IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 10399/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

DATE DELIVERED: 01 /11/19

SIGNATURE:

In the matter between:

ZELDAH NTOMBIKAYISE MASOKA Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKHUBELE J

Introduction

[1] The Plaintiff issued summons against the Road Accident Fund (the defendant), a statutory body established in terms of the Road Accident Fund Act, 56 of 1996 for payment of compensation for damages suffered by her

and her two minor children. It is alleged that the plaintiff's husband and the minor children's father was killed in a motor vehicle accident that occurred on 27 December 2015 at approximately 07:30 and at R571 Mananga Road, Naas Township, Nkomazi Municipality, Mpumalanga Province.

[2] It is common cause that at the time of the collision, the deceased, Simon Orlando Nkuna ("the deceased") was the driver of his motor vehicle (vehicle), a white Ford Ranger with registration letters and numbers FMR 664 MP.

[4] Three trial bundles were handed in, namely, Pleadings, Notices and the defendant's Assessor's Report. The latter comprised of witnesses' statements with regard to the plaintiff's locus standi, post-mortem reports, police statements and the accident report form.

The particulars of claim and plea

[5] It is alleged that the deceased's vehicle overturned whilst he was trying to avoid colliding with an unknown vehicle that disturbed him when it *'encroached in his lane of travel'*. It is further alleged that the accident was caused by the sole negligence of the unknown insured driver who was negligent in one or more or all of the following respects:

> *"6.1 He failed to keep a look out.*
>
> *6.2 He failed to keep the vehicle driven by himself under proper control.*
>
> *6.3 He failed to avoid the collision when by the exercise of due and reasonable care he could and should have done so.*
>
> *6.4 He drove at an excessive speed in circumstances that did not allow it.*

6.5 He failed to give adequate warning of his approach at a time when he could or should have done so.

6.6 He lost control over the vehicle, which at the time was licensed, and knocked down the Plaintiff.

6.7 He failed to apply brake timeously or at all.

6.8 He failed to display and exercise the necessary degree of skill as a driver of a motor vehicle."

[6] In its plea, the defendant denied the allegations pertaining to the *locus standi* of the plaintiff to institute the claim on her behalf and the children, her marriage to the deceased and his responsibility towards their maintenance.

[7] On the merits, the defendant denied the collision and liability. In the alternative, it pleaded that the accident was caused by the negligence of the deceased, further alternatively, that the deceased contributed to the causation of the accident. Particulars of the deceased's alleged negligence or contribution to the causation of the accident are almost similar to those stated by the plaintiff in her particulars of claim.

Separation of issues and orders granted

[8] At the commencement of the hearing, the parties advised me that they had agreed in terms of Rule 33(4) of the Uniform Rules of Court to separate the merits and the quantum. I was also advised that issues pertaining to the *locus standi* of the plaintiff in as far as her own claim is concerned, are still disputed and as such, the parties had agreed to defer its adjudication to a later stage. I accordingly granted an order to separate merits from quantum

and a postponement of the *locus standi* dispute in accordance with their agreement. The trial proceeds on the merits only.

[9] No specific issues recorded in the pre-trial minute were canvassed, and having had a look at its contents, there are no material concessions or agreements on the merits of the claim.

[9.1] The date of the accident was amended in court by agreement between the parties to be 02 December 2015 and not 27 December 2015, as alleged in the particulars of claim.

The oral evidence

Plaintiff

[10] The plaintiff called one witness only, Mr. Sthembiso Khoza. In the opening statement, he was introduced as the 'eyewitness' to the accident.

[11] His evidence in chief may be summarized as follows:

[11.1] He stays at Tonga. He does not know the plaintiff and the deceased.

[11.2] On the day in question he was walking along road R5571 from Tonga to Mangweni.

[11.3] When he reached an area where the road makes a steep downhill, he saw two motor vehicles that were overtaking each other in the direction he was heading towards. A white Ford Ranger was coming from the opposite direction. He heard a sound of a bell

(horn/hooter), from behind him and when he turned to look, he saw the Ford Ranger moving outside the tar road and overturning. He does not know where the sound of the horn was coming from amongst the three motor vehicles.

