REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

(1) REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: 1145/2016

13/9/2017

In the matter between:

NDIVHUWO VICTOR MATSHIDZE Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGEMENT

KGANYAGO J

[1] The plaintiff is this matter is claiming damages for bodily injuries arising out of a motor vehicle accident. It is common cause that the accident occurred on the 30th May 2015. At the time of the accident the plaintiff was the driver of motor vehicle with registration number [….]. According to the plaintiff's particulars of claim, the accident was caused by an unknown vehicle (insured vehicle) which was coming from the opposite direction with its bright lights on. The bright lights of the insured vehicle blinded the plaintiff and as a result of that, he drove into a donga and overturned.

[2] The plaintiff alleges that the driver of the insured vehicle (insured driver) was

the sole cause of the accident. The defendant in its plea denies that the insured driver was negligent. In the alternative the defendant has pleaded contributory negligence.

[3] At the commencement of the trial the parties agreed to separate issues of merits and quantum of damages of the plaintiff's claim. I ruled that the matter proceeded on the issue of merits of the claim only.

[4] The parties further agreed that they are in agreement that the plaintiff was involved in an accident which was caused by the insured driver. They are also in agreement that an apportionment of damages be applied but they are unable to agree on percentages. The only issue the court is called upon to determine is to what extent has the plaintiff contributed towards the accident.

[5] The plaintiff was the only witness to testify for his case. He testified that on the 30th May 2015 he was the driver of motor vehicle with registration number [….]. He was driving from the western direction to the eastern direction on a tarred road and it was at night. The insured vehicle came from the opposite direction with its bright lights on. This insured vehicle was also driving on his lane. As the insured vehicle was approaching him, he applied brakes in order to avoid an accident. When applying brakes he lost control of his vehicle and drove into a ditch and it overturned. When he was applying brakes he was trying to avoid a head on collision. He was seriously injured and was taken to hospital.

[6] The plaintiff was cross-examined and he stated that in his car he had three passengers. He conceded that in his affidavit that he made when he lodged his claim with the Fund, he did not mention that the insured vehicle was driving in his lane. He further conceded that there are material differences in his affidavit that was lodged with the Fund and the evidence that he had tendered in court.

[7] That concluded the plaintiff's evidence and he closed his case. The defendant argued that even through at the beginning of the trial, they have made a concession that the only issue to be determined by the court was the issue of apportionment, but now that the evidence that the plaintiff gave in court differs from what he had stated in the affidavit that he had lodged with the Fund, they are applying for absolution from the instance, alternatively, that the court should find that the plaintiff has contributed to the accident. Counsel for the plaintiff contends that the plaintiff has discharged his onus and that the defendant should be held liable.

[8] It is not in dispute that the plaintiff was involved in a motor vehicle accident on the 30th May 2015, and that as a result of that accident he had sustained injuries. At the beginning of the trial, there was a concession made by the defendant's counsel that the only issue to be determined by this court is the apportionment of damages. However, in their closing arguments, the defendant's counsel argues that since there are material differences in the evidence tendered by the plaintiff in court and the affidavit that he had submitted to the Fund, an absolution from the instance should be granted. In the alternative the defendant is arguing that an apportionment of damages should be applied.

[9] The question which I must first determine is whether the defendant can resile from to the concession that they have made when the trial started. In *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 0.N) at 78E - F the court said:

> *"The concession on the merits* was *more than an admission; it was an agreement of compromise on that part of the action from which not even a court could release one party without the consent of the other".*

[10] The ground upon which the counsel for the defendant seeks to withdraw his concession is that the plaintiff has conceded that the evidence that he had tendered in court is materially different from the affidavit that was lodged with the Fund. It is trite that an affidavit in terms of section19 (f) of the Road Accident Fund Act 56 of 1996 (the Act) is required to provide details of how the accident giving rise to the claim arose. The purpose of that affidavit is to furnish the Fund with sufficient information to enable it to investigate the claim and determine whether or not it is legitimate.

[11] The affidavit which the plaintiff has lodged with the Fund read as follows:

> *"I the undersigned, Ndivhuwo Victor Matshidze ID No.* ***[….]***
>
> *Do hereby declare under oath* as *follows:*
>
> *1*
>
> *I am the Claimant in this matter,* a *major male, residing at ….], Limpopo*

Province.

2

The facts herein contained fall within my personal knowledge unless stated otherwise and are both true and correct.

3

On the 30th May 2015 at Matangari Village, Vhembe District Municipality, Limpopo Province, a *motor vehicle accident occurred on Tata Bakkie bearing registration no. [….] driven by me, subsequent to the certain unknown driver who come and brightened me on my eyes and I drove into the donga. The other motor vehicle* was *driven by an unknown person.*

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I sustained multiple bodily injuries which I was later taken to Donald Fraser Hospital for medical attention as a *result of such collision.*

That is all I say".

