REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **34751/2011**

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

…….…… **…10/7/2015……**
SIGNATURE **DATE**

In the matter between:

PHUTI SAMUEL MOLOTO PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

J U D G M E N T

MALI AJ

[1] The plaintiff, an adult male instituted a claim against the defendant claiming for damages in terms of section 17 (1) (b) of the Road

Accident Fund Act 56 of 1996 ("the Act"). The damages were allegedly suffered as a result of a collision with a bus driven by an unidentified insured driver.

[2] At the commencement of the trial, the parties agreed that the issue of liability be adjudicated separately in terms of Rule 33 (4). This trial proceeded on merits only. The determination of quantum is postponed sine die.

[3] The merits of this matter are to be decided on the basis of the testimony of the plaintiff. The defendant did not call witnesses.

[4] It is not in dispute that a collision took place on 11 May 2009 at Phomolong Village in Polokwane involving a motor vehicle bearing registration letters and numbers B[……].

[5] What is in dispute is whether there is negligence on the part of the insured driver and if so to what extent.

[6] According to the plaintiff at about 8h30 in the morning he was driving a Toyota Hilux van on a steep unmarked gravel road. He was driving at 80 kilometres per hour on the left hand side of the road towards Phomolong. He noticed a bus approaching from the opposite direction downhill. The bus was driven at a high speed travelling along the plaintiff's lane of travel. In an attempt to avoid the collision he reduced his speed to 70 kilometres per hour. He swerved his motor vehicle to left hand side of the road and the car ended up in a ditch.

He further stated than he swerved right back onto the road the car then overturned to the left hand side again.

[7] Under cross examination he stated that there were people who arrived at the scene of the accident and the car was placed on wheels. He then went home and his wife arranged for his neighbour to take him to hospital.

[8] The defendant's counsel further cross examined the plaintiff on the contents of his affidavit. The plaintiff admitted his signature but stated that the contents thereof were not read back to him.

[9] The plaintiff closed its case. The defendant then closed its case. See **GAINTE V DICKINSON 1950(2) SA 450 (AD)** where the Court held at 465:

"It was not advisable to lay down a general rule as to the effect that may properly be given to the failure of a party to give evidence on matters unquestionably within his knowledge. But it seems fair to say in an accident where the defendant was the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of an explanation from the defendant to select out of the two alternative explanations of the cause of the accident which are more or less equally open on the evidence, than one which favours the plaintiff as opposed to the defendant".

[10] The failure to call the police officer who compiled the accident report and the hospital official who completed the hospital report is surprising especially as the insured bus driver is unidentified. It would seem as though little, if any, preparation had been given to the defendant's case, despite the matter proceeding to trial; in particular that on 2 June 2015 the defendant requested the matter to stand down for trial to 4 June 2015 fully aware of the status of its case.

[11] Counsel for the plaintiff argued that the defendant had admitted the collision in its plea. The only issue in dispute was whether the insured driver was negligent. It is undisputed that there was a bus, accordingly the court should accept that there was a bus and the plaintiff's car overturned when he was trying to manoeuvre his car to avoid collision with the speeding bus.

[12] Counsel for the plaintiff further argued for costs. He submitted that the matter was set down for trial on 2 June 2015 and the defendant requested the matter to stand down to 4 June 2015. Accordingly the plaintiff was entitled to the costs of 2 days.

[13] Ms Moses, counsel for the defendant argued that the plaintiff had three different versions which are as follows:

(i) There was a near collision;

(ii) There was head on collision;

(iii) The plaintiff fell out of the car and sustained injuries.

She further stated that out of the three versions the defendant took one version and gave the defendant a benefit of doubt and allowed the claim to proceed. In respect of the plaintiff's affidavit she argued that it was not compliant, accordingly the plaintiff's claim was not valid. This is the same affidavit she used to discredit the evidence of the plaintiff.

[14] The Counsel for the defendant who did not call any witnesses sought to cross examine the plaintiff on his version of the collision on the accident report and hospital records. This was disallowed because it amounted to hearsay.

