IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

20/4/2016

30183/2003

Not reportable

Not of interest to other judges

Revised

In the matter between:

D R NHLAPO N.O. **PLAINTIFF**

and

P MOEKETSANE **DEFENDANT**

JUDGMENT

MOLOPA-SETHOSA J

[1] The plaintiff, David Rajane Nhlapo N.O. ("plaintiff '), in his capacity as the curator *ad litem* to Ramphale Jacob Nhlapo ("claimant"), has instituted an action against the Defendant for damages arising out of a motor vehicle collision which occurred on 4 March 1994 at Witsieshoek, Qwaqwa, between a motor vehicle with registration letters and number […] ("the insured vehicle"), there and then driven by one T Motloung ("the driver of the insured vehicle") and the claimant who was a pedestrian at the time of the collision.

[2] It is common cause that the claimant, R J Nhlapo was entitled to pursue a claim against the Multilateral Motor Vehicle Accidents Fund ("the MMF"), in respect of that accident and pursuant to those rights he instructed attorney Moeketsane ("the defendant"), to lodge and prosecute that claim for compensation. That claim would have fallen and/or would have been dealt with pursuant to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("the 1989 Act"), and not the Road Accident Fund Act 56 of 1996 ("the 1996 Act"), which is currently applicable. In essence both acts provide for the same remedies for a person having been injured in a collision.

[3] The defendant, Moeketsane, settled this claim with the MMF, and issued a cheque in favour of the claimant in the amount of R10 105.30 on the basis of him having agreed with the fund, in accepting their tender of an appointment of 60/40 in favour of the MMF. The plaintiff, on behalf of the claimant, disgruntled with the aforesaid settlement has now instituted an action against the Defendant for damages as set out in paragraph [1] here above.

[4] At the commencement of the trial, the parties by agreement made an application for the separation of merits and quantum in terms of Rule 33(4) of the Uniform Rules of the Superior Court, which order was granted. The matter thus proceeded on the merits and quantum was postponed *sine die.*

[5] The only issue for determination before this court is whether there was negligence on the part of the driver of the insured vehicle, T Motloung, and whether there was contributory negligence on the part of the claimant and the extent thereof, if any.

[6] The Plaintiff led the evidence of Morake Johannes Morake. He testified that he is a tracer and a Methodist church preacher involved in church affairs. That he is 59 years old. Further that he has lived in the Witsieshoek area, Qwaqwa, since 1970.

[7] He testified that he knew the Tseki shopping centre very well. That he knows the main road leading through the shopping centre very well, and that the shopping centre does have lots of lights and is well lit. Further that the surface of the road leading to the shopping centre is a tarred surface, and that the road has got an edge; that soon after the yellow line there is gravel. He further testified that the shopping centre itself has a

pavement which runs for about 200m.

[8] He testified that in March 1994 he was resident at Witsieshoek. That the shopping centre was there and/or existed in March 1994. He further testified that he does not drive a motor vehicle at all.

[9] He testified that Tseki road comes from a Northerly direction, turns around and runs from the East to the West. That there are houses on the side and the shopping centre is situated on the left hand/Southern side of the road.

[10] He testified that the area is high up and that the lights can brighten an area for a distance of about 600 m, also considering the built up/residential area alongside the road.

[11] Under cross examination he stated that he was not present when the accident happened and that he does not know how the accident in question happened.

[12] The next witness that testified is Rachel Puleng Nhlapo, the claimant's wife. She testified that she was 52 years old, and that she was married to the claimant, and had been so married to the claimant for 21 years. Further that her highest educational qualification was junior certificate [JC], known as standard 8 or grade 10.

[13] She testified that on the day of the collision in question herein, on 4 March 1994 she was at her home when a certain man came and told her that her husband had been knocked by a vehicle. She then rushed to the scene of the accident and she found her husband lying still on the side of the road, she thought he was dead. That they waited there where husband got injured [at the scene of the accident], waiting for an ambulance.

[14] She further testified that her husband was bleeding and that he was unconscious when he was taken to hospital. That the claimant was rushed to Manapo hospital but was then transferred to Bloemfontein hospital. That the claimant was hospitalised in the Bloemfontein hospital for 5 to 6 days (about a week). Further that she does not know if he was operated on because she did not accompany him to the hospital.

[15] She testified that there was a shopping complex in the area and that she knows it, they use/shop at the shopping complex. Further that the distance from where her husband lay to the shopping centre was about 3 to 4 m. That the lights of the complex were on when she arrived at the scene.

[16] Under cross examination she stated that she does not know how the accident happened; that she does not know how her husband was knocked by a car.

[17] The next witness to testify was the claimant, Ramphale Jacob Nhlapo. He testified that he was born in 1957; that he was 54 years old; and that he lived/resided in Tseki village, not far from the shopping complex. That his house is on the same street as the shopping complex.

