

REPUBLIC OF SOUTH AFRICA



THE GAUTENG DIVISION, PRETORIA

Case no: 28577/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE

14/03/2023

SIGNATURE

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes.

In the matter between:

ZIBUYISE ROMUALO MAZEKA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MALUNGANA AJ

Introduction

[1] The plaintiff has instituted action against the defendant in terms of the provisions of the Road Accident Fund Act, 56 of 1996 ('the Act'), claiming payment of the sum of R 650 000.00, representing damages he allegedly as result of the injuries he sustained in the motor vehicle collision on 24 December 2016.

[2] At this stage the parties have agreed to the separation of merits from quantum in terms of Rule 33 of the Uniform Rules Court, and I have so ordered. Accordingly the issue of quantum is deferred for later determination. Counsel for the plaintiff also advised the court that the plaintiff passed away in May 2021, and he would ask the court to admit his affidavit relating to the occurrence of the collision in terms of Rule 38(2). It is so that a 'court may at any time, for sufficient reason, order that all or any of the evidence be adduced at the trial, be given on an affidavit.' I have so ordered that the deceased's affidavit be used as evidence at the trial.

[3] It is trite that the RAF (the defendant herein) is obliged in terms of the Act to compensate for damages arising from bodily injury 'caused by or arising from 'the driving of a motor vehicle. It follows that the plaintiff bears the onus to prove that there is casual link between his injuries and the negligent driving of the motor vehicle that resulted in a collision.

[4] In the particulars of claim, the plaintiff avers that his injuries were caused by the negligence of the unidentified insured driver, who was negligent in one or more of the respects set out in paragraph 5 thereof.

[5] In response to the plaintiff's claim the defendant has filed its plea in which it basically denies the occurrence of the collision. It pleaded further in the alternative that in the event of the court finding that the collision occurred as alleged or at all, then in that event the defendant pleads that the insured driver was faced with sudden emergency, and had neither the time nor opportunity to weigh the pros and cons of the situation in which he found himself.¹

¹ Para 5.1-5.2 of the defendant's plea, case lines 009-19

Evidence at the trial

[6] The plaintiff led the evidence of the deceased's brother, Mr Mlondolazi Mazeka. He testified that at about 15h00 he was in the company of his deceased brother (the plaintiff), and his uncle walking from Shoprite towards the taxi rank. Visibility was clear. The robots turned blue when they were about 6 paces from reaching the intersection of the Rider and Mandela road, allowing them to cross over to the other side. Whilst so crossing the intersection they were following each other, and his brother was behind the two of them. Suddenly the vehicle emerged from behind and collided with the deceased in the middle of the intersection. When asked if he saw the vehicle before the collision, he answered that he did not see it, he only saw it after when it sped off. He described the vehicle as a white van.

[7] Under cross examination he testified that his deceased brother was transported to the hospital from the scene of the collision by a Taxi Driver. He denied that the deceased consumed alcohol prior to the collision. He also denied the assertion in the deceased affidavit that he was taken to the hospital by EMRS paramedics. He insisted that his brother was transported by a private vehicle.

[8] During re-examination, Mr Mazeka stated that he was within the demarcated area when the collision occurred. The defendant closed his case without leading any witness.

[9] Counsel for the plaintiff submitted that the plaintiff's version was consistent and without contradictions. Nothing turns on the issue of how he was transported to the hospital. I am unable to agree with this submission. A perusal of the contents of the statement of the deceased and the hospital records discloses that the deceased was transported to the hospital by the paramedics EMRS.

[10] Counsel for the defendant, Mr Phokwane submitted that in terms of section 19(f) of the Act, the claimant is required to set out in full in his lodgement affidavit the circumstances under which the collision occurred, and the plaintiff has failed to comply with this requirement. He also argued that the plaintiff failed to prove that his injuries were the result of the motor vehicle accident (casual nexus). He pointed out that there is a material contradiction between the oral evidence adduced by the witness and his statement, in relation

to how the deceased was transported to the hospital. He argued that in his oral testimony the witness stated that the deceased was transported to the hospital by a taxi, whilst the deceased's statement indicated that he was transported by EMRS ambulance ('Emergency Medical Response'). This point was strenuously objected to by the plaintiff's counsel who argued that the abbreviation 'EMRS' does not refer to 'Emergency Medical Response Services.'

[11] I have alluded to the fact that the contents of the statements and the hospital records paint a different picture to the evidence which was adduced during the trial. It is now apposite to have regard to the relevant contents of the statements and medical records concerning the alleged contradictions, and allegations of alcohol.

Relevant witness statements

[12] On the 4th of April 2018, the deceased deposed to an affidavit regarding the occurrence of the alleged collision.² Due to the plaintiff having passed away, I was requested by the plaintiff's counsel that the said statement be admitted into evidence in terms of Rule 38. The relevant extract of the statement reads:

"I ZIBUYISO ROMUALO MAZEKA wish to state that on the 24th of December 2016 at about 14:00 when I walked as a pedestrian the vehicle came and knocked me on the head, neck and on my left hand and I fell down. The accident happened on corner Mandela and Ryder Street P/Shepstone and the EMRS came and uplifted me and ended up in Port Shepstone Hospital. My AR number is AR 58/11/2017."

