IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO.66/2017**

In the matter between:

SIFISO MABUZA **APPELLANT**

and

PHINDUVUKE BUS SERVICE **RESPONDENT**

Neutral Citation: *Sifiso Mabuza vs. Phinduvuke Bus Service (66/2017) [2018] SZSC 13 (30 MAY 2018)*

Coram: **MCB MAPHALALA, CJ**
DR. B.J. ODOKI, JA
S.B. MAPHALALA, JA

Date heard: **23 APRIL 2018**

Date delivered: **(30 MAY 2018)**

Summary: *Civil Procedure – Action by Appellant claiming damages for negligence – Bus conductor throws bottle under bus from which the Appellant has just alighted – Bus stamples over the stump of crushed bottle – Part of the bottle springs up and hits eye of the Appellant resulting in injury – Respondent raises plea of absolution from the instance on ground that the injury was not foreseeable – court* ***a quo*** *upholds the plea on ground that the bus conductor was not negligent as the damage caused was neither reasonably foreseeable nor preventable – whether court* ***a quo*** *applied proper test for absolution from the first instance – On appeal, held that on the evidence adduced the conduct of the bus conductor was negligent and the damage caused to the Appellant was reasonably foreseeable and preventable – Appeal allowed with costs – Matter remitted back to the court* ***a quo****, to hear the Respondent's case and determine the case on the merits.*

JUDGMENT

DR. B.J. ODOKI J.

[1] This is an appeal from the judgment of the court *a quo* whereby the court dismissed the Appellant's action in negligence following a plea of absolution from the instance.

[2] The facts of the case as found by the court *a quo* were that on 3 September 2009, a bus conductor in one of the Respondent's buses alighted from it with a bottle which had been lying idle on the floor of the bus and threw it under the bus.

[3] As the conductor did this he was rushing to offload the Appellant's luggage from the side-boot of the bus where it had been kept when the Appellant boarded the bus from Manzini to Lomahasha. The evidence revealed that as the bus took off with the conductor running to board it, the bus trampled on the bottle in question with its rear wheels causing a stump from the part that got crushed to spring up and hit the Appellant, who was tending to his luggage, on the right hand side eye and seriously injuring him in the process.The Appellan

[4] The Appellant brought proceedings claiming damages for the alleged negligence. As indicated in the beginning of this judgment, the Appellant's action was dismissed without calling upon the Respondent to defend itself.

[5] The Appellant being dissatisfied with the decision of the court *a quo* has appealed to this court on the following grounds:

1. *The Court **a quo** erred both in fact and in law by granting absolution from the instance when the evidence before it was sufficient and established a **prima facie** case against the Respondent.*

2. *The Court **a quo** erred both in fact and in law by finding and holding that the harm to Appellant could not have been foreseeable from the bottle being crushed and causing injury. Such occurrence was reasonably foreseeable.*

3. *The Court **a quo** erred both in fact and in law by finding and holding that a reasonable man could not have guarded against the harm that eventually occurred."*

ARGUMENTS OF THE APPELLANT

[6] Counsel for the Appellant submitted that there was undisputed evidence that it was conduct of the bus conductor that caused the Appellant's injury. It was Counsel's contention that the conduct of the bus conductor was unlawful under the Road Traffic Act of 2007 where Section 71 (i) (m) prohibits the depositing of petrol or other inflammable oil materials or refuse of whatever nature from such vehicle upon or along side such a road.

[7] It was also argued that Section 41 of Environmental Management Act No 5 of 2002 prohibits the disposal of waste matter in a manner that results in an adverse effect or significant risk of adverse effect. It was counsel's submission that the act of depositing a bottle on the road under the bus was

careless, negligent and prohibited by law, and therefore there can be no reasonable excuse to do so.

[8] Counsel referred to the celebrated case of **Donoghue vs. Stevenson** (1932) A C 532 where the court pronounced the neighbour principle to the effect that a person owes a duty of care to persons who are closely and directly affected by his actions to have them in contemplation when he is carrying out his actions or omissions.

[9] It was argued on behalf of the Appellant that the test of duty of care rests on a "three fold test" as formulated in the case **of Caparo Industries PLC vs. Dickman (1990)** UKHL 2, [1990] 2 AC 605; as follows:

1. *The harm must be reasonably foreseeable.*
2. *There must be relationship of reasonable proximally between the plentiful and the defendant.*
3. *It must be fair and just to impose liability.*

[10] It was counsel's contention that the harm caused by the bus conductor was reasonably foreseeable and that there was a relationship of reasonable proximity between the Appellant and the Respondent. It was also fair and just to impose liability.

