



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Held at Mbabane

Case No. 461/15

In the matter between:

**BUILD LINK (PTY) LTD**

**PLAINTIFF**

**AND**

**FRANCIS DUBE**

**DEFENDANT**

**Neutral citation:** *Build Link (Pty) Ltd vs Francis Dube [461/15] [2020] SZHC*  
*235 (11<sup>th</sup> November 2020)*

**Coram:** FAKUDZE, J

**Heard:** 24<sup>th</sup> June, 2020

**Delivered:** 11<sup>th</sup> November, 2020

**Summary:** *Civil Procedure – Application for absolution from instance – all elements of claim must be proved by plaintiff - where plaintiff’s case hopelessly weak, absolution from instance inevitable – Plaintiff must establish that there is a prima facie case upon which court might and not should find in favour*

*of the plaintiff – Plaintiff has established a prima facie case –  
Absolution from instance dismissed.*

## **JUDGMENT**

### **BACKGROUND**

- [1] The Plaintiff instituted a claim for damages against the Defendant for payment of the sum of E68 142.67, which constitutes the value of repairs incurred by the Plaintiff in restoring its motor vehicle to its pre-accident condition as a result of the Defendant who negligently caused the accident. The Defendant filed the Notice of Intention to Defend the action and in his Plea he raised the defence that accident was not exclusively caused by his negligence and went on to deny negligence.
- [2] At the trial, the Plaintiff paraded four witness; Dumsani Magagula who was the driver of the Plaintiff's motor vehicle; Sergeant Doctor Ngwenya who is the police officer who attended to the scene of accident; George Manuel Martin Alvis from Mbabane Panel Beaters who repaired the Plaintiff's car and Lucky Sibeko who is a Motor Vehicle Assessor who attended to the assessment of the Plaintiff's accident damaged vehicle before and after repairs.

### **Basis for Absolution**

- [3] At the close of the Plaintiff's case, the Defendant applied for Absolution from the instance and consequently filed his written submissions on the Absolution. The issues the Applicant is raising are as follows:-

- 3.1 The Plaintiff before court is Build Link (Pty) Ltd and that a quotation marked as Annexure “A” which the Plaintiff intended to use in proving the damaged motor vehicle parts was addressed to Tile Africa. There is no connection between Build Link (Pty) Ltd and Tile Africa in the quotation and no evidence was led to establish the connection;
- 3.2 The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff’s witnesses gave evidence that the Defendant was charged with negligent driving and appeared before the Magistrate’s Court but did and not produce evidence of such;
- 3.3 The Police Officer Doctor Ngwenya (PW 2) gave evidence on a Police Report that he did not write and/or compile;
- 3.4 The Police Report stated that there were no visible injuries on both motor vehicles and that there is no basis upon which the court can find in favour of the Plaintiff;
- 3.5 Doctor Ngwenya, the Police Officer who attended to the scene of accident, failed to give convincing evidence upon which the court can find in favour of the Plaintiff.

### **Plaintiff**

[4] On the issue of the quotation bearing the name of Tile Africa, the Plaintiff states that PW 3 testified that he was requested by Bruce Becker whom he knows to be the owner of Tile Africa to prepare a quotation for him. Bruce Becker is also the Director and owner of the Plaintiff company and at the time of requesting the quotation, he did not inform PW 3 to direct it to Build Link (Pty) Ltd. The quoted vehicle parts were in respect of the Plaintiff’s damaged motor vehicle.

[5] On the issue of no evidence of negligent driving in the form of a court record, since the Defendant did not appear in court, or was convicted, the Plaintiff states that PW 2 attended to the scene and caused the Defendant to be charged with negligent driving. Further, at this stage nothing turns on whether the Defendant was convicted for the criminal charge or not. The action by the Plaintiff is based on negligence which the officers who attended to the scene of the accident found upon investigation that the Defendant did in fact cause the accident. PW 1 also testified that the Defendant drove through a red light resulting in the accident.

[6] As regards the issue of PW 2 not being the author of the Police Report, the Plaintiff states that PW 2 adduced evidence that he personally attended to the scene of the accident and that he did investigations which revealed that the Defendant was negligent. He further testified that at the Police Station there are people responsible for compiling Police Reports and these people are not the Investigating Officers who attend to the scene of the accident. They extract the information from the dockets compiled by the Investigating Officers. The evidence that is needed pertains to the negligence as revealed by PW 2 and the officer who compiled the Report could not give evidence since he did not attend to the scene of the accident. His evidence would have amounted to hearsay. The Plaintiff finally alleges that a sketch plan of the scene was not necessary. PW 2 saw what caused the accident and made a determination as to who was negligent.

[7] On the issue that no visible injuries were seen on both motor vehicles as per the Police Report, the Plaintiff states that the Plaintiff's and the Defendant's motor vehicles were partly damaged. The Plaintiff's car was damaged on

the front part bumper and bull bar and the Defendant's motor vehicle was damaged on the windscreen and left side.