[11.4] He saw the brake lights of the motor vehicles that were overtaking each other. They did not stop but proceeded with their journey.

[11.5] The road had one lane in each direction. The accident occurred on the lane of travel of the Ford Ranger.

[11.6] He proceeded with his journey and did not stop or wait because he is scared of looking at scenes of accidents.

[11.7] He discussed what he saw with the person that he was going to visit.

[12] Under **cross-examination**, he testified that:

[12.1] He only met the plaintiff on the day that he testified in court.

[12.2] The vehicle that was overtaking is a Corolla. He could not make out the make of the other one because it did not appear to be a South African vehicle. He only remembers its colour, that it was silver gray.

[12.4] He could not confirm if there had been contact between the Corolla and the Ford Ranger, however, when he turned to look back after hearing the horn, it appeared to him that the latter was avoiding or 'running away' from the Corolla.

[12.5] He did not want to involve himself by looking in the Ford Ranger to see how many people were in it. He just proceeded with his journey.

[12.6] On how he was traced to come and testify, he gave two versions. The first one was that he was called by an unknown male person last month (July 2019) and told that he was needed. He went there and he was asked questions about this accident. This person called him by name but he does not know who he is. The second version is that he did not go anywhere after this person had called him. He did not meet him. They talked by phone. He was asked where he was on December 2015. He told this person that he remembers the accident. Then he was told that he was needed to testify.

[12.8] When pressed to talk about the first version about this unknown caller, he indicated that indeed he received a call in July 2019 when he was at Driekoppies. He does not know where this person was calling from. This person called again the day before the trial commenced and reminded him that he was needed to testify. He asked him where he was staying and they arranged that a driver would collect him in the morning. Indeed, he was collected but he does not know the name of the driver. When he arrived in court, he met the attorney and the legal team.

[12.9] He further testified that before he proceeding with his journey he spoke to people who had gathered there about the accident. The police were also there.

[12.10] It was put to him that the police version was that none of the people who had gathered at the scene had volunteered information about how the accident happened. His response was that he was a passerby. He denied that his evidence was a fabrication.

[13] The plaintiff was called to the witness stand to testify but it was agreed that her evidence with regard to her *locus standi* would not be relevant at this stage.

[14] The plaintiff closed her case.

The defendant

[13] The defendant called two police officers to testify.

[14] Constable Nomcebo Lucia Khumalo testified that she was on patrol duties with Constable Mashele when they saw a group of people and on arrival where they had gathered, they found a white Ford Ranger that had overturned.

[15] The information given to them was that the vehicle was traveling towards Mangweni and that it moved from its lane of travel and encroached on the oncoming lane. When it came back to its lane, it overturned.

[16] She completed the Accident Report Form, which she signed on that day at 07:50. Under 'Brief description of the accident', she recorded the following:

'It is alleged that the driver of m/v Reg FMR 664 MP was driving from the direction of Maas to Mangweni, the car went to the on traffic lane when he tried to take it to the correct lane that is when it overturned'

[17] Cross-examination elicited the following evidence:

[17.1] She obtained the information that she recorded in the AR form about what happened from the group of people who were at the scene. No one was willing to make a statement.

[17.2] The version of Khoza was put to her. Her response was that when they arrived there, no other person told them anything else other than what she recorded.

[17.3] It was put to her that she did not do her work properly because she could have obtained statements from the people who were there. She maintained that no one was prepared to give a statement.

[18] She justified her tardiness when asked by the court by reiterating that no one was willing to give the police a statement about what they saw. She did not meet or discuss with the investigating officer. She merely handed over the AR form to her commander. She did not follow-up to take a statement from the deceased who, according to her, was taken to hospital because the matter was out of her hands.

Submissions

[19] I granted the both counsel an opportunity to submit written submissions, which they did, about a week later.

[20] The question is the appropriate judgment in view of the issues that I had raised with them, as it will appear below on the weaknesses in both the

plaintiff and defendant's respective cases. Whether I should dismiss the claim or grant absolution from the instance.

