

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

Date: 2010-05-06

Case Number: 2009/12886

In the matter between:

LUCAS NEO JWILI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SOUTHWOOD J

[1] The plaintiff claims from the defendant payment of damages in the sum of R870 000 suffered as a result of the bodily injuries which he sustained when he was run over by a motor vehicle on 23 December 2005. On 15 February 2010 Rabie J, acting in terms of Rule 33(4), ordered that the trial proceed on 4 May 2010 on the issue of the defendant's liability and that the trial in respect of all other issues be postponed. On 4 May 2010 Van der Merwe J appointed Adv. Rob Allan Foden as *curator ad litem* for the plaintiff.

[2] In paragraph 4 of his particulars of claim the plaintiff alleged that at approximately 20h45 on 23 December 2005 and on the Hartbeesfontein-Coligny Road, a motor vehicle collision occurred between motor vehicle with registration BDF454NW, driven by Mr. K.D. Mbane ('the insured driver') and the plaintiff who was lying in the road at the time. In paragraph 5 the plaintiff set out the respects in which the insured driver was negligent in causing the collision; *inter alia* that Mr. Mbane failed to keep a proper look-out; that he travelled at an excessive speed and that he failed to apply the brakes of his motor vehicle timeously or at all. In its plea to paragraph 4 the defendant stated that it had no knowledge of the allegations and put the plaintiff to the proof thereof and in regard to paragraph 5 the defendant denied that the driver of the insured vehicle was negligent and that any negligence on his part caused the collision. In the alternative the defendant alleged that –

'In the event that the above Honourable Court finds that the insured driver was negligent (which is still denied) then and in that event the Defendant pleads that such negligence did not in any way contribute to the said collision, which was caused solely by the negligence of the Plaintiff who was negligent in one or more or all of the following respects:

5.3.1 He failed to keep a proper lookout;

5.3.2 He travelled at an excessive speed in the circumstances;

5.3.3 He failed to avoid the collision when by the exercise of due and reasonable care he could and should have done so;

5.3.4 He failed to take cognizance of the insured driver's actions or intended actions;

5.3.5 He failed to take into consideration the presence of other road users and in particular to the insured vehicle;

5.3.6 He cycled on a wrong side for cyclists;

5.3.7 He failed timeously or at all, stop his bicycle whilst he could and should have done so'

Finally, in the further alternative the defendant alleged –

'In the event that it is found by the above Honourable Court that the insured driver was negligent (which is still denied) and that such negligence contributed to the said collision (which is denied) then and in that event the Defendant pleads that the negligence of the Plaintiff was a contributory factor to the cause of the collision and pleads that any damages awarded to the Plaintiff be reduced in accordance with the apportionment of damages of Act 34 of 1956'

[3] In the minute of the pre-trial conference held on 29 April 2010, three days before the trial, the defendant's attorney, Mr. A.P. Ntimbana (of the firm T.M. Chauke Attorneys) was asked to admit paragraph 4 of the particulars of claim as well as paragraph 9 and answered that the

defendant would revert. Apparently the defendant did not revert and neither paragraph was admitted.

[4] The plaintiff did not testify and called only one witness, Mathusho Johannes Selebalo, a Warrant Officer in the South African Police Service. His evidence was not seriously disputed and no version was put to him. Accordingly the plaintiff closed his case. The defendant then closed its case without calling a witness. The court refused the defendant's application to recall Warrant Officer Selebalo so that the insured driver's version could be put to him. The insured driver inexplicably arrived at court on the 5th of May 2010, the day after Warrant Officer Selebalo had testified and been excused from further attendance at the court. During Warrant Officer Selebalo's evidence the defendant formally admitted that it was the plaintiff who Warrant Officer Selebalo found lying in the road and was struck by the vehicle. Before the plaintiff closed his case the defendant also formally admitted that the driver of the insured vehicle was K.D. Mbane and that he had been driving motor vehicle with registration BDF454NW and that the statement at p22-29 of exhibit A is the insured driver's statement.