### **APPLICABLE LAW**

[8] Rule 39(b) of the High Court Rules states that:-

*“At the close of the case for the Plaintiff, the Defendant may apply for Absolution from the instance, in which event the defendant or an advocate on his behalf may address the Court and the Plaintiff or advocate on his behalf may reply. The Defendant or his Advocate may thereupon reply on any matter arising out of the address of the Plaintiff or his advocate.”*

[9] **Herbstein and Van Winsen Civil Practice of the Superior Courts in South Africa, Third Edition, 1979** expound on the Rule as follows:-

*“After the Plaintiff has closed his case and before the Defendant has commenced his, the latter may apply for a dismissal of the Plaintiff's claim. The effect of the court acceding to such claim would constitute judgment of absolution from the instance. The lines along which the court should address itself to the question of whether it will at that stage grant Judgment of Absolution have been laid down in the leading case of **Gasoyne v Paul and Hunter 1917 TPD 170**, which contains the following formulation:-*

*At the close of the case for the Plaintiff, the question which arises for the consideration of the Court is; is there evidence upon which a reasonable man might but not should give Judgment against Hunter (Defendant)? It follows from this that the court is enjoined to bring to bear on the question the Judgment of a reasonable man and is bound*

*to speculate on the condition of which the reasonable man, of the court's conception not should, but might or could arrive. This is the process of reasoning which however difficult its exercise, the law enjoins upon the Judicial Officer."*

[10] In the case of **Gordon Lloyd Page and Associates V Rivera and Another 2001 (1) SA 88 (SCA)** it was held as follows:

*"This implies that a Plaintiff has to make out a prima facie in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff ..... As far as inferences from the evidence are concerned, the inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one."*

### **COURT'S ANALYSIS AND CONCLUSION**

[11] The approach courts have adopted with respect to granting Absolution is that it should be granted sparingly. When the proper occasion arises and in the interest of justice, the court should not hesitate to grant the Application. This applies where the evidence of the Plaintiff is hopelessly poor, vacillating or of something of so romancing a character the court may, in those circumstances grant the Application.

[12] The court's view is that at the close of the Plaintiff's case, the Plaintiff has established a prima facie case of liability and negligence against the Defendant. The Plaintiff adduced evidence in support of the elements of its claim as pleaded in the Particulars of Claim. The Plaintiff made the following allegations of liability and negligence against the Defendant:-

12.1 *on or about the 14<sup>th</sup> February, 2014 and at or near Four Square four-way traffic light a collision occurred between Defendant's motor vehicle being a Ford Sedan bearing registration number ABC 0456 with Plaintiff's motor vehicle, a Mazda double cab bearing registration number ISD 334 AM. The Plaintiff's motor vehicle was driven by Dumsani Magagula and the Defendant was driving his motor vehicle.*

12.1.1 *The aforesaid accident was caused exclusively by the negligence of the defendant who was negligent in one or more of the following respects:*

12.1.2 *He failed to give the right of way to the Plaintiff's motor vehicle;*

12.1.3 *He failed to keep a proper lookout;*

12.1.4 *He failed to avoid the accident as a reasonable driver would have done;*

12.1.5 *He failed to observe the road regulation of right of way;*

12.1.6 *He failed to apply breaks timeously or at all to avoid the accident;*

12.1.7 *He failed to avoid the accident when by exercise of due care and caution he could and should have done so;*

12.1.8 *He travelled at a speed which was excessive in the circumstances.*

12.2 *As a result of the said accident and direct consequence of the aforesaid negligence of the Defendant, the Plaintiff's motor vehicle was damaged and it suffered damages in the sum of E68,142.67 which constitute the value of repairs*

*necessary to restore the Plaintiff's motor vehicle to its pre-accident condition.*

*12.3 In the premises set out above the Defendant is liable for damages to the Plaintiff in the sum of E68,142.67.*

[13] The Plaintiff has managed to establish the following:

- (a) The Defendant drove through a red traffic light whilst the Plaintiff had the right of way.
- (b) The Plaintiff failed to apply breaks because the Defendant's car was driving at an excessive speed. He ended up hitting the Defendant's car on the left door.
- (c) The Plaintiff's car had its bull smashed and the grill was damaged.
- (d) The Police who was called to the scene attributed the accident to the negligence of the Defendant in that the Defendant did not apply brakes so as to give the Plaintiff the right of way;
- (e) The Repairer Mr. Alvis testified that he prepared a quotation for the damaged motor vehicle and later fixed it. He handed it over to the Plaintiff in its pre-existing condition;
- (f) The quotation was for the damaged car notwithstanding that the quotation was directed to Build Link. The issue of Build Link is neither here nor there;
- (g) Mr. Lucky Sibeko did the assessment before and after the repairs. He testified that he checked the quoted items against the actual motor vehicle to see if these tally.



[14] In the circumstances the Application for Absolution from the instance is dismissed.

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**FAKUDZE J.**

**JUDGE OF THE HIGH COURT**

Plaintiff: S. Matsebula

Defendant: Mr. B. Gamedze