Plaintiff

[21] In his heads of argument, Counsel for the plaintiff, Mr. Mhlanga, submitted that the evidence of the witness, Mr. Khoza, is sufficient and as such, I should find that the accident was caused by the negligence of the unidentified insured drivers.

[22] In the alternative, he suggested that in the interest of justice, I should mero motu grant absolution from the instance. He referred to the case of *Van Rensburg v Reid [1958] 2 ALL SA 319 (E)*.

Defendant

[23] The defendant's counsel, Mr. Mothibe, submitted that the plaintiff bore the onus to prove negligence, and in this regard, she must prove the presence of such unidentified vehicles and that their negligence was the cause of the accident.

[24] A further submission in this regard is that when the plaintiff filed a sworn statement to the police about a year later, after the accident, and gave her attorneys a power of attorney to prosecute this claim, she must have known the identity of the eyewitness and that he is the source of the information in the particulars of claim. However, the said eyewitness testified in court that he did not know the identity of the person who summoned him to

testify in court and furthermore, he did not consult with anyone from the plaintiff's legal team until he came to court to testify. He apparently saw and spoke to them for the first time that morning.

[25] Accordingly, counsel for the defendant suggested that the eyewitness, Mr. Khoza, might be a *'hired gun by that unknown person to shoot at the defendant and advance this claim in respect of an unidentified vehicle'*.

[26] I was urged to determine the probative value of the evidence of Mr. Sthembiso Khoza (the eyewitness) and in this regard, I was referred to the guidelines for resolving factual disputes as laid down in the case of *Stellenbosch Farmers Winery Group Ltd v Martel et Cie 2003 (1) SA 11 SCA* at 50.

Discussion

[27] Despite the glaring gaps left by the plaintiff's only witness, her counsel did not deem it fit to call further evidence, particularly with regard to the investigations that led to the appearance of Mr. Khoza as an 'eyewitness'.

[28] As matters stood, at the end of his testimony, it was clear that he was either not there when the accident happened or he is one of those people that had gathered here, but according to the police, refused to give a statement with regard to how the accident occurred.

[29] Counsel for the defendant did not apply for absolution from the instance, but proceeded to call the police officers, who did not add any value to both parties' versions. In fact, the police officers appear to take sides because if not, they would have conducted further investigations with a view to do justice to their mandate.

[30] The defendant appointed an assessor, who according to the report, was instructed to investigate 'merits and quantum'. However, there is nothing in the report to suggest that he/she did anything further than what the police officers who attended the accident scene did. The only attachments that relate to the accident are the Accident Report Form and the statements of the police officers. The remaining contents of the assessor's bundle are statements relating to the identity of the deceased, his family and children and the post-mortem.

[31] The evidence of the police officers and their sketch plan is not helpful at all. The importance of investigations in scenes of accidents was emphasized in Daly v Road Accident Fund[1]. In this matter, Rampai J was faced with a situation where the police officer and expert witness had failed to take photographs of what was alleged to have been a big oil spill. He referred to the matter of Guardian Royal Exchange Assurance Rhodesia v Jeti [2] where Baron JA said:

> *"This Court has said repeatedly that it is of the utmost importance for investigating officers to examine the scene of an accident with*

[1] (1857/2001) [2004] ZAFSHC 14 (4 March 2004)
[2] 1981(2) SA 102 (ZA at 106B

meticulous care and to place before the Court the fullest possible factual information, including accurate measurements."

[32] The burden of proof with regard to the negligence of the insured driver(s) lies with the plaintiff. This being a claim for loss of support, this burden of proof does not shift to the defendant because the plaintiff only has to prove the slightest degree of negligence on the part of the insured driver(s). This is the so-called 'proverbial 1% proof of negligence'. This would entitle her to 100% of her proven damages.

[33] The question, throughout, is whether the plaintiff has discharged the onus on her. The evidence of the insured driver, if he was identified or available would have been to prove whether he/she was negligent in any way. The degree of negligence would not have mattered. The evidence of the defendant's witnesses in this scenario would, in a way, supplement the plaintiff's case by bringing forth evidence to suggest negligence (even slight) on the part of the insured driver(s).