[5] The facts are very simple. At about 20h45 on 23 December 2005 Warrant Officer Selebalo was travelling along the Hartbeesfontein-Coligny Road in the direction of Tigane township. It was dark but the road was illuminated by street lights on Warrant Officer Selebalo's right hand side of the road. (These are visible in photograph 2 at p10 of

exhibit A). The road is tarred and carries two lanes for traffic, one in each direction. (This also appears from the photographs at p10 of exhibit A.) Warrant Officer Selebalo saw a man lying in the middle of the lane in which he was travelling. He took evasive action and managed to avoid colliding with the man. He pulled off the road onto the gravel verge on his left and then executed a U-turn and drove back in the direction from which he had come and stopped next to the man. He switched on the hazard lights of his vehicle to warn oncoming traffic and went to see what was wrong with the man. He saw that he was alive but did not examine him further. He saw other vehicles approaching, travelling in the same direction as he had been travelling. He realised that they could collide with the man and he positioned himself in the road between the oncoming vehicles and the man. He signalled to the driver of the first oncoming vehicle, a Venture, that he must slow down and the driver did so and passed safely by on the gravel verge. He also signalled to the driver of the second vehicle, a Combi, which was travelling about a hundred metres behind the Venture. The driver of the Combi first slowed and then accelerated. He did not swerve and Selebalo was forced to jump out of the way. The vehicle continued straight and ran over the man and something on the vehicle hooked onto him and the vehicle dragged him some distance before it came to a halt. Selebalo could see the man's head bouncing up and down on the road. Warrant Officer Selebalo also heard screams from the passengers in the vehicle before it came to a halt. After it stopped another policeman arrived on the scene and took

charge. Selebalo then left. The speed limit on that stretch of the road is 60 km/hour.

[6] The insured driver's statement reads as follows:

'Op 2005-12-23 om ± 21h00 was ek die bestuurder van 'n taxi met registrasienommer BDF454NW. Ek het vanaf Hartbeesfontein na Tigane gery in die rigting van Tigane. Dit was donker. Ek het passasiers gehad maar ken hulle nie.

Daar het 'n Venture voor my gery. Ek het gesien dat daar 'n voertuig regs van die pad staan met sy noodflikkerligte aan. Die Venture het skielik links uitgeswaai en ek het gesien dat daar 'n persoon in die pad lê. Ek het gerem maar dit was te laat en ek het oor die persoon gery. Die persoon is 'n ent saam onder die kombi gesleep. Ek het uitgeklim en die polisie het later opgedaag.

Ek het nie gesien dat iemand my probeer stop nie. Dit het te vinnig gebeur en ek kon nie gou genoeg stop om 'n botsing te vermy nie. Die Venture het aanhou ry. Dit was donker en daar was nie ligte langs die pad nie. Ek is in besit van 'n bestuurderslisensie nommer 02/6504015362085, Kode 1'

This statement was made at 12h00 on 11 January 2006.

[7] The plaintiff has therefore proved that at the time and place alleged in the particulars of claim motor vehicle with registration BDF454NW collided with the plaintiff while he was lying in the Hartbeesfontein-Coligny road and that this took place in the circumstances testified to

by Warrant Officer Selebalo. I should record that Selebalo testified in English and while he had no difficulty in expressing himself generally, he had difficulty in answering questions about distances which he could not point out in the court. I do not accept the accuracy of all the longer distances he testified to. I regard his impressions about these distances as more important and conclude that the insured driver had sufficient opportunity to see the plaintiff lying in the road and avoid colliding with him. There is no indication that Warrant Officer Selebalo did not think so. He gave his evidence clearly and coherently and in a balanced and unemotional manner.

[8] The evidence shows that the road is illuminated; that the speed limit is 60km/h; that Warrant Officer Selebalo saw the plaintiff lying in the road and was able to avoid a collision with him and that the driver of the Venture was also able to see the plaintiff and avoid a collision. The insured driver obviously saw something wrong at the scene but did not take any steps to avoid a collision with the body in the road. In my view he was negligent in one or more or all of the respects referred to earlier.

[9] In argument, the defendant's counsel did not contend that Mr. Mbane was not negligent and only attempted to persuade the court that the plaintiff was contributorily negligent. He relied only on the principle of *volenti non fit iniuria* (see **Netherlands Insurance Co of SA Ltd v Van der Vyver 1968 (1) SA 412 (A)**) which is not applicable on the facts of

the case and he could not suggest why the plaintiff should be found to have been negligent. In my view such a finding is not justified and I find that the plaintiff was not negligent.

