



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 771/2010

In the matter between:

GERALDINE PHINDILE DLAMINI

PLAINTIFF

and

NORAH GINIDZA

DEFENDANT

Neutral Citation : Geraldine P. Dlamini vs Norah Ginindza (771/10) [2018]
SZHC 58 (02 OCTOBER 2018)

Coram : MABUZA – PJ

Heard : JUNE 2017; OCTOBER 2017; NOVEMBER 2017.

Delivered : 02 OCTOBER 2018

SUMMARY

Civil Law: Law of Delict – Plaintiff’s claim is for damages to her motor vehicle as a result of a road traffic accident - Accident due to sudden emergency – Plaintiff fails prove Defendant’s negligence on a balance of probabilities – Plaintiff’s claim dismissed – Each party to pay its own costs.

JUDGMENT

MABUZA -PJ

- [1] The Plaintiff is Geraldine Phindile Dlamini an adult female Swati of Sigombeni area, Manzini District.
- [2] The Defendant is Norah Ginindza an adult female Swati of Mkhuzweni area, Manzini District.
- [3] The Plaintiff has sued the Defendant for payment of the sum of E70,000.00 (Seventy thousand Emalangen) in respect of damages to her motor vehicle as a result of a road traffic accident. She has also claimed interest at the rate of 9% per annum, costs of suit and further and or alternative relief.

[4] In her particulars of claim she states that at all material times she was the owner of a certain motor vehicle an Isuzu with registration number SD 593 PG there and then driven by Sicelo Dlamini.

[5] And that at all times material hereto Defendant was the owner and/or driver of certain motor vehicle to wit, Nissan Navara with registration number SD 548 VN there and then driven by Defendant.

[6] That on or about the 15th August 2009 and at or near Kai Kai Motel, along the MR 3 public road a collision occurred between Plaintiff's motor vehicle and Defendant's motor vehicle aforesaid.

[7] The Plaintiff alleges that the collision was caused by the negligence of the Defendant who was negligent in one or more of the following respects:

7.1 She failed to keep a proper look out.

7.2 She was driving the motor vehicle at an excessive speed in the circumstances.

7.3 She failed to control the motor vehicle and to avoid the collision when by the exercise of reasonable skill she could and ought to have avoided it.

7.4 She failed to exercise due care and skill.

[8] As a result of the collision Plaintiff's motor vehicle was extensively damaged

such that it was deemed uneconomical to repair.

[9] The pre-accident value of Plaintiff's motor vehicle was the sum of E70,000.00

(Seventy thousand Emalangeni) and that the salvage value of the wreckage was negligible.

[10] And that in the circumstances the Plaintiff alleges having suffered damages in the sum of E70,000.00 (Seventy Thousand Emalangeni) being the pre-accident value of the motor vehicle and that despite demand the Defendant refuses and/or neglects to make payment to Plaintiff in the sum of E70,000.00 or any sum at all.

[11] The Defendant in her plea denies that she was negligent as alleged in paragraph (7) hereinabove or at all.

[12] She pleads that when the collision occurred between her motor vehicle and that of the Plaintiff:

- (a) **Her motor vehicle was at a standstill and she was on her correct side of the road;**
- (b) **She had been involved in an earlier collision, as a result of which she brought her motor vehicle to a complete standstill;**
- (c) **Thereafter, the Plaintiff's motor vehicle came and knocked hers.**

Alternatively, she pleads, that the earlier collision placed her in a state of sudden emergency.

[13] The Defendant does not deny that the Plaintiff's motor vehicle was damaged beyond repair. She denies that the pre-accident value of the motor vehicle is E70,000.00 (Seventy thousand Emalangeni) and puts the Plaintiff to the proof thereof.

[14] She also admits that she refused to pay the amount of E70,000.00 (Seventy thousand Emalangeni) and avers that she is not in law liable to pay the said amount or any part thereof.

[15] A trial of the matter was held wherein the parties led oral evidence in support their respective positions. The Plaintiff led three witnesses and the defence one, herself.

[16] The Plaintiff's first witness was Sicelo Dlamini (PW1). He testified that on the 15th August 2009, he was driving along the Siteki-Manzini public road. He was driving towards Manzini in an Isuzu Twin Cam SD 593 PG. The motor vehicle is owned by the Plaintiff.

