

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

Case number: 08139/2017

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>28/11/2017</u> DATE	 SIGNATURE

In the matter between:

NEVER NKUNA

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

GOODMAN, AJ:

1. The plaintiff,¹ Never Nkuna, sues the defendant, the Road Accident Fund, for damages allegedly arising from injuries sustained in a motor vehicle collision. By

¹ Action was initially instituted on the plaintiff's behalf by his mother because he had not yet reached the age of majority. He was substituted as plaintiff on attaining majority status.

agreement between the parties, the issues in the trial were separated such that I was called upon to determine only the merits of the case. The question of quantum was held over for later determination.

2. The plaintiff sought an order that the RAF was 100% liable for any damages that he suffered. The RAF initially opposed such order. It contended that Mr Nkuna was contributorily negligent in respect of the accident and his injuries because:

- 2.1. First, it disputed where the accident took place and, more particularly, whether Mr Nkuna was on the sidewalk or crossing the road at the time of collision; and

- 2.2. Second, it argued that he had not taken adequate reasonable steps to avoid the accident or injury.

3. At roll call, and at the outset of the proceedings before me, the RAF took the position that it would not call any witnesses. On being cautioned that the court would have to accept the plaintiff's version of where the accident took place in the absence of evidence to the contrary, the RAF then indicated that it would, the following day, call an eye witness to the accident as well as the policeman who completed the accident report on which its cross-examination was based. It expressly disavowed any need to postpone the matter and recorded that it was ready to proceed.

4. The plaintiff then testified in person. His account was that the accident had occurred because the vehicle in question had lost control, mounted the sidewalk where he was walking, and collided with him from behind. He also testified that he had taken evasive action, in that he had run away from the oncoming car in an attempt to escape being hit. That strategy had worked for the three friends with whom he was walking; they had escaped impact.

5. In cross-examination, the RAF's counsel put to Mr Nkuna that the collision had occurred in the street, and not on the sidewalk as he had testified. I provisionally allowed that version to be put to him, on the understanding that a witness would appear for the RAF the following day to corroborate it. The RAF's counsel also put to Mr Nkuna that he had not taking take reasonable steps to avoid the impact

or his injuries because he slowed down his escape by looking back at the car bearing down on him or because he ought to have run into the field alongside him or into the road, instead of in the direction that he did.

6. The court adjourned at the close of Mr Nkuna's testimony, and was to reconvene the following day to continue with the RAF's case. However, when court reconvened, counsel for the parties recorded that the RAF had agreed to an order that it was liable for 100% of any damages suffered by the plaintiff and that only costs were in issue. The plaintiff sought attorney-client costs on the basis that:
 - 6.1. The RAF had come to court without any witnesses to refute the plaintiff's claim and only changed its stance in this regard on being cautioned by the court as to the effect of that decision on its case;
 - 6.2. It was clear that the RAF had not consulted with any witnesses prior to the hearing and consequently did not have a basis for putting the version to the witness that it did;
 - 6.3. The RAF's change in stance had resulted in the hearing being prolonged for a further day, with concomitant costs; and
 - 6.4. The RAF had ultimately conceded the merits of the case without calling any of the promised witnesses.
7. The RAF, in turn, argued that a punitive costs award would be unduly harsh, given that it had done what it could to settle the merits of the matter amicably and timeously. It pointed out that it had made a tender to settle the matter in September 2017, and that it only belatedly received a response to that offer. As a result, so it was contended, it had limited time properly to prepare for the matter. Once it had heard the plaintiff's account, it claims that it swiftly improved the offer made. It should not, so it was argued, be penalised for this approach.
8. In my view, however, the RAF's conduct has been wasteful, at best. In this regard, I note that:

- 8.1. A pre-trial was held on 17 May 2017 in which the merits of the matter were placed squarely in dispute. On 25 May 2017, the merits were set down for hearing this week. The RAF had from that date to investigate matters and to identify witnesses who could contest the plaintiff's version, if it wished to do so.
- 8.2. It is true that the RAF made a formal tender of settlement in terms of Rule 34 on 27 September 2017. In terms of Rule 34(6), the plaintiff had 15 days in which to accept the offer. When he did not do so, the RAF could no longer assume that the matter would become settled. It was required to prepare to run a trial on the merits, or to concede the merits portion of the case.
- 8.3. Instead, it came to court without any witnesses in support of its case and, accordingly, without a version of events. As far as I can tell, it ran the merits trial only to place pressure on the plaintiff to accept its offer or to take advantage of an opportunity to cross-examine the plaintiff without having investigated his case – and then conceded the merits in full once the plaintiff's case had been led. Its conduct, in my view, is an abuse of process that calls for sanction by this court.
- 8.4. Moreover, I do not accept the argument made by the RAF's counsel that the plaintiff has suffered no prejudice as a result of this approach. His costs for this aspect of the trial have been increased by the RAF's equivocal approach to the calling of witnesses, and the finalisation of his claim, as a whole, has been delayed.
9. In my view, the RAF's conduct in this part of the proceedings warrants a punitive costs award.
10. I accordingly make the following order:
 - (a) The defendant shall be liable for 100% (one hundred per cent) of the proved or agreed damages suffered by the plaintiff as a consequence of the motor vehicle collision of 21 February 2016;

- (b) The defendant is liable to pay the plaintiff's costs, on an attorney-client basis and at the High Court scale, in respect of the determination of liability;
- (c) The determination of quantum is postponed *sine die*.

A handwritten signature in blue ink, consisting of a stylized 'I' followed by a long horizontal stroke that curves upwards at the end.

I A GOODMAN, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 27-28 November 2017
Date of Judgment: 28 November 2017