[11] Counsel submitted further that the test in negligence is that of a reasonable man, and in the present case a reasonable person would not have engaged in similar conduct which caused injury to the Appellant.

[12] It was also the argument of counsel that while a precise or exact manner in which harm occurs may not be foreseeable, The general manner of its occurrence must be foreseeable. The case of **Mutter vs. Laurence High Court of South Africa** case No. 15279/15 was relied on by counsel to support his submission. Counsel also relied on the book by W.E. Cooper titled **Delictual Liability in Motor Law** (1996) page 222 to support his argument that the Respondent is liable for all the consequences flowing directly from its employee's act.

[13] Finally, counsel submitted that since the injury caused to the Appellant was foreseeable, the Appellant's employee could have prevented its occurrence by proper disposal of the potentially dangerous trash.

ARGUMENTS OF THE RESPONDENT

[14] Counsel for the Respondent submitted that the question of law to be determined by the court in an application for absolution from the instance is whether at the close of the Plaintiff's case, there is sufficient evidence upon which a reasonable man might give judgment in favor of the plaintiff. Counsel pointed out that the applicable test has been discussed in the cases of **Gascoyre** vs. **Paul and Hunter** 1917 TPD 170 at page 173**, Gordon Llyod Page and Associates vs. Revera and Another** 2001 (1) 88 SCA**, Claude**

Neon Lights (SA) vs. **Daniel** 1976 (4) SA 403 and **United Air Carries (Pty) Ltd** vs. **Jarmon** 1994 (2) ZLR 34.

[15] In the present case, it was counsel's contention that the court *a quo* correctly applied the applicable test as the court found that there was no evidence upon which when applying its mind reasonably to such evidence could or might find for the Appellant. Counsel submitted that the Appellant had failed to establish negligence which was an essential element of his claim because the court found that the Appellant had failed to establish that the Respondent or its employee was negligent.

[16] On the issue of negligence, counsel submitted that a person is negligent if he did not act as a reasonable man would have done in the same circumstances. Reliance was made to the book of Bogerg entitled **The Law Delict**, Vol 1 page 274.

[17] Counsel also referred to the book by J Neethling, **Law of Delict,** 2nd edition 1994 at pages 121 and 122 where the author states that "in the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because by giving insufficient attention of his actions, he failed to adhere to the standard of care legally required of him."

[18] It was further submitted that according to the definition of negligence, there are two essential elements that have to be established to prove that a person is liable in negligence. The first element is that the damage must be reasonably foreseeable.

A reasonable man in the position of the Defendant must have reasonably foreseen the harm. The second element is that harm must be reasonably preventable, that is a reasonable man in the position of the Defendant must have taken reasonable steps to prevent the harm.

[19] Counsel maintained that the basic principle of the law is that the specific harm that occurred must be reasonably foreseeable. It was his argument that it is not sufficient to reasonably foresee the occurrence of general harm. The wrong doer must reasonably foresee the occurrence of a particular harm. Counsel submitted that this approach is called the concrete or relative approach which the courts must apply to determine whether the wrong doer was negligent.

[20] In support of his submissions on the concrete approach, counsel relied on the authorities of Neethling, Portgieter, Visser, the **Law of Delict,** page 131 PQR Bor Bereg, **The Law of Delict** Vol 1 1984 edition, pages 226-277, **Ablort Morgan** vs. **Wente Bank Farms (Pty) Ltd** 1988 (3) SA 531, **Botes** vs. **Van Deventer** 1966 (3) SA 182 A and **Wasserman vs. Union Government** 1934 AD 228.

[21] Counsel submitted that the damage to the Appellant's eye was not in dispute, but what was in dispute was whether that damage was a result of its employee's negligence.

It was counsel's contention that the Appellant failed to establish that the Respondent's conduct was negligent because it failed to establish that a reasonable man in the position of the bus conductor would have reasonably foreseen that by putting the bottle in front of the rear wheels of the bus, a piece of the bottle would sprang up and cut a passenger's eye. It was argued that the specific harm was not reasonably foreseeable, and therefore the bus conductor could not have reasonably taken steps to prevent the specific harm because it was not foreseeable. It was also submitted that the specific harm which occurred was too remote for the conductor to guard against its occurrence.

[22] In support of his submission's counsel referred to the evidence of two witnesses for the Respondent who testified that they had never heard of a piece of a bottle jumping from a motor vehicle and injuring someone.