[13] Mr Mlondolazi Mazeka, the only witness who testified on behalf of the plaintiff also deposed to an affidavit on the eve of this trial, 08 November 2022. Paragraph 2 of the statement reads:

"I confirm that on the 24th of December 2016 I was with Zibuyise Romuald Mazeka (the Deceased). We were walking on the left side of the road. I confirm that an unknown motor vehicle knocked down the deceased and he sustained injuries, however, the main injury was a head injury. The deceased lost consciousness and a community member rushed him to Port Shepstone Hospital as the ambulance did not arrive."

² Case lines 010-15

RAF medical report and medical records from the hospital

[14] In light of the issues which I have been called upon to determine, being whether the injuries sustained by the plaintiff arise from the negligent driving of the motor vehicle as envisaged in section 17 of the Act, it is therefore necessary for me to also have regard to the RAF medical report portion which was completed by Dr. ID Vorster. The latter has recorded the nature of the treatment which the deceased received included; blunt head trauma, scalp laceration and right knee sprain.³

[15] The hospital records reveal that he was transported to the hospital by EMRS paramedics in a state of unconsciousness. On the progress report, it was noted that the deceased was assaulted.⁴ Hospital notes also suggest that he was smelling of liquor.⁵ Thereafter, so it appears the plaintiff was described as aggressive and having defaulted on taking his medication.

Applicable legal principles

[16] Section 17 of the Act provides:

17. Liability of Fund and Agents —(1) The Fund or an agent shall-

- (a) subject to this Act, in the case of a claim for compensation under this section arising from a motor vehicle where the identity of the owner or the driver thereof has been established;
- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

³ Case lines 014-26 RAF medical report

⁴ Case lines 014-38 (hospital records)

⁵ Case lines 014-42 (hospital records)

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.'

[17] In *JM Grove v The Road Accident Fund* (74/10) [2011] ZASCA 55 (31 March 2011) at para. 7, the Court held as follows:

'The RAF is obliged to compensate for damages arising from bodily injury 'caused by or arising from 'driving of a motor vehicle. The causal link that is required is essentially the same as the causal link that is required for Aquiline liability. There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether the act can be identified as a cause, depends on a conclusion drawn from the available facts and the relevant probabilities. The important question is how one should determine the causal nexus namely whether one fact follows from another.'

Applying the principles to the present case

[18] In applying the above principles to the facts of the present matter, the following is of relevance: the evidence before me, in particular the oral testimony of Mr Mazeka in relation to how and where the alleged collision occurred appear to be contradictory. I will point out aspects of contradictions later in this judgment. It is curious that in his oral testimony he mentioned his late brother being one of the people he was with but he did not mention this in his written statement. He denied that the plaintiff was removed from the scene of collision to the hospital by paramedics of EMRS. It is apparent that what he said is inconsistent with what is contained in the deceased's statement and the hospital records. It is hard and improbable to accept his testimony to the effect that the deceased was transported to the

hospital by a taxi. The only reasonable probability is that Mr Mlondolosi Mazeke was not present when the deceased was injured and later transported to the hospital for treatment.

[19] It is more than plain from the above authorities that the plaintiff should prove his case on the balance of probabilities the casual link between the injuries which he sustained, and the negligent driving of the motor vehicle for the Fund to become liable. Having said that, it is a matter of serious concern that the hospital records, whose authenticity is unquestionable do not even suggest that the deceased was treated for injuries sustained in the accident. On the contrary, it is noted therein that the injuries sustained were the result of assault. The plaintiff upon whom the evidentiary burden lies, did not bother to adduce the relevant evidence to contradict this assertion.

[20] In *National Employees General Insurance v Jagers* 1984 (4) SA 437 (E) 44D, Eksteen AJP (as he was known then) had this to say about onus of proof:

“It seems to me, with respect, that in any civil case , as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the evidence the case of the party on whom the onus rests...”

[21] It is worthwhile again to take note of the following remarks of Eksteen at para 440H of the above Judgment:

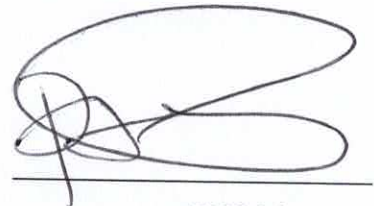
“I would merely stress however that when in circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separable fields of enquiry. In fact it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.”

[22] On the facts before me, Mr Mlondolosi's description of the accident is more improbable because it would involve a finding that if the vehicle which collided with the deceased emerged from behind, they too would not have escaped the calamity. Again if his version were to be accepted, that presupposes that the evidence contained in the deceased's statement should be rejected as it is entirely different from that of Mlondolosi. The next question, is that of credibility. There are material contradictions in his evidence in chief and his statement, particularly with regard to the exact point of impact. This clearly impacts negatively on his credibility. His statement reveals that he was walking on the left side of the road. This is contrary to what he testified during the trial, that the collision occurred in the robot control intersection.

[23] Having weighed all the versions of witnesses against the probabilities and improbabilities, I have come to the inescapable conclusion that the plaintiff in the present case has failed to discharge the onus that rested upon him of proving that the defendant is liable to compensate him for his loss or damages as contemplated in section 17 of the Act. I am therefore not persuaded that the injuries sustained by the deceased arose from the collision caused by the negligent driving of the motor vehicle. That being so, the following order is made:

Order

1. The plaintiff's claim is dismissed with costs.



PH Malungana

Acting Judge of the High Court

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Plaintiff : Adv. Greyling Jordan
Instructed by : Van Niekerk Attorneys

For the Defendant : Adv. Phokwane
Instructed by : State Attorney, Pretoria