The law

[34] Rule 39(6) reads as follows:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff

or his advocate. '

(35] Rule 39(7) reads as follows:

'If absolution from the instance is not applied for or has been refused and the defendant has not closed his case, the defendant or one advocate on his behalf may briefly outline the facts intended to be proved and the defendant may then proceed to the proof thereof

[36] Although rule 39(6) refers to application of instance at the close of the plaintiff's case, it is trite that an order of absolution from the instance may be granted at the end of the whole case, after the defendant has closed his/her case. In 'Erasmus's Superior Court Practice, Uniform Rules of Court[3]', Rule 39(6) is discussed under three headings, namely, (i) absolution at the close of plaintiff's case as contemplated in this subrule; (ii) absolution at the end of the whole case and; (iii) absolution where the burden of proof is on the defendant.

[36.1] Headings (i) and (iii) are not relevant for purposes of this judgment because as I have already indicated, the defendant did not apply for absolution of instance at the close of the plaintiff's case, and there is no burden of proof on it. It is therefore not necessary to undertake an academic discussion with regard to applicable requirements thereof.

[37] With regard to heading (iii), the learned authors stated the following[4]:

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[3] Volume 2, Service 5,2017 at D1-529 -535
[4] at D1-533

'if, in a case where the burden of proof lies on the plaintiff, the court, after hearing all the evidence, cannot decide to its satisfaction on which side the truth lies, the proper judgment is absolution from the instance[5]*. Thus, if the versions of the plaintiff and of the defendant are mutually destructive in the sense that acceptance of the one version necessarily involves the total rejection of the other version, and the court is unable to accept the version of the plaintiff as true and the version of the defendant as false, the proper judgment is absolution.*[6]

[38] The versions presented before me as to how the accident occurred are totally irreconcilable and thus mutually destructive. The approach to resolve disputes of this nature is stated in the matter of *Stellenbosch Farmers Winery Group & Another v Martell & Others*[7]. The court summarized the technique generally employed to resolve factual disputes in order to come to a conclusion. The court is required to make findings on, (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

[39] On the question of onus, the Supreme Court of Appeal, per Mhlanta JA had this to say in the matter of the *City of Johannesburg Metropolitan Council v Patrick Ngobeni*[8] had this to say:

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[5] see cases referred to therein, such as Forbes v Golach & Cohen 1917 AD 559
[6] see cases referred to therein, such as Koster Ko-Operatiewe Landboumaatskappy Bpk v SA Spoorwee en Hawes 1974 (4) SA 420 (W).
[7] 2003 (1) SCA 11
[8] 9314/10 **[2012] ZASCA 55** (30 March 2012)

"[50] It is trite that a party who asserts has a duty to discharge the onus of proof. In African Eagle Life Assurance Co Ltd v Cainer,[11] Coetzee J applied the principle set out in National Employers' General Insurance Association v Geny **1931 AD 187** *as follows:*

> *'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version ...'*

[51] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in National Employers' General v Jagers,[12] as follows:

> *'It seems to me, with respect, that 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 it is 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 satisfied 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.'

Findings and Conclusion

[40] In the matter before me, the burden of proof lies with the plaintiff throughout, however, since the defendant has chosen to place its version on record, the question now is whether there is evidence upon which a reasonable man should (or ought) to give judgment in favour of the plaintiff. (Herbstein & Van Winsen: Civil Practice of the High Court, 5th edition, Vol 1, at p921)

[41] The plaintiff's only witness, who was said to be the one who saw how the accident occurred left a poor impression on me. At first, he was very confident but when asked to talk about specific issues, it was as if he was not at the accident scene. He became less interested in answering questions as the trial progressed.