[18] He testified that he was told that he had been involved in an accident; further that he was told that at some stage he ended up in hospital. That he does not know that he was in hospital or how he ended up in hospital. That he was told that he was hit by a motor vehicle.

[19] He further testified that when he was hit by a vehicle he was either going to or coming from the shopping centre. That he has forgotten, he has lost his memory.

[20] Under cross examination he stated that now he can recall the accident because of the injuries on his right leg and on his head as he was told at Bloemfontein hospital. That he also had an operation on his abdomen.

[21] He stated that he does not know how the accident happened. That he was walking on the side of the road.

[22] That concluded the plaintiff's case. The defendant closed its case without calling any witnesses, and asked the court to grant absolution from the instance as the plaintiff had not made out any case.

[23] After argument, judgement was reserved. Prior to judgement being handed down

the plaintiff brought an application to re-open its case, on the basis that new evidence which was material to plaintiff's case had emerged; that plaintiff needed to lead evidence of a material witness. The application was heard on 29 May 2014, and in the interests of justice the application to re-open the plaintiff's case was granted.

[24] The plaintiff thus, subsequently led further evidence by calling one Motlalepule Daniel Makgwadi. He testified that he is a lieutenant in the South African Police Services ("SAPS") stationed at Phuthaditjaba with 27 to 28 years' service. That on 04 March 1994 he was stationed at Tseki police station.

[25] He confirmed that he had a police docket, under case no. 0103194 relating to the accident in question herein; that he had the original sketch plan and report which contained the report and the diagram and key thereto, pertaining to the accident that took place on 04 March 1994, which were handed in as exhibit AA.

[26] He testified that he attended to the scene of the accident herein on 04 March 1994. That on his arrival at the scene the claimant/injured person was no longer on the scene. That the driver of the insured vehicle pointed out the point of impact to him [depicted as C on the sketch plan], as well as the stationery insured vehicle [depicted as F on the sketch plan]. That he is the one who wrote down the measurements contained in the key and diagram.

[27] He testified that the road where the collision occurred is a very busy road.

[28] Under cross examination he stated that the driver of the insured vehicle merely mentioned to him that there were other vehicles parked outside the road on point E on the sketch plan. He confirmed that there is no point E depicted on the sketch plan, stating that the space between the two boxes on the left hand side of the road on the sketch plan should have been marked E.

[29] He stated that he cannot recall as to how many cars the driver of the insured vehicle had told him were parked at point E. that he believes that it was not just one car parked at point E.

[30] He stated that he did not write out his report and sketch plan at the scene of the accident; further that he did not show the driver of the insured vehicle the sketch plan after he had drawn it. I may just state that the date on the draft sketch plan and key is 05 March 1994, a day after the collision in question herein. He stated that point C/the point of impact, is what he was told [by the driver of the insured vehicle], that a car hit a pedestrian. That he was told that the insured vehicle stopped on the yellow line at point F after the collision. That he and the driver of the insured vehicle were communicating in Sesotho.

[31] He stated that he did not ask the driver of the insured vehicle why he ended up stopping at point which he indicated on his key to the sketch plan to be 48.20 from the alleged point of impact [C].

[32] He further stated that he is not the person that prepared/completed the police road traffic report ("'the accident report"). That he only drew the sketch plan and the key thereto. He could not explain the discrepancy between the sketch plan and the accident report, which mentioned that the claimant appeared in front of parked vehicles between cars supposed to be marked point E and walked into the path of travel of the insured vehicle.

[33] Under re-examination he stated that he prepared the formal sketch plan and key on 13 March 1994. That he had prepared the rough sketch the day after the collision, on 05 March 1994. That he believes that his sketch plan is the correct version as to what happened because he was assisted by the driver of the insured vehicle.

[34] On the court's questions [for clarity] he stated that he does not know who prepared the accident report, handed in as exhibit AB; that the author might be established from the signature appended to the original report. I may state that the original accident report was never furnished to the court, and there was no attempt to trace the author of the accident report.

[35] That concluded the evidence of the Plaintiff, and the evidence pertaining to the whole matter. The defendant closed his case without calling any witnesses, and asked for the dismissal of the plaintiff's claim with costs. The plaintiff s counsel argued that on

the evidence before court the plaintiff's claim should be upheld with costs; at worst that the court should find that there was contributory negligence on the part of the driver of the insured vehicle.

[36] As already stated above, the only issue for determination before this court is whether there was negligence on the part of the driver of the insured vehicle, T Motloung, and whether there was contributory negligence on the part of the claimant and the extent thereof, if any.

[37] In essence counsel for the Plaintiff argued that the court should accept, amongst others, the hearsay evidence of the witnesses that testified on behalf of the plaintiff, and that of the claimant.

