

22/6/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case Number: 66853/15

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

22/6/2017
DATE

SIGNATURE

In the matter between:

MOTHETSI MATHEUS MOILOA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

Coram: HUGHES J

REASONS

HUGHES J

Introduction

[1] The plaintiff, Mothetsi Matheus Moilola, was a passenger for reward in a Toyota Quantum. On 10 April 2012, this Toyota Quantum (Quantum) was involved in a collision with a Mercedes Sprinter (Sprinter).

[2] The vehicle wherein which the plaintiff was a passenger was travelling from Lesotho to Vaal Reef, whilst the Sprinter was travelling in the opposite direction.

Facts

[3] On the date of the trial, being 14 June 2017, the plaintiff was represented by Adv. E Botha. On the other hand the defendant had its attorney, Mr T Maribulla present at court. Incidentally, the attorney of the defendant did not have any robes in order to appear before the court. In addition, importantly, he did not have a right of appearance in terms of Section 4(2) of Right of Appearance in Courts Act 62 of 1995.

[4] In essences, the plaintiff representative was the only party prepared and ready to proceed with the trial. The plaintiff as a passenger was the only person who gave evidence at the trial. At the end of his evidence the plaintiff closed its case seeking judgment in its favour. No evidence was adduced on behalf of the defendant.

[5] The plaintiff testified that on 10 April 2012 he was a passenger in a Quantum travelling from Lesotho, which is his home country, to Vaal Reef where he worked in the mines. In the Quantum motor vehicle the plaintiff was seated on the back seat.

[6] During the course of his travels, at or near town of Ladybrand, the Quantum was involved in a collision with the Sprinter, which was travelling in the opposite direction. The Sprinter was travelling from Klerksdorp to Lesotho.

[7] He testified that from where he sat he saw the Sprinter coming towards the Quantum, in the path of the travel of the Quantum. The Sprinter was travelling at a high speed and was in the process of overtaking three vehicles which were driving in front of it. In executing this manoeuvre, the plaintiff states that, the Sprinter encroached

onto the Quantum's path of travel. A head-on collision ensued between the two vehicles.

[8] The plaintiff testified that on impact he was flung from the vehicle into the air, he landed face down on the ground and the Quantum rolled over him.

[9] On the scene, he was rendered unconscious for a while, he regained consciousness and heard the people around him, and they were trying to lift the Quantum off him. He further testified that he sustained the following injuries:

- a) A soft tissue to his head injury;
- b) A fracture of his C1 vertebrae; and
- c) A fracture of his right tibia

[10] He was hospitalised for his injuries at Clocolan Hospital and subsequently transferred to Westvaal Hospital.

[11] He confirmed that he completed a statutory occurrence affidavit on 23 May wherein he stated the following:

"I was a passenger in a taxi, travelling from Lesotho to Vaal Reefs. The taxi which was travelling from opposite side, collided into our taxi. Police and ambulance from Clocolan attended place of accident. I was transported by ambulance to the hospital."

The Law

[12] **W.E Cooper** in his book *Delictual Liability in Motor Law* at page 101 had the following to say about a vehicle driving on the incorrect side of the road:

"(b) Vehicle driving onto incorrect side of the road"

Where a motor vehicle drove onto the incorrect side of the road and collided with an approaching vehicle it has been held *res ipsa loquitur* because the only reasonable inference was that the defendant's driving onto the incorrect side of the road at an inopportune moment was due to his failure to exercise proper

care. Proof that a vehicle was on its incorrect side of the road at the time of the collision (it is held) is *prima facie* proof of the driver's negligence.

[13] In the circumstances where a vehicle is found to have collided with another on its incorrect path of travel the onus surely lies with the driver of that vehicle on its incorrect path of travel to provide some explanation to negate negligence being attributed to the said driver.

[14] This in my view is a case of *res ipsa loquitur* meaning the accident speaks for itself. In the absence of an explanation from the defendant I am entitled to conclude that from the facts of the collision as testified by the plaintiff, the collision could not have occurred, but for the negligent act of the defendant's insured driver. The defendant's insured driver having entered his incorrect side of the road, in the path of travel of the Quantum, being the vehicle that the plaintiff was a passenger in.

[15] On the evidence of the plaintiff and the fact no explanation was forthcoming from the defendant, I can but only conclude that the defendant was negligent in all material respects and was the cause of the collision that ensued. The plaintiff being a passenger need only prove but 1% negligence on the part of the defendant insured driver to attain 100% liability against the defendant. In my view, in this instance the plaintiff has succeeded in doing so.

Costs

[16] Adv. Botha on behalf of the plaintiff argued that the defendant should be ordered to pay the costs occasioned on an attorney and client scale. To this end, he submitted that, this was a passenger's claim and the plaintiff was only required to prove 1% negligence on the part of the insured driver of the Sprinter. Further, that the defendant had 120 days from the lodgement of the plaintiff's claim to investigate and verify the issue of liability, to establish or refute the 1% negligence on the part of the insured driver. In respect of both issues it is clear that the defendant did not apply its mind to the matter and neither did it comply with its statutory duty to investigate the collision.

[17] The conduct of the defendant was frivolous and vexatious in that it prolonged the proceedings right up to and inclusive of running the trial without a version on the papers and before this court. The defendant did not even see fit to locate the insured driver of the Sprinter to advance his version and the cherry on the top was appearing at court for the trial without a representative that could appear before this court on behalf the defendant.

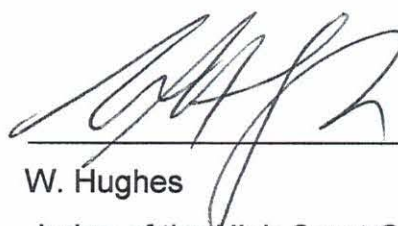
[18] It is trite, that only in extra-ordinary circumstances and if special considerations arise out of the conduct of the parties or the circumstances that gave rise to this trial, may a punitive costs order be granted. This would ensure that the party who is seeking a punitive costs order is not put out of pocket and that such an order is thus not granted lightly.

[19] The special circumstances mentioned *supra* include but are not limited to, where a party acts dishonestly, fraudulently, in a vexatious manner, recklessly, maliciously and had frivolous motives or committed a grave misconduct in the conduct of the case itself. Refer to **Herbstein and Van Winsen** *The Civil Practise of the High Courts of South Africa* (5 Ed) at pages 971 to 973.

[20] It is evident to me, from the reason above that the defendant *in casu* proceeded to defend this case in a reckless, frivolous and vexatious manner. Thus the plaintiff is entitled to be granted a punitive costs order in its favour on an attorney and client basis to demonstrate this courts displeasure as regards the conduct of the defendant.

[21] Consequently, the following order is made:

1. The defendant is ordered to pay 100% in respect of liability of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay costs, inclusive of costs of the interpreter, counsel and the correspondent attorney, on an attorney and client scale.



W. Hughes

Judge of the High Court Gauteng,
Pretoria

Appearances:

For the Plaintiff: Adv. Botha
Instructed by: Kritzinger attorneys

For the Defendant: Mr Maribulla
Instructed by: Maluleke Msimang & Associates
Date delivered: 14 June 2017