the flooding was probably caused, or was probably caused only, by the water coming off the defendant's roof.

The evidence does in my view establish that at times significant quantities of debris did accumulate in the catchpits. It does not appear to me that any refuse that is shown to have gathered in the open drain was of any real significance. Nevertheless, Mr. Hlatshwayo (after being shown the photographs) did acknowledge that debris was allowed to accumulate for more than one day. On the evidence, I myself think it is probable that it sometimes accumulated for rather longer than that. I am not satisfied that it has been shown that the catchpits were probably cleaned out every second day at least.

Although I keep in mind the onus of proof, the evidence does not demonstrate that debris was allowed to gather to the point where the catchpits overflowed. The evidence that was led to show that debris did gather in the drainage courses and catchpits does itself also show, or indicate, that steps were taken to clear them periodically.

Mrs. Hlatshwayo's evidence was that the courses and catchpits were from time to time cleaned out. She said that

on the days in question, the flood water came from the defendant's roof. Mrs. Dlamini did say that she was unable to tell, on the day about which she gave evidence, whether some of the flood waters were coming from the smaller catchpit, but she was also saying that the flooding stemmed from the defendant's roof. The subsequent observations of Mr. Bagshaw and Mr. Little do raise some doubts in my mind, but in the end, in the context of this case, these are really matters of speculation.

No further flooding has occurred since April of 1990, despite heavy rain on at least one occasion. The plaintiff has in my view shown that the water from the defendant's roof probably caused the floods.

I therefore find that the defendant did negligently cause the flooding complained of.



DAVID HULL
CHIEF JUSTICE

(The case was then postponed to 9.30 a.m. on 26th November 1993 for judgment on damages, interest and costs).