[23] It was counsel's submissions that as the elements of negligence were not established by the Appellant, the court *a quo* correctly granted the application of absolution from the instance, as calling upon the Respondent to its defence could not have improved the Appellant's case.

CONSIDERATION OF THE APPEAL

[24] The main issues raised in the grounds of appeal are, first, whether the court *a quo* applied the correct test in holding that the Appellant had not made out a *prima facie* case of negligence against the Respondent.

Secondly, whether the court *a quo* was correct in finding that the Appellant had not established that a reasonable person would not have foreseen that the bottle in question when trampled upon by the bus would spring up and injure the Appellant's eye and therefore he would not have taken steps to prevent the occurrence.

[25] In his judgment, the judge in the court *a quo* stated at the onset that the matter turned in a point of law as opposed to facts. This is what he stated;

> *"[5] Whatever else has been said in the Defendant's plea as regards the claim against it, when the matter commenced and upon evidence having been led by the plaintiff, it became clear that this was more the type of matter that turns on a point of law as opposed to facts. This is because the dispute as may have existed related to whether the bus conductor threw or put one bottle or several bottles under the bus including whether such bottles were actually thrown or simply put there, which are irrelevant to the determination of the real question."*

[26] The learned judge in the court *a quo* correctly addressed himself to the test applicable where an application for absolution in the first instance is made

citing the decisions in **Water Authority** (892) 2006 [2017] SZHC 106 (8th June 2017) and **Neo Lights SA Ltd** vs. **Daniel** 1976 (4) SA 403 (AD) at p. 409. In these cases it was held that the application is appropriate in cases where it is shown that the Plaintiff has failed to establish a *prima facie* case against the Defendant.

It is also well settled that the test applied is not whether the evidence led by the Plaintiff establishes what would finally be required to be established but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Plaintiff.

[27] The next issue dealt with by the court *a quo* is whether negligence had been established against the Respondent. The judge in the court *a quo* referred to several authorities on negligence including J Neethling, **Law of Delict** (Supra), **Ablort – Morgan vs. White Bank Farms (Pty) Ltd** (Supra) and PQR Borberg, **The Law of Delict**, (Supra) **Botes** vs. **Van Deventer** 1966 (3) SA 182 (A) at p. 199, and **Wasserman** vs. **Union Government** (Supra).

[28] The learned judge identified two theories of negligence, the abstract approach where harm must be generally reasonably foreseeable and the concrete or relative approach of foreseeability where the test for negligence for a person's conduct may only be described as negligent in regard to a specific consequence or consequences. The judge adopted the relative or a concrete approach and came to the conclusion that the specific injury to the Appellant was not foreseeable to a reasonable person. The judge stated,

[18] It is clear therefore that the applicable test in the facts of this matter is the relative or concrete approach of foreseeability. Applying this test to the facts of the matter, it is apparent that a reasonable man would not have foreseen the bottle in question after being tramped upon by the bus springing up and hitting the Plaintiff on his eye where he was injured.

He therefore would not have taken steps to prevent the same. This is because it is not enough that harm in general was foreseeable as the actual consequences of the act should have been foreseeable. In **Botes** v. **Deventer 1966 (3) SA 182 (A) at 199** *the following statement was made which in my view underscored the concrete approach to foreseeability as a test of reasonableness:-"*

> *" If the actual consequence or kind damage which ensues form the Defendant's negligent conduct was not reasonably foreseeable, the damage was too remote or could not be considered as a legal consequence of the Defendant's conduct."*

[29] The procedure for granting absolution from the first instance is provided for in Rule 39 (b) of the High Court Rules which states:

> *"(b) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one 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."*

[30] Herbstein and Van Winsen, in *THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA*, Third Edition 1979, at page 462, 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 form the instance. The lines along which the court should address itself to the question of whether it will at that stage grant a judgment of absolution have been laid down in the leading case of ***Gasoyne*** *vs.* ***Paul and Hunter*** *1917 TPD 170, which contains the following formulation:"*

> *"At the close of the case for the plaintiff, therefore, 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."*

[31] The authors in the said book go on to explain the difference between consideration of evidence at this stage and after having heard the evidence for the Plaintiff and for the Defendant, in these terms;

> *"The inquiry there is: 'Is there evidence upon which the court ought to give judgment in favour of the Plaintiff?'.*

It is quite possible, therefore, for a court that refused an application by a defendant for absolution at the conclusion of plaintiff's case to give a judgment of absolution after the defendant has closed his case even without any evidence being tendered by the latter"

Later on the authors opine at page 463 as follows"

"An application for absolution from the instance stands much on the same footing as an application for discharge of an accused at the close of the evidence for the prosecution."