- [10] Costs must clearly follow the result. The question is whether a special costs order should be made against Mr. Ntimbana, the defendant's attorney in terms of Rule 37(9)(a)(ii). The Rule provides that –

‘At the hearing of the matter, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or his attorney, because he or his attorney –

- (ii) failed to a material degree to promote the effective disposal of the litigation.’

- [11] The strange allegations in the defendant's plea have already been referred to. Apart from the fact that it is contradictory to deny all knowledge of the collision alleged and then positively allege that the plaintiff was negligent in a number of respects it appears from the answers provided by Mr. Ntimbana, the author of the plea, through the defendant's counsel, that he had no instructions as to what to plead and that he had simply used a standard form of plea which was necessary because the defendant had received a notice of bar. (A notice of bar was delivered on 29 April 2009 and the defendant delivered its plea on 2 May 2009). He claimed that the reference to a bicycle in the plea is a *bona fide* error which he did not notice when he signed it. Mr. Ntimbana confirmed that he was not in possession of

copies of the statements in the police dossier (which constitute exhibit A) or a statement from a witness and that he had not consulted with Mr. Mbane. When it was suggested that the plea is a fabrication Mr. Ntimbana said it was necessary to file a plea to avoid being barred.

- [12] With regard to the defendant's failure to admit the allegations in paragraph 4 of the claim Mr. Ntimbana said that he could not get instructions from the defendant. He also said that when instructed by the defendant the defendant did not furnish him with copies of the statements in the police dossier. He clearly made no attempt to obtain copies of the statements himself. It is common cause that statements were available as the police dossier containing all the statements was made available on the morning of 4 May 2010. Mr. Ntimbana's inability to get instructions from the defendant persisted right up to the morning of the trial. Mr. Ntimbana obviously did not consider withdrawing as attorney of record as he should have done. According to Mr. Ntimbana, the claims handler at the Menlyn office of the defendant responsible for this case is a Mr. Sibongele Dondashe and he was unresponsive or not available. The defendant's counsel informed the court that both he and Mr. Ntimbana had advised the defendant that there was no defence to the plaintiff's claim and Mr. Ntimbana informed the court that he was instructed not to run a trial which he understood to mean that he should settle the case. According to the defendant's counsel who was only briefed on the morning of 4 May 2010 he understood that there was an instruction to settle the merits on the

basis of an apportionment of 75 % to 25 % in favour of the plaintiff. When that proposal was not accepted the claims handler (inexplicably) was not available to give further instructions.

- [13] It is clear that the defendant did not prepare for a trial. No answers to the questions asked at the pre-trial conference were provided, no witness was consulted and no documents relevant to the merits were obtained. It appears that when no instructions were forthcoming Mr. Ntimbana decided to seek a postponement of the trial and tendered the costs of the postponement. (This application was refused for reasons given at the time. There was simply no merit in the application.) Usually I would have great difficulty in accepting that the claims handler would not be available to provide instructions, particularly on the morning of a trial, but, regrettably, I must accept that it is not so improbable that it must be rejected. This was the third of the trials I was allocated on 4 May 2010: all involved claims against the Road Accident Fund. The first trial settled in the time it took for the advocates to walk from the roll call to my chambers and I was told that the defendant's counsel had only just received instructions from the Road Accident Fund. The second trial settled minutes before I went into court, again because the Road Accident Fund had delayed giving its instructions. On both occasions I was told that the attorneys had had great difficulty in obtaining instructions from the Road Accident Fund. Nevertheless I consider that Mr. Ntimbana's conduct of the case failed to a material degree to promote its effective disposal. First, if his