[15] The defendant tried to prove that the plaintiff lied because in his affidavit he stated that the bus collided with his motor vehicle, whereas in his evidence he stated that there was a near collision. According to the counsel for the defendant these destructive versions point to the fact that there was no collision. As stated above the defendant did not call any witness to prove that there was no collision.

[16] The Counsel for the defendant further submitted that the damages of the vehicle do not correspond with the head on collision. There was also no evidence led in this regard. The Counsel further stated she was not in a position to argue if there was a bus or no bus. She in conclusion submitted that in the event it was found that there was an

accident there should be apportionment of damages to the plaintiff. Her submission was not supported by any argument.

[17] For the plaintiff to succeed in his claim, he has to meet the requirements in terms of section 17(1) of the Act of proving negligence for the statutory liability of the defendant. In **Klopper, H.B The Law of Third Party Compensation, (3ed), 2012** at page 75. It is trite law that even the slightest degree of negligence on the part of the driver of the insured vehicle is sufficient to satisfy that requirement of negligence. Any negligence on his part which is relevant for the causation of the accident would suggest contributory negligence and justify apportionment of damages by this court.

[18] In **Goode v SA Mutual Fire and General insurance 1979 (4) SA 301 (W)** it was held

"*the maxim res ipsa loquitur applies to street accidents although in a limited manner. This limitation occurs because the Court is dealing with two vehicles which, prima facie, are lawfully travelling on the road. Once the inference of negligence is established the defendant has a tactical onus of furnishing an explanation of his conduct which either excludes negligence on his part, or is equally consistent with negligence or no negligence".*

[19] The plaintiff appeared to know his facts and was impressive. He answered all questions articulately. He did not lie about the affidavit; he stated that the affidavit was never read back to him. To what was

considered to be an inconsistency by the defendant he gave satisfactory explanation. Furthermore he did not lie about his reduction speed. He made it clear that he was scarred of being squashed by the bus and had to do his best by swerving the car to the left hand side of the road to avoid collision. I therefore accept his testimony as credible and that the probabilities favour his version than any other, since there is none before court.

CONTRIBUTORY NEGLIGENCE

[20] Section 1 (a) of the Apportionment of Damages Act 34 of 1956 provides:

"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".

[21] In **Sedumemanyatela v Road Accident Fund (65678/2012) [2014] ZAGPPHC 445 (30 May 2014)** at page 14 paragraph 21 Molefe J appositely remarked:

"Even when an approaching vehicle is on its incorrect side of the road, a driver on his correct side may assume that the former will return

timeously to its correct side of the road. But this assumption does not entitle a driver on the correct side of the road to remain passive in the face of threatening danger. As soon as the danger of the collision becomes evident he is under a duty to take reasonable steps to avert one".

[22] In *casu* the plaintiff who was travelling in a village on a steep unmarked gravel road reduced his speed from 80 to 70 kilometres per hour to avoid collision. I consider the 70 kilometre reduction not reasonable by any means. A gravel road by its nature is risky and dangerous; the plaintiff would have been expected to be extra cautious especially with his speed.

[23] Consequently, I find it appropriate to apportion the degree of fault between the plaintiff and defendant at 30%- 70% respectively. Such apportionment is made on the considerations of justice and equity. See: **General Accident Versekeringsmaatskappy Bpk v Uijs NO [1993] ZASCA 58; 1993 (4) SA 228 (A) at 234J-235E.**

ORDER

[24] In the circumstances it is ordered:

1. **That the defendant is liable to pay 70% to the plaintiff of his proven or agreed damages.**

2. **That the defendant is to pay the costs of suit; such costs to include the costs incurred in the postponement of the matter on 2 June 2015 on party and party scale.**

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MALI AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the Plaintiff:	Adv WJ Botha
Instructed by:	Frans Schutte Incorporated
Counsel for the Respondent:	Adv Moses
Instructed by:	Tsebane Molaba Incorporated
Date of Hearing:	04 June 2015
Date of Judgment:	10 July 2015