[32] In view of the principles set out above, it is clear that a trial court should be very chary of granting absolution at the close of the Plaintiff case. The court should not at this stage evaluate – and reject the Plaintiff's evidence. See Van Winser, the **Civil Practice of the Superior Courts of South Africa** (supra) p 464.

[33] The determination of whether there was a *prima facie* case made out against the Respondent did not depend entirely on law but also on the assessment of the evidence which was presented by the Appellant. In other words it is a question of mixed law and fact.

[34] Secondly, the court *a quo* was required only to find that a *prima facie* case of negligence had not been established against the Respondent, and that a reasonable court could or might find for the Appellant if no explanation is offered by the Respondent. The court was not required to determine conclusively whether negligence had been established against the Respondent. It seems the court *a quo*

applied a higher standard of proof in determining whether a *prima facie* case had been made out against the Respondent.

[35] The next issue is whether there was *prima facie* case of negligence established against the Respondent. There are many approaches to defining negligence and its elements. The court *a quo* referred to various authorities, as did counsel on both sides in this Court.

[36] The starting point is the celebrated case of **Donoghue** vs. **Stevenson** (Supra) which established the "neighbour principle" Lord Alton stated this principle as follows:

> *"The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyers question, who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to act or omissions which are called in question"*

[37] In a decision of the House of Lords in **United Kingdom Caparo Industries PLC** vs**. Dickman** (Supra), the court reviewed many cases which had dealt with the issue of duty of care and developed a three fold test which requires that;

> *(a) The harm caused by the Defendant must be reasonably foreseeable,*

(b) There must be a relationship of proximally between the Plaintiff and the Defendant, and

(c) It must be fair and just to impose liability.

[38] In the present case, when dealing with the test of foreseeability, the court *a quo* adopted what is called the concrete or relative approach as the test for negligence. After referring to a number of authorities from academic writers and judicial decisions, the judge in the court *a quo* observed:

> *"[14] As regards what is known as the concrete (or relative) approach of foreseeability as a test for negligence a person's conduct may only be described as negligent in regard to a specific consequence or consequences. According to this approach, it is a prerequisite for negligence that the occurrence of a particular consequence must be reasonably foreseeable. In other words a wrong doer is only negligent with reference to a specific consequence if that consequence, and not merely damage in general, was reasonably foreseeable." See in this regard* ***J. Neethling's Law Of Delict' (Supra)*** *at page 131."*

[39] The Court *a quo* then came to the following conclusion:

> *"[21] I therefore agree with the Defendant's counsel that in so far as it was not shown that the incident that brought about the Plaintiff's injury was going to bring about that specific injury in the manner done, the Defendant's conductor's action cannot be said to have been negligent in so far as it was not reasonably foreseeable and that the Defendant reasonably failed to guard against it, which is to say legally, the Defendant was not negligent and is therefore not liable to the Plaintiff*

for the damage suffered. It was therefore more an accident which for legal purposes fits the adage that the injury lied where it fell."

[40] In my view, the court *a quo* took a narrow view of the concept of negligence, and the foreseeability test. There is no doubt that the Respondent owed a duty of care to its passengers or indeed other road users not to engage in actions or omissions which were reasonably likely to injure them. These persons ought to have been in the reasonable contemplation of the Respondent's employees in the bus.

[41] The action of the bus conductor in throwing a bottle under the tyre of the bus was unlawful, careless and inconsiderate. Any reasonable person ought to have known or reasonably contemplated that if the bus run over the bottle it would break and the bottle particles would fly off or spring up hitting any person who was standing near the bus. It is immaterial that a reasonable person may not have contemplated that the bottle pieces would land on a specific part of the body, namely the eye. But it was in contemplation of a reasonable person that one of the parts of the body which could be injured would be the eye. Therefore, even by applying the concrete approach, the specific consequences which the Respondent's conduct caused were reasonably foreseeable and therefore preventable. It is also fair, just and reasonable to impose liability against the Respondent for the damage caused to the Appellant.

[42] In the result, I make the following order:

1. The appeal is allowed
2. The judgment of the court *a quo* is set aside

3. The matter is remitted back to the court *a quo* for hearing evidence of the Respondent, and, making the final determination of the matter

4. The Appellant is awarded costs.

DR. B.J ODOKI
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

S.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant: **S. JELE**

For the Respondents: **L.M. SIMELANE**