client did not provide him with the relevant statements he should have obtained them himself. He would then have seen that the defendant had no defence and advised the defendant accordingly. The failure to obtain this information is inexcusable and in my view probably resulted in the matter proceeding to trial when it never should have done so. Second, the plea filed by Mr. Ntimbana is a fabrication. Mr. Ntimbana had no facts on which to even deny the plaintiff's allegations let alone make positive allegations about the plaintiff's negligence. The fact that he was under pressure because of the notice of bar is no excuse. A legal practitioner has a duty to the court, not only to his client, and must not misrepresent facts to the court. If Mr. Ntimbana had no instructions and could not obtain an extension of time to file the plea he should have refused to file a plea and withdrawn from the case. Third, Mr. Ntimbana clearly did nothing to prepare for trial after he filed the plea in May 2009. Mr. Ntimbana did not answer the plaintiff's attorney's request to separate the issues in terms of Rule 33(4) and the plaintiff brought a substantive application for such relief which was not opposed. The plaintiff was also obliged to bring an application to compel the defendant to make discovery. More importantly, Mr. Ntimbana did not obtain copies of the statements in the police dossier or consult with the witnesses. Mr. Ntimbana does not appear to have given any thought to withdrawing from the case and I am driven to the conclusion that this was simply because he continued to earn fees while he remained in the case. Win or lose, whether or not he

conducted the case indifferently or well, he would still be paid by the defendant.

[14] Mr. Ntimbana is clearly not entitled to a fee for conducting the case and if he or his firm has received a fee for doing so thusfar it must be repaid. I shall make an order to that effect.

[15] I have given serious consideration to making an order that Mr. Ntimbana alone pay the costs of the hearing (i.e. *de bonis propriis*) in terms of Rule 37(9)(a)(ii). While I am satisfied that the Rule applies I am not satisfied that this could not be prejudicial to the plaintiff. Mr. Ntimbana may not be able to pay the costs and if that proves to be the case the plaintiff would be out of pocket. While I do not wish to make an order against the defendant as I consider that the claims handler was responsible, in part, for the manner in which the case was conducted, the plaintiff is entitled to his costs and the defendant is clearly the party who can pay. I shall therefore order that the costs of the hearing be paid by the defendant and Mr. Ntimbana, jointly and severally, the one paying the other to be absolved.

[16] I am loath to make an order for costs against the defendant because of the conduct of its claims handler Mr. Sibongele Dondashe but I am unable to find a way to make him liable for the costs of this hearing which have been unnecessarily incurred. I shall nevertheless order

that the registrar send a copy of this judgment to the Road Accident Fund to investigate his conduct.

- [17] The plaintiff requested that the costs include the qualifying fees of Prof. Lemmer who is an expert in accident reconstruction. I do not consider that the involvement of such an expert is reasonable in the circumstances of this case and I am not prepared to make such an order. The plaintiff did not press the matter and attempt to justify Prof. Lemmer's appointment.

Order

- [18] I It is declared that the defendant is liable for 100 % of any damages which the plaintiff is able to prove;
- II The defendant and Mr. A.P. Ntimbana, the defendant's attorney, of the firm T.M. Chauke Attorneys, are ordered to pay the costs of this hearing jointly and severally, the one paying the other to be absolved;
- III Mr. A.P. Ntimbana, the defendant's attorney, and his firm T.M. Chauke Attorneys, are not entitled to receive any fees for the conduct of this case from the date of his appointment until the date of this judgment. Any fees which he or the firm have received prior to the judgment must be repaid to the defendant

within 6 weeks of this order. Proof of such payment in the form of an affidavit must be filed with the registrar of this court within 10 days of payment;

IV The registrar is requested and directed to send a copy of this judgment together with copies of the pleadings and exhibit A to the President of the Law Society of the Northern Provinces to investigate Mr. Ntimbana's conduct of this case in the light of this judgment;

V The registrar is requested and directed to send a copy of this judgment to the head of the Road Accident Fund to investigate the conduct of this case by Mr. Sibongele Dondashe in the light of this judgment.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 2009/12886

HEARD ON: 4 May 2010 and 5 May 2010

FOR THE PLAINTIFF: ADV. A.G. HORAK

INSTRUCTED BY: G.W. Wolter of Adams & Adams

FOR THE DEFENDANT: ADV. P.L. UYS

INSTRUCTED BY: Mr. A.P. Ntimbana of TM Chauke Attorneys

CURATOR AD LITEM: ADV. R.A. FODEN

DATE OF JUDGMENT: 6 May 2010