



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 1199/2017

In the matter between:

SIKHUNJULWE MADOLO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

LAING J

[1] This is a claim for damages arising from a motor vehicle accident that occurred on 7 May 2016, along the N2 freeway, in the vicinity of the Berlin off-ramp, between Qonce and East London.

Background

[2] The plaintiff alleges he had been the driver of a motor vehicle when another driver suddenly changed lanes without warning, colliding with the plaintiff as the latter was overtaking. The cause of the accident, pleads the plaintiff, was the sole and exclusive negligence of the other driver. As a result, the plaintiff suffered various fractures, lacerations, and a head injury. He claims damages in the amount of R 5,300,000.

[3] The defendant's plea amounts to a bare denial. It pleads, in the alternative, that any negligence on the part of the other driver was not the cause of the accident, which was caused by the negligence of the plaintiff.

Issues for determination

[4] The parties identified, *inter alia*, the following issues in relation to the determination of the merits: the cause of the accident; the plaintiff's degree of negligence; whether the other driver had been negligent; whether the plaintiff suffered any injuries; and whether the defendant was liable for compensation to be paid to the plaintiff.

[5] The court ordered that the determination of the merits be separated from the determination of quantum. The matter proceeded to trial on the question of merits only.

[6] A brief overview of the relevant principles is set out in the paragraphs below.

Legal framework

[7] In terms of section 17(1) of the Road Accident Fund Act 56 of 1996, the defendant is obliged to compensate a person for loss or damage suffered because of a

bodily injury caused by or arising from the driving of a motor vehicle. The defendant's liability is conditional, however, upon the injury having resulted from the negligence or wrongful act of the driver.¹ This means that a person such as the plaintiff is required to prove such negligence.

[8] The loss or damage can be reduced by the degree of any contributory negligence on the part of the accident victim. This arises from the provisions of section 1 of the Apportionment of Damages Act 34 of 1956 ('the Act'), which states as follows:

'(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

[9] The above principles comprise an elementary framework for the assessment of the facts in the present matter. We proceed to deal with the evidence presented during the trial proceedings.

Evidence at the trial

[10] The plaintiff testified on his own behalf. He stated that he had been returning to his home in East London after finishing late at work, in Qonce. He had been travelling in the slow lane of a double carriage freeway at a speed of between 80 and 100 kilometres per hour when he caught up with a white Toyota *bakkie*. It had been approximately

¹ MP Olivier, 'Social Security: Core Elements', *LAWSA* (LexisNexis, Vol 13(3), 2ed, July 2013), at paragraph 163.

10.00 pm and it had been drizzling at the time. Visibility, however, had been relatively clear.

[11] The *bakkie* had been travelling very slowly, prompting the plaintiff to indicate his intention to overtake it. There was a gap of about nine metres between the motor vehicles. As the plaintiff moved into the fast lane, on his right-hand side, the *bakkie* swerved in front of him, clipping his front bumper. The collision caused his motor vehicle to roll and come to a rest on the far side of the freeway. No other motor vehicles had been in the area at the time.

[12] The plaintiff testified that he had lost consciousness but was taken to the Cecilia Makiwane Hospital in Mdantsane. He was severely injured in the accident and received extensive medical treatment. There was, in his opinion, nothing that he could have done to have prevented the accident.

[13] During cross-examination, the plaintiff explained that the collision with the *bakkie* had forced his motor vehicle onto a section of gravel between the fast lane and the median strip. This had resulted in his losing control of the motor vehicle.

[14] To questions put to him by the court, the plaintiff testified that the accident had occurred on a straight portion of the road, with a slight up-hill gradient. The condition of the tar had been good but wet because of the rainy conditions at the time.

[15] The plaintiff closed his case without introducing any further witnesses. The defendant led no evidence.

Onus on the parties

[16] It is helpful, as a point of departure, to restate a basic principle that applies in civil matters. In Schwikkard PJ (et al), *Principles of Evidence*, the learned writer observed that:

'In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities" but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.'²

[17] The plaintiff in the present matter bears the onus of discharging the burden of proof regarding the allegation that the other driver was negligent. Insofar as the defendant has denied the allegation that the other driver was negligent and gone on to plead that the cause of the accident was the plaintiff's negligence, the onus lies with the defendant to prove this.

[18] The subject of onus was addressed in this division in the case of *National Employers' General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E), where Eksteen AJP, for a full bench, held as follows, at 624-5:

'...in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

² 4th Ed, 2016, ch32-p 628.

[19] The evidence presented by the plaintiff was his own testimony about the accident. He was a credible witness, making consistent statements and no obvious contradictions while under cross-examination. As to reliability, no criticism can be levelled against him, other than to say that there would be an inherent bias in his evidence since he is the plaintiff, and the possibility cannot be excluded that an entirely truthful and accurate recall of the events would have been compromised by the passage of time and the uncontested fact that he lost consciousness immediately after the collision. The probabilities of the plaintiff's version, however, require further comment.