[17] PW1 says that he was travelling in the slow lane and was following a truck. There are two lanes towards Manzini, a slow lane and fast lane. There is only one lane towards Siteki.

[18] He says that a car which was travelling on the fast lane overtook him and the truck. This was soon after passing a restaurant called Kai-Kai.

[19] This car disturbed traffic coming from Manzini as a portion of it straddled the solid white line thereby encroaching on the oncoming lane.

[20] He stated that after this car had passed the truck another motor vehicle from the Manzini direction came straight to his car and collided with it on the

driver's side. His car was forced off the road due to the impact, overturned and landed on its left side outside the road. The aforesaid motor vehicle left its lane, crossed the fast lane and collided with his motor vehicle in the slow lane.

[21] He found out later that the driver of the aforesaid motor vehicle was the Defendant Norah Ginindza. She was driving motor vehicle SD 548 VN.

[22] He later learned that the motor vehicle which had overtaken the truck was driven by a male by the name of July Dlamini.

[23] He says that he was travelling at a speed of about 50 km/hour. And that the Defendant's motor vehicle was bumped by July Dlamini and due to that impact it travelled fast towards his motor vehicle and collided with the vehicle driven by him.

[24] He testified that the weather was fine and it was clear. The time was about 1900 hrs as the vehicles had their lights on. PW1 says that he witnessed the collision between July Dlamini's car and that of the Defendant.

[25] PW1 says that the Plaintiff's car was damaged extensively mainly on the driver's side. And that when a valuation to repair it was sought, they were advised that repairing it would cost more than its value. He says that the Defendant's car was damaged on the driver's side. And that from his observation the Defendant was unable to control her car.

[26] When he was cross-examined it was put to him that he collided with the Defendant's car. His car drove straight to hers. He denied this and maintained that she collided with him.

[27] It was put to him that Defendant would say that after July collided with her motor vehicle she came to a standstill because she was in shock.

[28] His response was that Defendant's car drove towards his lane and only came to a stop after it had hit his car.

[29] He further testified that the police came to the scene and recorded statements as to how the accident had occurred including a statement from him.

[30] Asked if he knew if anyone had been charged for the accident, he responded that July Dlamini had been charged but that no one was charged for the accident involving his car.

[31] He was asked if he knew that the Defendant was with a passenger and his response was that he got to know about the passenger later. He was informed that the passenger would testify that it was PW1 who had collided into the Defendant's motor vehicle.

[32] Through her lawyer, the Defendant denied failing to keep a proper look out, that she drove her vehicle at an excessive speed, that she failed to control her motor vehicle and to avoid the accident when by the exercise of a reasonable skill she could and ought to have avoided it nor that she failed to exercise due care and skill.

[33] Generally she denied that the collision was caused by her negligence and said that after July Dlamini had collided into her car she was unable to do anything until she crashed into PW1's vehicle. PW1 maintained his position that it was the Defendant who was negligent and was the cause of the accident. He says that the Defendant could have applied her brakes and

stopped the car on the centre lane. She could have swerved towards her left even though there was little space there.

[34] The second witness was the Plaintiff, Geraldine Phindile Dlamini (PW2). She testified that she was the owner of the motor vehicle SD 593 PG an Isuzu Double Cam.

[35] She further stated that this motor vehicle was involved in a road traffic accident on the 15th August 2009. She was not the driver. The driver was Sicelo Dlamini. She had given Sicelo Dlamini permission to drive the aforesaid motor vehicle.

[36] It was Sicelo Dlamini who later reported to her that the motor vehicle had been involved in a road traffic accident. It was not insured.

[37] After the accident, the motor vehicle was towed to the Manzini Police Station.

[38] She stated that she went to Magnum Car Repairers to obtain a quotation for her car to be repaired. The owner of the Magnum fetched an assessor from

Lombewu Investment Motor vehicle assessors and took him to where the car was where it was found that the car was badly damaged and was a write off.

[39] Mr. Magwaza (PW3) an assessor from Lombewu Investment assessed her motor vehicle.

[40] Mr. Magwaza prepared a report in which he advised PW2 that repairing her car would be very expensive and would cost more than the value of the car.

