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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 36885/07

4 February 2010

IN THE MATTER BETWEEN:

MALKE ESTHER SEBOTHOMA

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

OMAR, AJ

[1] This is an action for damages arising out of a motor vehicle collision on the 5th of September 2003 at or about the Pretoria – Pietersburg road and in the vicinity of Dennilton.

[2] The plaintiff alleges that she was a passenger in a motor vehicle with registration number MKH 389 GP (“hereinafter referred to as “the taxi”) when the collision occurred between the taxi and a motor vehicle with unknown registration numbers. (“Hereinafter referred to as “the unknown vehicle”).

[3] The matter was set down for determination of both quantum and merits. The parties, however agreed that subject to a finding in respect of liability, the Plaintiff’s damages shall be in an amount of R200 000,00.

[4] It is common cause between the parties that:

a) The plaintiff was a passenger in the taxi

b) The vehicle in which the plaintiff was a passenger was involved in a collision.

c) The collision occurred at night on the Pretoria-Pietersburg road in the vicinity of Dennilton on 5 September 2003.

[5] In its plea, the defendant denies that the collision occurred as alleged by the plaintiff in her particulars of claim or at all.

[6] The issues to be decided by the court as they appear from the pleadings are:

a) Whether the collision occurred as alleged by the plaintiff or at all

b) If the collision occurred as alleged by the Plaintiff, or at all, whether the collision was caused by the sale negligence of the driver of the taxi.

- c) If the collision occurred as alleged or at all, whether any negligence of the driver of the unidentified motor vehicle causally contributed to the collision.

[7] The plaintiff testified herself and called no other witnesses. The defendant called no witnesses.

[8] The plaintiff's evidence in chief was very brief.

She testified that she was a passenger in the taxi sitting behind the driver. The road was straight, without any bends and consisted of one lane in each direction. A sedan travelling in the opposite direction was approaching the taxi. A truck (the unidentified motor vehicle) was overtaking the sedan and moved onto the lane in which the taxi was travelling. The taxi driver flickered his lights and said that the truck was going to collide with the taxi and the taxi driver then swerved to the left in order to avoid the truck and as a result the taxi overturned.

On cross-examination the plaintiff testified, *inter alia*, that there were nine (9) people in the taxi. She saw the truck approaching when it was approximately thirty (30) metres from the taxi. She saw the truck flickering its lights and started screaming and told the taxi driver, Leslie, that they were going to die. The taxi driver only got out of the way when the truck was approximately seventeen (17) metres from the taxi.

She further testified that she knows the driver of the taxi and that he stays in Alexandra. He was hired by the plaintiff and the other passengers to transport them to a funeral. She still has his cell phone number available.

- [9] The plaintiff conceded that on the 17th August 2005 she deposed to an affidavit containing a different version, of events. In paragraph 2 of the said affidavit she states the following:

“We were travelling from Johannesburg to Pietersburg when an unidentified motor vehicle drove behind us at high speed. Our

taxi driver turned slightly to his left to let the unidentified fast travelling motor vehicle pass and the taxi overturned.”

This affidavit was submitted to the Defendant by the plaintiff’s attorneys when lodging plaintiff’s claim with the defendant.

The plaintiff responded that she had explained to the person taking the affidavit what had happened and that this explanation was the same as the one she gave to this court in her evidence in chief.

This court was also provided with a third version of events by the plaintiff which is contained in the medical-report of professor E Steyn which forms part of the court documents. The relevant part of the report reads as follows:

“According to her own account, the patient was travelling to Polokwane in a taxi on 2003/09/06. At approximately 11 pm a truck overtook the taxi at speed, the taxi driver took evasive action by swerving, lost control and the vehicle overturned.”

The Plaintiff responded that she did not remember meeting the doctor in question and had no idea why such a version has been recorded by the doctor.

[11] It is clear from the evidence of the plaintiff and the documents before this court that there are three versions of events by the plaintiff and these versions are clearly contradictory.

[12] I find the explanations by the plaintiff with regard to the affidavit deposed to on the 17th of August 2005 and the report by Professor E Steyn to be untenable. Why would her legal representative prepare an affidavit contrary to her instructions and similarly why would Professor E Steyn report her history if this was not stated to him by the plaintiff.

[13] The plaintiff was a single witness and her evidence must be viewed with caution.

[14] It was submitted by counsel for the defendant that the plaintiff formulated the version presented before this court in order to avoid the limitation of liability provided for in section 18(1) of the road Accident Fund Act 56 of 1996.

I tend to agree with the submission by defendant's counsel.

[15] The plaintiff's evidence in court was uncorroborated. It is clear from her evidence that there were nine (9) passengers in the taxi as well as the taxi driver. The plaintiff testified that she and the driver and the front passenger sustained injuries as a result of the accident. As indicated earlier, the plaintiff testified that she knows the driver of the taxi and know where he lives and still has his cell phone number available. She could very easily have called him as a witness to corroborate her evidence in court. She could very easily have called any of the other passengers as witnesses to corroborate her evidence as it is apparent that she knows the passengers since they hired the taxi together to go to a funeral.

[16] In my view, the plaintiff failed to call any of the witnesses mentioned above at her peril and the court has to draw an adverse inference on her failure to do so. The witnesses were clearly available according to the evidence of the plaintiff. The court invited plaintiff to call witnesses to clarify or corroborate her version. However plaintiffs counsel elected not to do so.

[17] The plaintiff bears the onus of proving all the issues before the court.

[18] The submission by counsel for the plaintiff that there is only one version before the court is rejected with the contempt it deserves, as there are clearly three (3) contradictory versions before this court.

[19] The further submission by plaintiffs counsel that the plaintiff, after putting her version before the court, has shifted the evidentiary burden to the defendant and the duty then arises on the defendant's part to adduce evidence in rebuttal, is further rejected by the court as this is clearly not so as the burden of proof remains with the plaintiff.

[20] In my view, the plaintiff has failed to convince the court that the collision occurred as alleged by her.

[21] I find that the collision was caused by the sole negligence of the driver of the taxi.

Further I cannot find any negligence on the part of the driver of the alleged unidentified motor vehicle which casually contributed to the collision

Even on the plaintiffs version in court the taxi driver only got out of the way when the truck was about seventeen (17) metres away from the unidentified motor vehicle.

[22] Accordingly the plaintiff cannot succeed in her full claim against the defendant and her claim is limited in terms of Section 18(1) of the Road Accident Fund Act 56 of 1996.

[23] It is noted from the court documents that the defendant has in terms of its notice in terms of Rule 34 of the Rules of the Court dated the 23rd October 2009, offered to settle the plaintiff's claim and costs on a without prejudice basis.

In the result, I make the following order:

1. The plaintiff's claim is limited in terms of Section 18(1) of the Road Accident Fund Act 56 of 1996.