[20] It was not disputed that the accident happened at night in rainy conditions, along a straight section of the N2 freeway with a slight up-hill gradient and a tarred surface in good condition. It was also not disputed that the other driver had been travelling slowly and that there had been a gap of about nine metres between the *bakkie* and the plaintiff's motor vehicle when the latter had commenced to overtake. It was not disputed, furthermore, that the other driver had swerved in front of the plaintiff. What is puzzling is the force of the collision, which had caused the plaintiff's motor vehicle to roll, leading in turn to the severe injuries described. This would not have been expected considering the conditions at the time, the distance between the motor vehicles, and their relative speeds. It is, in the circumstances, improbable that the other driver had been travelling very slowly, and that the plaintiff had been travelling between only 80 and 100 kilometres per hour. It is likely that their speeds would have been somewhat higher to have supplied the kinetic energy necessary to have overturned and rolled the plaintiff's motor vehicle so that it came to a rest on the far side of the freeway. Such a finding has a bearing on the question of contributory negligence.

Contributory negligence

[21] At the outset of proceedings, counsel for the defendant indicated that she would argue that there was contributory negligence on the part of the plaintiff. His claim should be reduced accordingly. She accepted that the defendant had not pleaded contributory

negligence but contended that the court was not prevented from applying section 1(1)(a) of the Act.

[22] The relevant portion of the defendant's plea reads as follows:

'...Defendant in particular denies that the driver of the insured vehicle was negligent either as alleged or at all.

...In the alternative... and only in the event of this Honourable Court finding that the insured driver was negligent either as alleged or at all (which is denied), then the defendant pleads that such negligence did not cause or contribute to the collision which was caused by the negligence of the plaintiff who was negligent in one or more of the following respects...'

[23] The defendant prayed that the plaintiff's claim be dismissed with costs. There was no prayer for the apportionment of damages.

[24] In *AA Mutual Insurance Association Ltd v Nomeka*,³ the erstwhile Appellate Division considered the case law in relation to a defendant's failure to plead apportionment. More specifically, it dealt with the assertion that the defendant was precluded from relying on the Act and that the court was barred from applying the provisions thereof if it held that the plaintiff was partly at fault. Viljoen AJA stated that:

'The weight of the decisions is, therefore, that provided the plaintiff's fault is put in issue, an apportionment need not be specifically pleaded or claimed. This is the correct view, in my opinion.

The Act has become part of our law of delict. It has supplanted the former all-or-nothing effect of the common law in this respect. I agree... that upon a determination of issues properly raised in the pleadings the Court must give judgment in accordance with the imperative direction of section 1 of the Act.⁴

[25] The reasoning of the court has been followed in subsequent decisions and the relevant principles appear to have become established in our common law.⁵

³ 1976 (3) SA 45 (A).

⁴ At 55 D-E.

[26] In the present matter, the plaintiff has alleged that the sole and exclusive cause of the accident was the negligence of the other driver. The defendant, in contrast, has pleaded that the negligence of the plaintiff was the cause of the accident. At the end of the matter, the court is satisfied that the plaintiff has discharged, in general, the burden of proof. The defendant, however, has failed to do so in relation to its plea.

[27] The court, nevertheless, is not persuaded that the defendant must be held 100% liable for the damages incurred. It can well be said that a reasonable person in the position of the plaintiff would have foreseen the reasonable possibility that his or her driving at night in rainy conditions and approaching another motor vehicle at speed could have led to an accident and would have taken reasonable steps to guard against such an occurrence.⁶ Here, the plaintiff could have reduced his speed or created a greater gap between his motor vehicle and the *bakkie*, but failed to do so. He must be found to have contributed to the negligence that led to the damages in question.

Relief and order

[28] The court is of the view that the plaintiff has proved his case but is not entitled to all the recoverable damages. In the absence of evidence from the defendant, it would not be unreasonable to hold that the plaintiff contributed towards the negligence involved and to apply section 1(1) of the Act. It would, consequently, be just and equitable to reduce the plaintiff's entitlement to damages by 10%.

⁵ See, for example, *Ndaba v Purchase* 1991 (3) SA 640 (N); *Gibson v Berkowitz and another* 1996 (4) SA 1029 (WLD); and *Harwood v Road Accident Fund* 2019 JDR 1768 (GP). See, too, the discussion in Klopper HB, *The Law of Collisions in South Africa* (LexisNexis, 8ed, 2012), at 92 and 148; and Harms LTC, *Amler's Precedents of Pleadings* (LexisNexis, 9ed, 2018), at 274.

⁶ See the classic test for negligence in *Kruger v Coetzee* 1966 (2) SA 428 (A), at 430. See, too, the general discussion of negligence in Neethling J and Potgieter JM, *Law of Delict* (LexisNexis, 7ed, 2015), at 137-9.

[29] The only remaining issue is that of costs. The plaintiff has been substantially successful, but it would seem fair and just to implement the above approach and to adjust the plaintiff's award of costs by the same degree.

[30] The following order is made:

- (a) the defendant is ordered to pay 90% of the plaintiff's damages, as may be proved or agreed; and
- (b) the defendant is directed to pay 90% of the plaintiff's costs in relation to the determination of the merits.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

For the plaintiff: Adv Teko, instructed by Akhona George Attorneys,
Makhanda.

For the defendant: Ms Futshane, instructed by The State Attorney, East London.

Date of hearing: 16 May 2023.

Date of delivery of judgment: 23 May 2023.

