

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 889/2013

In the matter between:

VUKILE NGXANGEXENI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT ON MERITS

LOWE J

INTRODUCTION

1. The plaintiff in this matter instituted action against defendant claiming damages arising from a motor vehicle collision which plaintiff alleges occurred on 28 December 2011 at Mthathi Location, Peddie, plaintiff claiming to have been knocked down, as a pedestrian, by a motor vehicle with registration letters and numbers unknown to plaintiff and driven by an unknown driver.

2. It was alleged that the collision was due solely to the negligence of the driver of the unknown vehicle who failed to keep a proper look out, drove it at an excessive speed, in the circumstances failed to keep the vehicle under proper control and failing to avoid the collision when by the exercise of reasonable care and skill he (or she) could and should have done so.

3. The plaintiff sustained severe bodily injuries to say the least, particularly fractures of the left and right femurs, ankle and pelvis.

4. It was pleaded that plaintiff was treated at Frere Hospital where he was admitted, he claiming damages arising from the collision relating to future medical expenses, loss of earnings and general damages.

5. Effectively defendant put plaintiff to the proof of most of the relevant issues.

6. At a pre-trial meeting reflected in a minute, the parties agreed that the issue of merits and quantum would be separated, merits to be dealt with first and that *“the court will be requested to determine whether the injuries sustained by the plaintiff are consistent with motor vehicle injuries.”*

7. At the commencement of the trial I made a formal order reflecting the separation of the merits from quantum but at the trial requested that the parties make it clear in a minute exactly what issues were to be separated and determined.

8. In due course a further minute was presented at the trial which admitted *inter alia*:

8.1 That plaintiff was admitted to Frere Hospital on 30 December 2011 and discharged on 14 March 2012;

8.2 The RAF 1 form completed by Dr. Smyth.

8.3 A summary of plaintiff's injuries;

8.4 The accident report and attached statement of plaintiff.

9. The parties then set out that the issues for determination were:

“The court is called upon to determine whether the injuries sustained by the plaintiff on 28 December 2011 were as a result of the plaintiff being injured in a motor vehicle [collision] by the defendant’s unknown insured driver as pleaded in the particulars of claim”.

10. It was then stated *“Should the court find that the injuries sustained by the plaintiff are as a result of the motor vehicle accident as pleaded, then the defendant shall be liable for the plaintiff’s proven or agreed damages.”*

11. At the end of the day, accordingly, I was to determine in the separated hearing on merits the stated issue as to whether or not the injuries pleaded and referred to in the documents were incurred as a result of, or caused by, the motor vehicle accident alleged on 28 December 2011.

12. At the trial, plaintiff gave evidence and was cross-examined, thereafter plaintiff closing his case. The defendant contented itself with cross-examining plaintiff and led no evidence, closing its case without having done so.

THE EVIDENCE OF PLAINTIFF

13. In chief, plaintiff stated that he was *“bumped by a motor vehicle”* on a date that he could no longer remember in December 2011. He said that he was walking on foot along a gravel road with no road markings *“on the right side of the road”*. He said *“I was only the right side and the motor vehicle was coming on his side, which is the left side, from the front, and when I saw the light of the motor vehicle I swerve”*. (sic)

14. He says he swerved to the right as he put it, so that he was not hit by the motor vehicle which was *“on the left and I am on the right side”*. He said that he moved away from the side of the motor vehicle and then was hit by the vehicle. He confirmed his injuries in broad outline stating that the vehicle hit him on the right side of his body. When asked to create a clearer picture in chief of what had happened he confirmed that the vehicle was travelling on the left hand side of the road and that he was *“on the right”*. He clarified that this was when he was walking on the far right side of the road. He said *“I think or I am assuming that the driver left his side and he came to my*

side". He said that he was left lying on the ground where other people assisted him. In chief again, it was clarified that when referring to "*swerving*" he meant he crossed the road from one side to the other moving from the side where the vehicle was driving intending to return to his original path when the vehicle had passed. He said that his movement across the road was when the vehicle was about ten metres from him. This occurred at approximately midnight on the day in question, he coming from a family ceremony on the day.

15. In cross-examination he said he was on his way home to go and sleep and that he had consumed some alcohol "*but not too much*". He was walking alone. He confirmed having reported the accident to the police years later on 14 March 2019 as he said he did not know he had to go and report it to the police prior to this. In cross-examination he said "*I was walking on the right side, which is the side that we are using when we are walking on foot, and the motor vehicle is also coming on the right side of me.*" Clarifying he said, "*it is on the left, according to the driver of the motor vehicle, but to me it is not on the left side, to me it is on the right side.*"

16. He said he saw the lights coming towards him and when asked "*and you say you tried to run to the other side of the road*" answered "*immediately when it was not nearer me I moved to the other side of the road so that it must not hit or bump me*". (sic)

17. He said that he could not move to the right as there were cliffs on that side and streams.

18. He was asked "*so are you trying to say that the vehicle followed you from the right to the left side?*" he answered "*I want to say it followed.*"

19. It was put to him that he did not remember what had happened on the day and that the cross-examiner did not think that there was a motor vehicle that hit him as he alleged. He said that he could not remember due to the pain but heard from the people who came across him what happened.

20. This last issue was clarified on the interpretation to reflect that he did not remember what had happened when he was in pain at the hospital, but as I understand it, later remembered being “bumped”.

