THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 3404/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
23/01/2024	
DATE	SIGNATURE

In the matter between:

MZWANDILE RONNIE NGWENYA **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Langa J

Introduction and Background

[1] This action is for damages arising out of a motor vehicle collision that occurred on 10 March 2018 around 22:00 on Vrystaat Street between a motor vehicle with registration numbers J[…] driven by one Bheki Nene and H[…] driven by the Plaintiff.
It is alleged that as a result of the said collision the Plaintiff sustained serious injuries which necessitated his admission in two hospitals for more than three months where he had to undergo surgeries.

[2] It is common cause that before the collision the Plaintiff was employed as a General Worker and earned R7000 a month without overtime and about R8000 with overtime included. After the accident he became unemployed and only recently started working as a rubbish collector by EWP and earns about R1700 a month.

Issues before court

[3] Based on the plea both the merits and quantum are in dispute. The following are however common cause. Plaintiff was involved in the motor vehicle collision, the collision occurred as a result of the sole negligent driving of the insured driver; the Plaintiff sustained serious injuries and was admitted in two hospitals; Plaintiff's ability to earn an income was severely affected; Plaintiff must still undergo further surgeries; Plaintiff has suffered bodily disfigurement; Chances of the Plaintiff being employed as a General Worker again are close to none.

The merits

[4] The only witness to testify on the merits was the Plaintiff. The Defendant did not call any witness. The Plaintiff testified that on the date of the accident he was driving on Vrystaat Road from Vukuzakhe Township to Volksrust to fill his tank. He was in the company of one passenger, Boesman who has passed away. He said as he was driving, he noticed a motor vehicle driven by the insured driver driving on his side of the road driving fast. He then decided to change lanes in order to avoid the collision and that is when the collision occurred. He was injured as a result of this collision was admitted in two different hospitals, Majuba Hospital and Provincial Hospital in Ermelo for a total period of more than three months. He testified further that his quality of life has been negatively impacted by the accident as he now can no longer lift heavy objects and he cannot stand for a long time. He further stated that as a result he can no longer be able to perform the duties he used to perform as a general worker where he earned about R7000 a month. Although he has been unemployed since the accident, got employment as a rubbish collector and earns about R1700 a month.

[5] When he was questioned under cross-examination about the road where the accident took place the Plaintiff could not explain the differences in his, particulars of claim, the evidence and the affidavit he made in terms of Section 19 (f) of the Act on 07

February 2019. It became clear the in his particulars of claim he stated that the collision took place on the Vrystaat street whereas in his affidavit he stated that it occurred on the Michealson street. His explanation was that the collision took place on Mandela Road and that Michaelson Street is the street where he stays.

Evaluation

[6] As enunciated in *Ntsala and Others v Mutual & Federal Insurance Co. Ltd* 1996 (2) SA 184 (T), in damages claim, the onus rests on the Plaintiff to prove negligence. In order to succeed with the claim, the Plaintiff has to show that the insured driver was guilty of conduct which was negligent, wrongful and was the cause of the damages. In *Tele matrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para [12] the Supreme Court of Appeal stated the following basic rule. *'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful ...'*

[7] The test for negligence is to be found in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G. *'For the purposes of liability culpa arises if –*

(a) A diligens paterfamilias in the position of the defendant –

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) Would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.

… Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case…'

[8] The evidence of the Plaintiff is confusing to say the least. The Plaintiff could not properly explain the differences in respect of the place where the incident took place. His *viva voce* evidence as well as his affidavit do not support the allegations in the particulars

of claim. The averment in the particulars of claim it is clearly alleged that the collision took place on Vrystaat street, Volksrust on 10 March 2018. In the affidavit in terms of Section 19 (f) the Plaintiff stated the following. “I was driving from Michealson Street about to join Mandela Drive …’’ In his testimony in court, he clearly stated that the collision took place on Mandela Drive.

[9] The Plaintiff could not satisfactorily explain these differences. In fact, when asked questions by court in clarification he stated that expressly stated that he was not driving on Vrystaat street as alleged in the particulars of claim. When asked why he stated in the affidavit that he was on Michealson about to join Mandela drive when the collision took place, he could not explain save to say that he was already on Mandela drive. He disavowed the information in the affidavit which he said was incorrect.
It is trite that the pleadings constitute evidence. It is clear that the evidence on this point is unclear and confusing. The Plaintiff could not clearly state where the accident took place.

[10] Regarding the collision itself the allegations made in the particulars of claim are generic allegations normally found in accident claims. It is alleged that the insured driver “was negligent in one, more or all of the following aspects’’.

(a) He drove at a speed that was excessive in the circumstances;

(b) He failed to reduce speed (sic) of his vehicle when he ought to and should have done so;

(c) He failed to keep a proper look out;

(d) He failed to apply the brakes of his vehicle either timeously, adequately or at all;

(e) He failed to keep the vehicle he was driving under proper or effective control;

(f) He failed to take any or adequate steps to avoid the accident when by the exercise of reasonable care and diligence he could and should have done so;

(g) He executed an overtaking manoeuvre at a time when it was unsafe to do so.

[11] While one appreciates that the pleadings and the particulars of claim cannot be approached in a mechanical fashion, they are nevertheless the basis of the Plaintiff’s claim. The Plaintiff is expected to allege in the particulars of claim the conduct of the defendant which it is alleged caused the collision. However, as can be seen from the above allegations, whilst all the catch-all allegations are made, it is, however, nowhere alleged in the particulars of claim that the insured driver drove his vehicle on the wrong side of the road or encroached onto the Plaintiff’s correct lane of travel. The Plaintiff made

all the generic allegations save for this one. This important allegation that the insured driver veered to his lane is only made in the affidavit in terms of Section 19 (f) as well as in his *viva voce* evidence. There is no explanation why this important allegation on which the Plaintiff's case is based was not made in the particulars of claim.

[12] Further, the Plaintiff conceded under cross examination that the collision or impact took place on the on-coming lane. He further conceded that he went to the on-coming lane where the impact took place. His explanation was that the vehicle came to his side as if avoiding something and he tried to avoid it by going to its lane and the impact took place as he was trying to avoid it. He does not explain why he went to the oncoming lane and not to his left to avoid the collision.

[13] It is trite that the onus rests on the Plaintiff to prove on a balance of probabilities that the defendant was negligent. As stated in *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E), in order to discharge the onus, a plaintiff must adduce credible evidence in support of its case. In the light of the above, it cannot be said in this case that the Plaintiff has discharged the onus. He has failed to prove on a balance of probabilities that the insured driver was negligent. In fact, his evidence that the collision took place on the oncoming lane suggests that he was to an extent at fault. I therefore find his version to be highly improbable and should be rejected.

Conclusion

[14] In conclusion I find that the Plaintiff's evidence falls short on the merits. Even though the Defendant has not called any witness to testify on the merits, the Plaintiff retains the onus to prove its case on a balance of probabilities which it has dismally failed to do. In the circumstances I find that this is an appropriate case where an order for absolution from the instance should be granted. It is therefore not necessary to traverse the merits. Concerning the costs, the general rule is that costs follow the result. The Plaintiff is therefore ordered to pay the costs of the suit.

Order

[15] in the result the following order is made.
Absolution from the instance is ordered with costs.

MBG LANGA
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Mr S. Zimema
For the Respondent:	Mr N Mhlanga
Date of hearing:	5 September 2023 and 12 September 2023
Date of judgment:	23 January 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 23 January 2024 at 15h55