[41] She stated that Mr. Magwaza advised her that the pre-damage value in respect of her car was E60,800.00 (Sixty thousand eight hundred Emalangeni).

[42] She however, wanted the sum of E70,000.00 (Seventy thousand Emalangeni) as claimed in the summons. She stated that the reason that she claimed more than the E60,800.00 (Sixty thousand eight hundred Emalangeni) was because she had factored in the cost of towing the car from the scene of the accident to the police station, her travelling expenses to the police station and the cost of removal from the police station to where it was ultimately kept. She did not state these amounts but said it would be the

difference between E70,000.00 and E60,800.00 which totaled equalled E9,200.00.

[43] She stated that the car was damaged on its right side, on the driver's side, the roof top as well as the right wheel on the driver's side.

[44] She stated that the body of the car was sold after three years for E12,000.00 (Twelve thousand Emalangi) and that this amount could be deducted from the amount of E70,000.00 (Seventy thousand Emalangi).

[45] Nothing much turns on her being cross-examined as she did not have any details about the accident except what she had been told by Sicelo Dlamini.

[46] Mr. Magwaza (PW3) next gave evidence. He testified that he assessed the damage on the car and recorded his findings in a report which he handed in as (Exhibit A).

[47] He confirmed that he inspected the car on the 20th May 2010, that the book value was E60,800.00 (Sixty thousand eight hundred Emalangi) that it retailed at E66,600.00 (Sixty six thousand six hundred Emalangi) and that

the trade in value was E55,000.00 (Fifty five thousand Emalangeni). The report is supported by photographs of the motor vehicle.

[48] The summary states the damages on the vehicle as follows:

“Bonnet, R.H. Fender, rear Fender, steering geometory, windscreen. Front suspension, front right tyre, rim, front bumper, alternator, radiator, fan, air con, cab both head lamps, passenger mirror, driver’s mirror, door air cleaner housing fuse box. That is a write off-(salvage).”

[49] Mr. Magwaza confirmed his findings in oral evidence and that the car was a write off. Thereafter the Plaintiff closed her case.

[50] The defence case opened with Hlelisiwe Norah Ginindza (DW1) giving evidence. She testified that on the 16th August 2009 she was driving along the Manzini – Siteki main road. At or near Kai Kai area the road sloped downwards. She slowed down and travelled at 60 km/p as she was getting ready to turn to her home. The turn-off to her home is at Helehele where she turns right.

[51] While preparing to turn, her car was hit by another smaller car which was exiting Kai - Kai Restaurant and entering the main road. Her car came to a standstill. While stationary, it was hit by a car coming from Siteki direction SD 593 PG. That car struck hers on its right side went past it and overturned a distance away and landed upside down. The smaller car stopped for a short while behind her but then it left. The driver was later charged with drunken driving.

[52] She testified that after the second car had struck her she could no longer drive as her right side was in pain. Some people helped and she was later taken to hospital by her son.

[53] Her lawyer Mr. Mabuza put the Plaintiff's case to her, namely that the collision was due to her negligence in that she failed to keep a proper look out, that she drove at an excessive speed and failed to control the motor vehicle and to avoid the collision and that she failed to exercise due care and skill.

[54] She denied these allegations and stated that she travelled at a speed of 60 km/h because it was downhill and because she was about to turn right she

had to slow down which she did. Furthermore as her car was heavily loaded she could not drive at an excessive speed. She stated that the first vehicle damaged her right side and that when the second vehicle struck hers she was stationary.

[55] She further stated that her vehicle was stationery with its lights on when SD 593 PG collided into her car and that because of this it was the Plaintiff who was negligent and not her.

[56] She stated that the police did not charge her for negligent or reckless driving. Instead they charged July who was the driver of the first car.

[57] She stated that it was quite clear that there was an accident ahead where the Plaintiff was driving from. She stated that she could not have swerved left because there was only a footpath on the left and no space and her car would have overturned.

[58] She denied any liability for the claim of E70,000.00 (Seventy thousand Emalangeni) in respect of damages claimed by the Plaintiff because her vehicle was stationery when it was struck by the Plaintiff's vehicle.