[12] In *Pithey V Road Accident Fund* (319/13) [2014] ZASCA 55 (16 April 2014) the court in paragraph 18 and 19 said the following:

"[*18] I pause to say something about the primary purpose and objective of the Act. It has long been recognised in judgments of this and other courts that the Act and its predecessor represent social legislation aimed at the widest possible protection and compensation against loss and damages for the negligence driving of a motor vehicle. Accordingly, in interpreting the provisions of the Act, courts are enjoined to bear this factor uppermost in their minds and to give effect to the laudable objectives of the Act. But,* as *the Full Court correctly pointed out, the Fund which relies entirely on the fiscus for its funding should be protected against illegitimate and fraudulent claims.*

> *[19] It has been held in a long line of cases that the requirement relating to the submission of the claim form is peremptory and the prescribed requirements concerning the completeness of the form are directory, meaning that substantial compliance with such requirements suffices.* As *to the latter requirements this court in* SA *Eagle Insurance* Co *Ltd v Pretorius reiterated that the test for substantial compliance is an objective one".*

[13] Counsel for the defendant when the trial started was very clear when he made a concession that the only dispute to be determined by the court was the percentages of the apportionment to be applied, and the plaintiff's counsel also agreed with him on that aspect. In other words the parties were agreeing than an accident has occurred but that both plaintiff and the insured driver were to blame for the accident and that the court should determine to what extent they can be held liable.

[14] The defendant's counsel is not submitting that he had made the concession as a result of fraud by the plaintiff. He is merely relying on the material difference of the plaintiff's evidence in court and what he has stated in the affidavit that was lodged with the Fund. He has also not requested any consent from the plaintiff's counsel to withdraw his initial concession. However, in both instances the plaintiff is alleging that he was distracted by the bright lights of the oncoming insured vehicle. The only difference is that in the affidavit he did not mention that the oncoming insured vehicle has encroached into his lane of driving. In my view, despite this difference, the plaintiff's affidavit contained sufficient information to have enabled the defendant to investigate the claim and determine whether or not it was legitimate. The difference in the affidavit and the actual evidence tendered in court are minimal and immaterial. Therefore, in my view the counsel for the defendant had failed to raise exceptional circumstances why he should be allowed to withdraw his concession. He is therefore bound by the concession that he has made when the trial started.

[15] Now I turn to the issue of determining to what extent the plaintiff and the insured driver can be held liable in contributing towards the accident. The evidence presented by the plaintiff shows that he was driving on his correct lane when he was

distracted by the insured vehicle which was driving to the opposite direction with its bright lights on.

[16] In *Milton v Vacuum Oil* Co *of SA Ltd* 1932 AD at 205 the court stated:

> *"Where there are two streams of traffic in road in opposite direction; a person in a vehicle proceeding in one direction is entitled to assume that those who are travelling in the opposite direction will continue in their cause and that they will not suddenly and inopportunely turn across the line of traffic. A person travelling in one direction can assume that on travelling in the opposite direction will continue his course, but he may only assume that until he is shown a clear intention to the contrary. When a clear and undoubted warning is given, then there is no longer any room for the assumption that the other person will continue in his former course".*

[17] The plaintiff has seen the insured vehicle in advance that it was driving with its bright lights on, and that the said lights were distracting him to see properly. The only precaution that he took was to apply brakes when the insured vehicle was next to him. That in my view he did so for the sole purpose of trying to avoid a head on collision. If it was not to avoid the head on collision, he would not have applied brakes. In my view, since he saw the insured vehicle in advance with its bright lights on, and that the bright lights were distracting him, there was no longer any room for him to assume that the insured vehicle will continue in its former course. In my view, a reasonable person faced with that situation would have stopped on the side of the road and allow the insured vehicle to pass since it was distracting him, but the plaintiff has failed.to do so. He is therefore, also to blame for the accident.

[18] Taking into consideration the circumstances under which the accident occurred, in my view, the insured vehicle is 70% to be blamed for the accident.

[19] I accordingly find that the plaintiff was 30% contributorily negligent, whilst the insured driver contributed 70% to the accident.

[20] In the result I made the following order:

20.1 The defendant is liable to pay 70% of the plaintiff's proven or agreed damages from the accident which occurred on the 30th May

2015.

20.2 The defendant shall pay the plaintiff's taxed or agreed party and party costs.

_____

M F KGANYANGO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on:	1st September 2017
Judgment Delivered:	13/09/2017
, For the Plaintiff:	Adv MS Sello
Instructed by:	Khorommbi Mabuli Attorneys
	c/o Mvundlela
For the Defendant:	Adv N Makhani
Instructed by:	Noko Maimela Inc.
	c/o P.B.N Mawilla Attorneys