[38] Counsel for the defendant on the other hand argued that the court should dismiss the plaintiff s action with costs, on the basis that the plaintiff has failed to make out a case for negligence on the part of the driver of the insured vehicle. That the evidence before court is mainly based on hearsay and riddled with contradictions; especially the evidence of the police that attended to the scene of the accident, vis-a-vis the sketch plan and the accident report.

[39] It is so that all the witnesses that testified on behalf of the plaintiff could not give an account of how the accident in question herein happened. Morake and Mrs Nhlapo never witnessed the accident. They both conceded that they do not know how the accident happened. Their evidence is simply not helpful to this court.

[40] Morake may have testified about lighting around the Tseki shopping complex, however, that on its own, without any explanation as to how the collision itself may have occurred, and/or how the claimant ended up on the side of the road after the collision, is not helpful. The court cannot just draw an inference that there was negligence on the part of the driver of the insured vehicle merely from the fact that there was a collision wherein the claimant was injured; and that the area was well lit. It not even known whether on the day or night of the collision in question there were lights on or not.

[41] Mrs Nhlapo's evidence that when she arrived at the scene the claimant was lying

injured on the pavement also does not help. There is no evidence whatsoever on how the claimant landed on the pavement or side of the road. Counsel for the plaintiff sought to argue that the court should draw an inference that the claimant was hit by the insured vehicle on the side of the road, solely based on the evidence of the claimant that he was walking on the side of the road. This is in fact contradicted by Lieutenant Makgwadi, who testified that according to the driver of the insured vehicle the point of impact was at point £.of the sketch plan, which is inside the lane of travel of the driver of the insured vehicle. According to the accident report [exhibit AB] the point of impact would have been next to parked vehicles [supposedly at what would according to Makgwadi, have been point E, which is further away from what he depicted as the point of impact, at point C.

[42] It is clear from the evidence of the claimant that he has no idea at all as to how the accident happened. His evidence is to the effect that he was told at the Bloemfontein hospital that he had been involved in an accident. He himself does not even know whether prior to the accident he was going to or coming from the Tseki shopping complex. He was clearly confused and he clearly had no recollection of how the accident occurred. One may sympathise with him, but that cannot be the basis to draw an inference that there was negligence on the part of the driver of the insured vehicle. The plaintiff bears the onus to prove on a balance of probabilities that the driver of the insured vehicle was negligent. On the totality of the evidence before court this cannot be said, and on the facts and evidence before court there is no basis upon which the court can draw an inference that there was negligence on the part of the driver of the insured driver. I have had regard to the cases referred to by parties and on the evidence at hand no case comes to the assistance of the plaintiff.

[43] Makgwadi 's evidence is also hearsay; it is allegedly what he was told by the driver of the insured vehicle. The driver of the insured vehicle was not called to confirm the alleged point of impact. Makgwadi did not even show the driver of the insured vehicle the sketch plan after he had drawn it to confirm with him that he correctly depicted what was allegedly shown/pointed by the driver of the insured vehicle.

[44] On the sketch plan drawn by Makgwadi, exhibit AA, there is an indication of some two boxes/vehicles on the left side of the road, which were supposed to depict point E.

however, there is no Point E. On the key to the sketch plan point E is said to be "alleged position where at the other vehicles had parked". Makgwadi stated in his evidence that he cannot say and/or does not know what the significance of point E would have been. According to him he drew a draft sketch plan a day after the collision in question, i.e. 05 March 1994, in the presence of the insured driver, and drew a formal sketch on 13 March 1994. It is surprising that he would have specifically mentioned point E without any specific significance.

[45] According to the police accident report, exhibit AB, the complainant surfaced in between parked vehicles, depicted by Makgwadi at what was supposed to be point E, and walked into the lane of travel of the insured vehicle, hence the collision. This aspect as well could not be confirmed as the author of the police accident report is not known. Obviously there was no effort by the plaintiff to establish who the author of the report was and to call such as a witness; for obvious reasons I guess, the version in the accident report does not favour the plaintiff s case. In any event I find Makgwadi to have been very dodgy on this aspect. It does not make sense at all that he would not know and/or would have forgotten why he referred to point E. Anyway there t s a contradiction between his sketch plan and the police accident report. His hearsay evidence does not in any way assist the plaintiff s case.

[46] On the totality of the evidence before court it cannot be said that the plaintiff has made out a proper case for the relief sought. This is a case where in my considered view, absolution from the instance should be granted and that the plaintiff, who is the one that has instituted these proceedings, be ordered to pay the costs of suite.

[47] In the result I make the following order:

1. Absolution from the instance is granted.
2. The Plaintiff is ordered to pay the costs of suite, which costs shall also include the costs of the hearing on 09 May 2011, costs of 10 September 2013 and costs of the hearing on 29 May 2014.

JUDGE OF THE HIGH COURT

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