[59] She stated that her vehicle was damaged beyond repair but she did not sue the Plaintiff because she realized that the owner was a woman otherwise the Plaintiff's driver was at fault. She stated that as her vehicle was new it was the Plaintiff who owed her money in respect of damages. Finally she asked that the Plaintiff's claim be dismissed with costs.

[60] In cross-examination she was asked if the police had arrived on the scene and she agreed. Because she was injured she had to go to the hospital and the police interviewed her there. That her passenger, Tebenguni Simelane was also interviewed.

[61] The contents of the police report that she did not stop but merely swerved were put to her. Her response was that the police report was incorrect, she had stopped.

[62] Asked if the first car that hit her had turned into the road from Kai Kai she responded that she could not say as she was shocked. She agreed that Kai Kai was ahead of her and that she was very close to the Kai Kai exit.

[63] She was asked when the first vehicle hit hers had it first turned into the road or was it a distance into the road. She responded that she was not in a position to have seen that. When it was put to her that the first vehicle was not exiting Kai Kai she responded that she was not in a position to answer as she was injured during the accident and could not say whether or not it had recently existed or not.

[64] It was put to her that she had stated in her evidence in chief that July hit her while he was turning into the road. She responded that she was not in a position to tell if he had just exited as it was at night and she was also driving. However, she was sure that the vehicle was from Kai Kai.

[65] It was put to her that at the time that July Dlamini collided with her car, he was overtaken by a truck which was travelling on the slow lane and had encroached upon her lane towards Helehele. Her response was that she did not know anything about a truck she just felt it when her car was collided with.

[66] She was referred to the police report paragraph 3 which reads:

“Investigation revealed that the driver of motor vehicle SD 787 IN caused the accident by overtaking a truck that was heading towards Manzini direction and the motor vehicle failed to use the middle lane after overtaking the truck, but it went to the lane coming from Manzini. Nissan Navara which then tried to avoid going out of the road on the left side when going down to Helehele, the driver of the Nissan Navara swerved it to the right side and eventually went as far as the far lane going up to Manzini from Helehele direction where the motor vehicle collided with motor vehicle SD 593 PG an Isuzu which was coming from Helehele direction towards Manzini thus moving it out off the road”.

[67] Thereafter she was asked in which of the three lanes she stopped. Her response was that she stopped on the left lane that she had been using.

[68] It was put to her that after the first impact her vehicle swerved and moved to the lane to Manzini. Her response was that that was not true. It was put to her that after swerving into the lane to Manzini, her vehicle collided with the Plaintiff’s vehicle and went onto the third lane going towards Manzini. Her response was that was incorrect, her vehicle was stationery in the lane towards Helehele. And that there was no way that the other car would have hit the right lamp of her vehicle if it had done what counsel was putting to her.

[69] She was reminded that when her lawyer cross-examined Sicelo Dlamini, he put to him that the accident created a sudden emergency. And the defence of sudden emergency is used to excuse a driver who panics in a situation. Her response was that she had informed her lawyer that her car had come to a stop and that she did not agree that she panicked because she applied her brakes and did not drive into the lane towards Manzini.

[70] She was asked where the Plaintiff's car landed after the collision and she replied that it landed on the grass on the other side of its lane. She further responded that the Plaintiff's car hit hers on the front side, overturned and landed on its lane towards Manzini.

[71] Asked if she had seen the extent of the damages on the Plaintiff's car, she said she had not because she was also injured.

[72] It was put to her that the Plaintiff's car landed on its right side because hers had collided with it. She responded that it had overturned because it was speeding when it collided into hers.

[73] She was asked how it was not possible to see July Dlamini's oncoming vehicle as she had a full view of the oncoming cars if she had been paying attention to the road at the time. She responded that she was paying attention but it was not possible to see July's car because it was already dark.

[74] She was asked if she had applied her brakes as July's car was right in front of her. She replied that she could not remember because she was travelling at night and had to concentrate on her driving when all of a sudden she felt the impact of the other car when it collided into hers.

[75] It was put to her that July's car hit the back of her bakkie causing her to slide across the road. She denied that he hit the back of her bakkie.

