

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG PRETORIA)

13/11/2012

CASE NO: 71831/2009

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.

13/11/2012
DATE


SIGNATURE

In the matter between:

MAFUKAMA ISHMAEL MAFUKAMA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI, J

INTRODUCTION

- [1] The plaintiff's claim is for special and general damages in the sum of R1 400 000 in respect of injuries that he sustained in a collision between a taxi in which he was travelling and a motor vehicle insured by the defendant.
- [2] Before the trial started, there was a request by the defendant's counsel that the matter be postponed on the basis that the matter was not ripe for trial. The plaintiff's counsel opposed the application. I dismissed the application and ordered that the trial should proceed.
- [3] At the beginning of the trial the parties agreed to separate the issues and for the matter to be heard on merits only. I therefore in terms of rule 33(4) of the Uniform Rules of Court ordered separation of merits from quantum. The matter before me was thus heard on merits only.
- [4] The plaintiff gave evidence on his behalf.

- [5] The defendant closed its case without leading any evidence and its counsel called for absolution from the instance on the basis that the plaintiff did not properly establish his case.
- [6] The plaintiff's claim is that on the 28 December 2007 at or near N8 Tweespruit road a motor collision occurred between a motor vehicle whose registration numbers are unknown to him (the insured motor vehicle) and a motor vehicle with registration numbers DHV 766 FS in which he was a passenger (the taxi). He alleged in his particulars of claim that the aforesaid collision was caused solely by the negligence of the driver of the insured motor vehicle.
- [7] The defendant is defending the matter and in its plea denied that the collision was caused by the sole negligence of the insured driver. It pleaded further that in the event the court finds that the plaintiff was involved in the aforesaid collision (which was denied) and was the passenger as alleged, in that event it submitted that the collision was caused by the sole negligence of the driver of the motor vehicle with registration number DHV 766 FS.

THE ISSUES TO BE DECIDED

[8] This court has now to determine, firstly, whether the plaintiff was a passenger in the taxi that was involved in the collision in question, and if so, whether the said collision was caused by the sole negligence of the driver of the insured motor vehicle, i.e. the motor vehicle whose registration numbers were unknown to the plaintiff.

THE EVIDENCE

[9] The plaintiff's evidence is that on the 28 December 2007 he boarded a taxi in Ficksburg travelling to Bloemfontein. He did not note its registration number and he did not know the owner of that taxi. He was seated in the front passenger seat. Along the way they had to pass a road that crosses the one they were travelling on. That road is from Tweespruit to Botshabelo.

[10] When the taxi was about to pass the Tweespruit – Botshabelo road, a motor vehicle came from the right of the taxi i.e. from the direction of Tweespruit and without stopping turned towards the direction the taxi was traveling to and drove into the taxi's

path of travel. The taxi driver swerved away from the motor vehicle but was not able to avoid the collision and hit that motor vehicle at the back. The taxi had the right of way and the other motor vehicle was supposed to have stopped and allowed it to pass. The taxi was impacted on its right side and landed on the pavement.

[11] The speed limit on the road the taxi was travelling on was 100Km/h and at the time of the collision the taxi must have been travelling at a speed of 70 – 80 km/h. The taxi driver was driving very well as he was also praised by other passengers for doing so. He could not estimate the speed of the other motor vehicle, as he did not see it coming. He did not remember seeing whether that motor vehicle indicated its intention to turn or not.

[12] He was as a result of the collision trapped in the taxi and his left foot was broken. He was pulled from the taxi and made to lie on the side of the road to await the ambulance. The last time

he was aware was when the ambulance arrived. He was taken to Thaba Nchu hospital.

[13] Whilst waiting for the ambulance he talked to a certain man from Lesotho, who was also a passenger in the taxi, about the collision.

[14] He was cross-examined at length about the affidavit he made in terms of section 19 (f) of the Road Accident Fund Act 56 of 1996 (the Act). He initially denied any knowledge of the affidavit as it was shown to him but confirmed the signature as his. He did not remember whether the affidavit was explained to him or whether he provided the information in the affidavit. This he said was because since the accident he is forgetful. There were discrepancies between some of the contents of that affidavit and his *viva voce* evidence. In the affidavit he had stated that the other motor vehicle was travelling at a very high speed. His explanation for the discrepancies was because at the time of making the affidavit he was dizzy and not well. He

said between the two i.e. the statement and his oral evidence in court the court must accept the affidavit.

[15] The defendant closed its case without leading evidence. At the close of the defendant's case both counsel addressed the court. The plaintiff's counsel argued for judgment in favour of the plaintiff. The defendant's counsel called for absolution from the instance on the basis that the plaintiff did not properly establish his claim.

ON THE QUESTION WHETHER THE PLAINTIFF WAS INVOLVED IN THE COLLISION

[16] The fund or its agent is obliged in terms of section 17 of the Act to compensate any person (third party) for loss or damage which the third party has suffered as a result of any bodily injuries to himself or herself caused by or arising from the driving of a motor vehicle by any person if the injury is due to the negligence or other wrongful act of the driver or of the owner of that motor vehicle.

