

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 52173/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

DATE: 30 May 2023

In the matter between:

ADV AJ DU TOIT NO obo GA KWAMBA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

ALLYAJ

[1] This is an action for damages arising from injuries sustained in a motor vehicle collision on 4 July 2017 at Gerald Street, Bishop Lavis.

[2] At the time of trial the Plaintiff Mr Kwamba had been substituted by Adv. AJ Du Toit, the Curator ad Litem.

[3] The Plaintiff was represented by Adv. BP Geach SC who appeared with Adv. A Laubscher and the Defendant was represented by Mr Mukasi of the State Attorney's Office in Pretoria.

[4] At the outset Plaintiff's Counsel, Adv. BP Geach SC, indicated that

merits and quantum were in dispute and that they will be calling a witness in respect of liability of the Defendant.

[5] The witness, Mr Conway Kobi, testified that on the date of the collision, 4 July 2017, at about 10H00, he was in Gerald Street when he witnessed a motor vehicle collide with Mr Kwamba whom he had known for some time.

[6] His evidence was that Mr Kwamba was walking on the right-hand side of the road away from where he, Mr Kobi, was standing. He testified that a white motor vehicle which he described as a Toyota Conquest or Tazz came down the street, lost control and hit Mr Kwamba from behind whilst Mr Kwamba was still on the pavement.

[7] Mr Mukasi on behalf of the Defendant cross-examined the witness. The cross-examination consisted of questioning whether the collision occurred as stated Mr Kobi. Mr Kobi denied any version that was inconsistent with his and maintained that the collision occurred as he stated in his evidence.

[8] Mr Mukasi attempted to put versions to Mr Kobi that were contrary to his testimony which was objected to by Mr Geach on the basis that Mr Mukasi could only put the version if he would be calling the witness who would be able to testify as to the correctness of the version. The objection by Mr Geach was upheld as it is trite law that even where parties have agreed that documents may be used without formal proof, the correctness of the contents thereof, where not agreed, cannot be used unless such statement is authenticated and the witness is called to testify.

[9] Mr Mukasi submitted that Mr Kwambi had made a statement to the effect that he saw the motor vehicle approaching whilst he was walking on the pavement. On the basis of this statement, Mr Mukasi submitted that Mr Kwambi was contributory negligent because he saw the vehicle and he could have at least done something to avoid the collision.

[10] At this point it needs to be stated that Mr Mukasi indicated that he would not be calling any witnesses in support of Defendant's case and in fact closed his case after the Plaintiff's case was closed in respect of liability, after the testimony of Mr Kobi.

[11] It is also trite that where the Defendant pleads contributory negligence, there is an onus on such Defendant to prove same. A Defendant can prove same by presenting admissible evidence of the contributory negligence of a Plaintiff.

[12] Mr Mukasi submitted that the Court is entitled to have regard to the statement by Mr Kwambi in considering Defendant's plea of contributory negligence. Mr Kwambi was not called to testify and therefore, in my view, his statement does not serve as admissible evidence to conclude that he was contributory negligent. Furthermore, in my view, the submission by Mr Mukasi, demands of this Court to draw an inference from such statement, accepting that such statement was admissible evidence, that Mr Mukambi was contributory negligent.

[13] It is clear from the principles set out in **R v Blom 1939 AD 188 at 202**, namely:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[14] In this case, the Defendant has not presented any evidence to reach a status of proven facts and furthermore the inference being sought to be drawn is not the only reasonable inference, especially because Mr Kwambi did not testify.

[15] Mr Kobi was forthright in his testimony as to how the collision occurred and no admissible evidence was led to gainsay same. I am of the view therefore that this Court only has the testimony of Mr Kobi to rely on in making a determination of whether, firstly, the Plaintiff has proven on a balance of probabilities that the insured driver was negligent. Secondly, on the admissible evidence before this Court, the Defendant has not proven that Mr Kwambi was contributory negligent in his conduct on the day of the collision.

[16] Accordingly, based on the reasoning set out above, this Court finds that the insured driver was solely responsible for the collision and thus that the Defendant is found to be 100% [hundred percent] liable for the proven damages of Mr Kwambi.

[17] Accordingly the following Order shall issue:

- a). The Defendant is 100% [hundred percent] liable for the proven damages of the Plaintiff.

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Appearances:

Attorneys for the Plaintiff: **SAVAGE JOOSTE & ADAMS INC**

Counsel for the Plaintiff: **Adv. BP Geach SC with Adv. A Laubsher**

Attorneys for the Respondent: **MR T MUKASI**
STATE ATTORNEY PRETORIA