[76] She was asked why she did not counterclaim against the Plaintiff if she was convinced that the driver of the Plaintiff's car was the cause of the accident. Her response was that it was because her car was insured. It was put to her that she did not claim because she knew that she was at fault. She disagreed stating that if that were the case the police would have charged her.

[77] She was informed that the Plaintiff's motor vehicle was valued at E60,800.00 (book value) and E66,600.00 (retail value). She stated that she had nothing to say in respect of the value except that she was not negligent as her car was stationary.

[78] Thereafter the Defendant closed her case without calling her passenger as her lawyer had earlier intimated that she would do.

[79] The police report which had been discovered was formally handed into court as part of Exhibit A. The contents thereof are reproduced hereunder:

“1. On Saturday the 15th August 2009 at about 1900 hours at or near Kai Kai along MR3 public road, a motor vehicle Hyundai sedan SD 787 IN, CC. 10830 year 4/2009 that was driven by July Dlamini S.M.A. 51 years of Matsapha knocked a Nissan Navara registered SD 548 VN, CC.11816 year 4/2009 that was driven by Norah Ginindza S.F.A. 60 years of Mkhuzweni area and it went on to knock motor vehicle SD 319 XN, CC. 12685 year 4/2009 on the right side that was driven by Sibongile Malindzisa S.F.A. 41 years of Mzimpofu. The motor vehicle SD 787 IN further collided with motor vehicle SD 461 XN, CC. 07698 year 4/2009 that was driven by Phillip Mazibuko S.M.A 36 years of Tshaneni area. In the process motor vehicle SD 548 VN collided with motor vehicle SD 593 PG, CC. 11816 year 4/2009 that was driven by Sicelo Dlamini S.M.A. 27 years of Sigombeni area. The motor vehicles were extensively damaged mostly motor vehicle SD 787 IN, SD 548 VN, SD 593 PG and motor vehicle SD 461 XN.

2. The accident was reported to the Manzini Police whereby they attended to the scene of accident and upon arrival they found that five motor vehicles were involved, SD 461 XN, SD 548 VN, SD 593 PG, SD 319 XN and SD 787 IN. All the motor vehicles were driven along MR 3 public road; SD 787 IN and SD 593 PG were driven from Hhelehhele towards Manzini while SD 548 VN, SD 319 XN and SD 461 XN were driven from Manzini towards Hhelehhele direction. A passenger in motor vehicle SD 548 VN Tebenguni Simelane S.F.J. 16 years of Mkhuzweni area sustained injuries and was admitted at Mpilo Clinic. Another passenger Lungile Dlamini S.F.A. 23 years of Hluthi area in motor vehicle SD 593 PG also sustained injuries and was taken to RFM hospital. Statements were recorded from all the drivers and a sketch plan was not drawn since it was dark and it was difficult to locate the point of impact. The weather condition was clear and the tarmac was dry.

3. Investigations revealed that the driver of motor vehicle SD 787 IN caused the accident by overtaking a truck that was heading towards Manzini direction and the motor vehicle failed to use the middle lane after overtaking the truck, but it went to the lane coming from Manzini. Nissan Navara which then tried to avoid going out off the road on the left side when going down to Hhelehhele, the driver of the Nissan Navara swerved it to the right side and eventually went as far as the far lane going up to Manzini from Hhelehhele direction where the motor vehicle collided with motor vehicle SD 593 PG an Isuzu which was coming from Hhelehhele direction towards Manzini thus moving it out off the road. On the other hand motor vehicle SD 548 VN it continued to knock motor vehicle SD 319 XN on the right side thus motor vehicle was coming from Manzini towards Hhelehhele direction. Furthermore it collided with motor vehicle SD 461 XN which was following motor vehicle SD 319 XN coming from Manzini towards Hhelehhele direction. The driver of motor vehicle SD 787 IN July Dlamini was charged

for negligent driving and drunken driving. He was summoned to appear before the Manzini Magistrate Court on the 1st September 2009.”

[80] PW1 testified that he learnt later that the motor vehicle that overtook the car that he was driving and the truck which he had been following was driven by July Dlamini. The police report also confirms this fact. DW1 testified that she was disturbed by the car driven by July Dlamini.