- [17] In order for the fund to be liable the third party must have been involved in a particular collision either as a driver of another motor vehicle, or a passenger in any of the motor vehicles involved in the collision or a pedestrian. In this instance, the plaintiff's evidence is that he was a passenger in a taxi that was involved in the collision that occurred on the 28 December 2007.
- [18] However, the defendant's plea is that the plaintiff was not a passenger in the motor vehicle with registration numbers DHV 766 FS and also that he was not involved in the collision in question. This, the defendant also denied during the pre-trial conference held on the 15 August 2012. This defence was based on the ground that the plaintiff's name was not on the list of passengers appearing on the accident report.
- [19] The factual situation is that the plaintiff served the defendant with Form 1 (claim) form on the 24 June 2009. From a copy of the form on record the collision is recorded as having occurred on the 28 December 2007 at about 11h35 on the N8 crossing.

The accident was reported at Tweespruit police station under CAS 42/12/2007. The registration number of any other motor vehicle involved in the accident is noted as DHV 766 FS. In paragraph 5 (h) of the form it is noted that at the time of the accident the plaintiff was travelling as a passenger. It is however, not noted in which motor vehicle he was a passenger. The medical report part of the form was completed at Pelonomi hospital on the 1 August 2008 by Dr Pule. The doctor noted that the report was completed according to the clinical records and the 28 December 2007 is indicated as the date on which the plaintiff was first attended to at the hospital.

- [20] The plaintiff, as claimant, has also deposed to an affidavit in which he states that the accident in which he was involved occurred on the 28 December 2007 around 11h35. At the time of the accident he was a passenger in a motor vehicle with registration numbers unknown to him. The motor vehicle was travelling straight on N8 crossing when it collided with another motor vehicle. The collision was occasioned by the sole negligence of the driver of the insured motor vehicle. In his

evidence in court he testified that immediately the ambulance arrived to take him to Thaba Nchu hospital he lost consciousness.

[21] A copy of the accident report on record indicates that two motor vehicles were involved in a collision on the 28 December 2007 at 11h50 at a cross road. The driver of motor vehicle "A" is noted as Mokgobo driving a motor vehicle with registration number DHC 766 FS which was travelling in the northerly direction. The particulars of motor vehicle "B" were not recorded but the motor vehicle was travelling in a northerly direction as well. There were eleven names of passengers recorded. Two of them had serious injuries. The name of the plaintiff is not on the accident report. This report was compiled at 13h45 on the same date of the accident.

[22] To my mind all the above documents should be read together for purposes of determining whether the plaintiff was indeed involved in the collision. If the accident report, on which the defendant relies, is read in isolation it does not establish that

the plaintiff was one of the passengers involved in this collision. But if all these documents and the plaintiff's oral evidence, which is undisputed, are taken together, a different picture emerges.

- [23] A similar situation prevailed in the **SA EAGLE** - case below. In that judgment an MVA13 claim form was submitted to the appellant (RAF), together with, *inter alia*, an affidavit from one "M", who was the driver of the vehicle in which "B" had been a passenger. The affidavit explained how the collision occurred, but did not mention "B" by name. The appellant raised a complaint in respect of this affidavit as not complying with the requirements of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. The court however made a finding that in order to establish that the deceased was the person killed in the collision the MVA13 form must be read together with other documents to close the *lacuna* in the affidavit. See **SA EAGLE INSURANCE CO LTD v VAN DER MERWE NO** 1998 (2) SA 1091 (SCA) at 1095C – D.

[24] There may be a number of reasons, which I choose not to speculate about, why the plaintiff's name is not on the accident report. However, having regard to all the documents I have referred to above, I find that the plaintiff was a passenger in the motor vehicle with registration number DHV 766 FS as alleged and that he sustained the injuries in the collision in question.

NEGLIGENCE

[25] I now have to consider whether the collision was caused by the sole negligence of the driver of the insured motor vehicle.

[26] Section 17(1) of the Act creates liability for the fund, the defendant in this instance, *inter alia*, where a person suffers bodily injury caused by any person if such injury is due to the negligence or other wrongful act of the driver or of the owner of the insured motor vehicle.

[27] A driver in a through street, while being required to keep a general lookout is entitled to assume, in the absence of

indication to the contrary that a driver approaching from a stop street will heed the stop sign operating against him or her and bring the motor vehicle to a stop. See NEG INSURANCE CO LTD v SULLIVAN 1988 (1) SA 27 (AD) at 36D.

[28] The unchallenged evidence before me is that the insured driver was coming from a side road approaching a stop sign. It was expected that she would stop at the stop sign but she failed to do so and turned into the path of travel of the taxi. The taxi was travelling on a through road, had the right of way and as such the insured motor vehicle was supposed to have stopped and allowed it to pass.

[29] As already stated the defendant did not proffer his version of the events and at the end of the case I was left with only the version of the plaintiff. And this is the version that I must consider in determining the cause of the collision.