[42] Issues of impressions aside, on his own version, he was traveling facing the direction of where the alleged insured motor vehicles were coming from. These motor vehicles overtook each other. He heard a sound of a bell (horn/hooter), from behind him and when he turned to look, he saw the Ford Ranger moving outside the tar road and overturning. He does not know where the sound of the horn was coming from amongst the three motor vehicles. His reason for not stopping and giving information to the police is because he is scared of accident scenes. His evidence is not reliable. His version did not make sense at all. He only looked back when he heard a sound and horn, but he concluded that the Ford Ranger was avoiding the two insured motor vehicles.

[43] He cannot dispute the version that was given to the police that the Ford Ranger encroached on the lane of travel of the oncoming vehicles, and when it wanted to move back to its lane, it overturned. The reason he cannot dispute this is because even on his own version, he only looked behind where the Ford Ranger was coming from, when he heard the sound and horn.

[44] The fact that he can only remember the one vehicle's make and colour could mean that there was only one vehicle coming from the direction he was facing.

[45] On the other hand, the unknown police informers' version that the Ford Ranger encroached on the wrong lane appears to be incomplete, and if it is correct, it suggests a single vehicle accident. Why did he want to move back to his lane? Was he overtaking? Were there vehicles approaching from the opposite direction?

[46] The failure by the plaintiff to put before court the investigations that led to the testimony of this eyewitness has compromised her version. If indeed Mr. Khoza saw how the accident occurred, it means that he supplied the version that informed the drafting of the particulars of claim.

[47] Much as the defendant has a duty to investigate allegations regarding how the accident occurred, the plaintiff has a duty to provide information for a proper and meaningful reconstruction of the events. It is particularly important in cases such as this where the driver is deceased. The assessor's report does not say anything about the nature of investigations that were conducted with regard to the 'merits', save for attaching police statements.

[48] I do not think that dismissal of the claim would be an appropriate order under these circumstances. The investigators from both sides failed the plaintiff and her children. The police, the assessors have a duty to conduct

proper investigations. There are minor children whose future livelihood has been affected by the death of their father. The attorneys conducted some investigations that led to the identification of Khoza as a witness, but for some reason, such evidence was withheld. I cannot, on the evidence before me, give judgment in favour of the plaintiff.

[49] ***Costs:*** The manner in which the plaintiff has conducted the trial warrants a cost order, even though it may appear to be harsh. I considered making an order to call on her attorneys to give reasons why they should not pay the costs. When they came to introduce themselves in my chambers, counsel for the plaintiff, Mr. Mhlanga, informed me that he had not yet consulted with the witness but he has been informed that he is an 'eyewitness' to the accident. I asked how he was going to put a witness he has not consulted with on the stand and prove a case he had not reflected on. Mr. Mhlanga asked for a few minutes to consult, which I acceded to. As it turned out in court, the witness had a meltdown, which clearly indicated, as he stated, that he never consulted with anyone, except talking to someone on the phone and agreeing to testify about the accident, which he confirmed having witnessed.

[50] After much reflection, I decided against asking the plaintiff's legal team to give reasons why they should not pay costs, mainly because I do not know what has been going on in the past four years (since the date of the accident) between the plaintiff and her attorneys with regard to the investigations that led to the testimony of Mr. Khoza.

[51] If I had decided to dismiss the claim, I would have reserved costs and called on the plaintiff's attorneys to give reasons why they should not pay costs. For the moment, I think the appropriate order is for the costs to follow the results. I do not think that it would be fair for the defendant (using taxpayers money) to pay the costs for the plaintiff's lack of preparedness and failure to investigate the cause of her husband's accident and if she did, to pass on that information to the Road Accident Fund to enable it to make a proper assessment, and if need be, to give proper instructions to the assessor.

[52] Accordingly, I make an order of absolution from the instance with costs.

TAN MAKHUBELE J

Judge of the High Court, Gauteng Division

APPEARANCES

PLAINTIFF:	**ADVOCATE K MHLANGA**
Instructed by:	MH Mkhabela Attorneys
	PRETORIA

DEFENDANT:	**ADVOCATE WN MOTHIBE**
Instructed by:	Maponya Incorporated
	PRETORIA

Heard on:	30 August 2019
Judgment delivered on:	01 November 2019.