[81] The police report states that when they arrived at the scene of the accident they found that five motor vehicles were involved and these included the Plaintiff's motor vehicle (SD 593 PG) the Defendant's vehicle (SD 548 VN) and SD 787 IN driven by July Dlamini.

[82] The motor vehicle driven by July Dlamini knocked SD 548 VN, knocked SD 319 XN (driven by Sibongile Malindzisa) knocked SD 461 XN (driven by Philip Mazibuko). In the process SD 548 collided with SD 593 PG (driven by Sicelo Dlamini). The motor vehicles were extensively damaged mostly SD 787 IN (July). SD 548 VN (Defendant), SD 593 PG (Plaintiff) and SD 461 XN.

[83] It is clear from the evidence that July Dlamini was the cause of the accident. His driving as described by PW1 was extremely negligent and yet he was not cited in these proceedings.

[84] Furthermore July Dlamini created a situation of sudden emergency in respect of all the cars he came into contact with including that of the Defendant as he collided with them.

[85] In *casu* in the alternative the Defendant raised the defence of sudden emergency. The defence of sudden emergency has been stated as follows:

“A man who, by another’s want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger”.

See Pollock on Torts (15th ed) p. 366, applied in **Thornton and Another v Fisser** 1929 AD 399 at 412; **Union Government v Baier** 1914 AD 273 at 286.

[86] The doctrine of sudden emergency has often been applied in motor collision cases. It has been held for example that a driver was faced with a sudden emergency when an approaching vehicle remained on its incorrect side of

the road until an collision appeared imminent or inevitable. See **Pienaar v Norbye** 1939 CPD 293. See also **South African Motor Law: Cooper and Bamford** p. 269 and chapter 30 p. 517.

[87] At all times a person is required to take reasonable care and use reasonable skill; **Stoomvaart Maatshchappy Nederland v Peninsular and Oriental Steam Navigation Co**, 5 AC 876 at 891, quoted with approval in **Van Standen v Stocks**, 1936 AD 18 at 22.

[88] The steps expected from him are such as “a reasonably careful man would fairly be expected to take in the circumstances and conduct will not be excused which (even in the critical stage) is not reasonable.” A driver’s conduct, as Innes C.J. pointed out in **Solomon & Another v Musset and Bright**, Ltd 1926 AD 42 at 435, must “not be judged in the light of subsequent events but by the standard of what a reasonable man would have done at the time.” The learned author PQR Boberg in his book, **The Law of Delict**, Vol. 1, Juta at page 333 states that:

“Our Courts have repeatedly stated that the precautions which a reasonable man would take in a particular situation depend on the circumstances, and that no general rule can be laid down.

This Schreiner JA did in *Herchel v Mrupe* 1954 (3) SA 464 (A) at 477, when he said that the main factors are the degree of likelihood that harm will occur and its probable seriousness if it does.”

[89] In judging the conduct of a person faced with a sudden emergency allowance must be made for error of judgment; see ***Thorton and Another v Fismar***, 1928 AD 398 at 412. As Wessels C.J. said:

“Once man may react very quickly to what he sees and takes in, whilst another man may be slower. We must consider what an ordinary reasonable man would have done. Culpa is not to be imputed to a man merely because another person would have realized more promptly and acted more quickly. Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this course the better whilst another may prefer that.

It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonable, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa.”

See also ***Marine and Trade Insurance Co. Ltd v Mariannah and Another*** 1978 (3) SA 489 AD.

[90] It is my finding that the Defendant was faced with a sudden emergency when her car was hit by the Plaintiff’s motor vehicle driven by July Dlamini;

and being in shock may not have accurately registered the events around her.
The police version of events is more probable.

[91] When the Defendant gave evidence she stated that she did not sue the Plaintiff after she realized that SD 593 PG belonged to a woman. Following that magnanimous gesture, I shall not order the Plaintiff to pay the Defendant.s costs.

[90] In the event it is my finding that the Plaintiff has not discharged the burden of proof as required by law namely proof on a balance of probabilities. The

Plaintiff's claim is hereby dismissed. Each party is hereby ordered to pay its own costs.

AT MBABANE

Crim. Case No.



Q. M. MABUZA
PRINCIPAL JUDGE

For the Plaintiff : Mr. Simelane
For the Defendant : Mr. H. Mdladla