[30] The defendant's counsel submitted when addressing me that no reliance should be placed on the plaintiff's evidence. His

argument is that the plaintiff's demeanor and conduct when answering questions in the witness box were such that I should not rely on his evidence. I do not agree.

[31] In this regard counsel must be referring to the outburst by the plaintiff during cross-examination. This was when he was asked to explain the contradictions between the contents of his affidavit and his oral evidence in court. To my mind, the outburst was not due to the fact that the plaintiff was evading questions or that he was not telling the truth. To me it came across as the frustration of a person who has waited too long for justice. The plaintiff's case is typical of the adage "justice delayed is justice denied". He was injured in 2007 and four years after the fact his case is only being heard. I see no reason why this should adversely affect his evidence.

[32] Counsel submitted further that I should not rely on the plaintiff's evidence because it was riddled with inconsistencies and contradictions. This submission in my view is baseless. There were a few discrepancies in the plaintiff's version. I found them

to be of negligible value particularly having regard to the time lapse since the collision. For example, firstly, the plaintiff's pleadings were at variance with his *viva voce* evidence in court. The plaintiff testified in court that he did not know the registration numbers of the motor vehicles that were involved in the collision, as he did not check their registration numbers. However, in his particulars of claim he stated that the registration number of the motor vehicle he was travelling in was DHV 766 FS.

[33] Secondly, there was a contradiction between his oral evidence in court and some of the contents of his affidavit. In court he testified that he did not see the insured motor vehicle approaching however in the affidavit he stated that that motor vehicle came traveling at a high speed.

[34] In my opinion, the plaintiff was a satisfactory witness. Although the collision occurred some years ago he was able to relate the events to my satisfaction. I am thus satisfied with the evidence of the plaintiff and am of the view that it can be relied on.

[35] In cases of this nature, the *onus* rests with the plaintiff to prove negligence on the part of the defendant's driver. There is no *onus* on the defendant to show that the insured driver has not been negligent, but, once the plaintiff has proved an occurrence giving rise to an inference of negligence on the part of the defendant's driver, the latter has to give an explanation which is sufficient to dispel *prima facie* proof of negligence, otherwise he or she runs the risk of judgment being given against him or her. The defendant has a tactical *onus* of furnishing an explanation of his or her conduct which either excludes negligence on his or her part, or is equally consistent with negligence or no negligence. See NTSALA & OTHERS v MUTUAL & FEDERAL INSURANCE CO LTD 1996 (2) SA 184 (TPD) at 190E/F – 192B/C and GOODE v SA MUTUAL FIRE & GENERAL INSURANCE CO LTD 1979 (4) SA 301 (WLD) at 306C – D.

[36] My view is that, in this instance, the defendant's driver is the only person who can explain why the vehicle she was driving did not stop at the stop sign and why she travelled in the taxi's

path of travel without stopping at the stop sign. And without that explanation, the only reasonable inference I can make is that the negligent conduct of the driver of the insured vehicle, in failing to keep a proper lookout and not stopping at the stop sign thereby travelling on the taxi's pathway caused or contributed to the accident resulting in the bodily injuries to the plaintiff.

[37] In instances like this, the plaintiff has only to prove 1% negligence. The plaintiff has accordingly on a balance of probabilities discharged the *onus* of at least establishing that the conduct of the driver of the insured vehicle contributed to the collision.

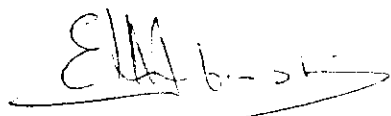
[38] As regards the call by the defendant's counsel for absolution from the instance, my view is that, the plaintiff has made out a *prima facie* case, which calls for an answer and a prayer for absolution must therefore fail.

[39] When a court comes to consider, after having heard the evidence of the plaintiff, and the evidence, if any, adduced by the defendant, whether or not to grant absolution from the instance, the question to be asked is whether a reasonable man should (or ought to) give judgment in favour of the plaintiff. See GEOGHEGAN v PESTANA 1977 (4) SA 31 (TPD) at 34A.

[40] To my mind, the evidence produced by the plaintiff on whom the *onus* rested, is of such a nature that without any answer from the defendant it justifies a reasonable man to find for the plaintiff on the matters in issue.

[41] In the circumstances I make the following order:

- 41.1 The plaintiff's claim succeeds.
- 41.2 The defendant is liable for payment of the plaintiff's proven damages resulting from the insured driver's negligence.
- 41.3 The defendant is ordered to pay the costs of suit.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE	: 23 AUGUST 2012
DATE OF JUDGMENT	: 13 NOVEMBER 2012
PLAINTIFF'S ATTORNEY	: CHUENE ATTORNEYS C/O MOGALE ATTORNEYS
PLAINTIFF'S COUNSEL	: ADV M.E. MANALA
DEFENDANT'S ATTORNEY	: A.P. LEDWABA INCORPORATED
DEFENDANT'S COUNSEL	: ADV L.T. LEBALLO