21. It was finally put by the cross-examiner that he did not remember what had happened on the day having quite a lot of alcohol. He said that he did have alcohol but was not consuming in a manner as he put it, which would have prevented him from moving away from the vehicle. It was put to him finally that there was not enough evidence to show that he was struck by a motor vehicle with which he disagreed.

22. In re-examination he stated that he sustained the injuries as a result of being hit by a motor vehicle. He stated that he remembered being injured and the cause of that injury being the collision with the vehicle.

23. In finally answering questions put by the court he confirmed that he was walking along the right hand side of the road in the direction of his home and that a vehicle was coming towards him on that driver’s left side of the road. He clarified that he was walking on the right hand side of the road on the edge of the road and that the vehicle coming towards him was on the same side as him. He said then he moved away to the left side of the road across the road. He said he could not go to the right there being no pavement and there being a drop of a considerable distance on his right down to the water.

THE PROPER APPROACH TO THE EVIDENCE AND THE ISSUE TO BE DECIDED

24. As stated in **Chuma v Road Accident Fund**¹ the Court pointed out that the resolution of civil disputes turns on the probabilities of the competing versions.

25. In this matter there is only one version. That does not mean, of course, that plaintiff’s version must inevitably be accepted.

¹ High Court of South Africa, Gauteng Division, Pretoria, case no 20414/2016; Crutchfield AJ

26. There is no obligation on a court to accept an improbable explanation of events merely because no other positive explanation is presented, or that the alternative seems to the court to be even less probable.²

27. As pointed out in **Van Meyeren** (*supra*) at paragraph [13] *“the fact that the judge did not feel able to reject their evidence did not mean that he was obliged to accept it. The issue was whether on a balance of probabilities theirs was the only explanation for the dogs escaping. Unless that conclusion could be reached Mr. Van Meyeren did not discharge the onus of proof and the defence should have failed.”*

28. In this matter, applying this reasoning this is of course clear that there is no obligation upon me to accept the evidence of plaintiff if this is an improbable explanation as to what occurred simply because it is not challenged in other evidence by the defendant the issue being whether plaintiff’s version is acceptable on a balance of probabilities.

29. In **National Employers General Insurance Co. Ltd v Jagers** ³ it was stated as follows:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the evidence of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the Plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably be bound up with a consideration of the probabilities of the case and if the balance of probabilities favour the Plaintiff, then the

² **Van Meyeren v Cloete** 2021 (1) SA 59 (SCA).

³ 1984 (1) SA 437 (ECD) 440 – 441: of course here there are not two mutually destructive versions.

court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false." ⁴

30. In **SFW Group (supra)** the following was said which is relevant to this evaluation of a witness even though here there is only one version:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it."

⁴ See also: **SFW Group (supra)**.

31. One must of course have regard to a conspectus of all the evidence. Probabilities must be distinguished from conjecture and speculation, within the four corners of the proved facts.

32. Even in respect of a witness who has been mendacious this does not necessarily warrant the rejection of the evidence in its entirety as false. It is permissible to either accept or reject the evidence of a witness who has lied previously or in relation to a particular aspect of fact. As pointed out in *Principles of Evidence*⁵, everything depends on the particular circumstances of the case.

THIS MATTER

33. In assessing the probabilities of plaintiff's version, bearing in mind that the only issue which arises for my determination relates to whether plaintiff's injuries (which are essentially admitted) arose from a motor vehicle collision, and not some other cause, it is relevant to repeat that it was common cause, having been admitted, that plaintiff indeed sustained injuries of the nature already set out above, and admitted, relevant to the fractures of his right ankle and femurs amongst others on 28 December 2011, he being admitted first to a hospital in Peddie and thereafter to Frere hospital where he was held, being treated until being discharged months later on 14 March 2012.

34. It is also apparent from the evidence, not challenged, that the plaintiff was found by passers-by on the side of the road where he alleges the accident occurred.

35. In the Rule 37 minutes defendant admitted the accident report and witness statements in the trial bundle which reflected an accident having occurred at the alleged residential area in Peddie on the date in question at 22h00. The witness statement referred to an accident on the day and time in question at the place referred to in the pleadings and referring to his having been travelling on the road in question, as he put it, and hearing that something hit him causing him to fall down. This refers to people finding him in that place and assisting him to go to hospital.

⁵ Schwikkard, Juta, 4th Edition, § 30 4

36. Against this background there can be no doubt at all that plaintiff was severely injured in a manner which would amongst other possible causes certainly be consistent with injuries that could have been caused in a collision between a motor vehicle and a pedestrian.

37. It cannot, on the evidence, be rejected that he was found at the place close to the road in question and accordingly on the probabilities the injuries which were severe would have been caused at or around that location or in its immediate vicinity.

38. Whilst the plaintiff's evidence was by no means a model of clarity, on the proper approach thereto it would seem to me to be in accordance with the probabilities that he having walked along the right hand side of the road saw a vehicle approaching him on its correct side of the road, its left hand side, and that plaintiff being right on the edge of the road and not being able to move to the right out of the way, crossed the road in front of the motor vehicle and was struck accordingly. Whilst the plaintiff was somewhat uncertain in his evidence, which required to be clarified, I most certainly did not gain the impression in any way that he was mendacious. Viewed against the probabilities the evidence relevant to the issue that I am asked to decide gained in reliability.

39. The evidence judged against the probabilities, it would seem to me, supports plaintiff's version and in the absence of any contradictory explanation for the injuries it accords with the probabilities that his injuries were caused in a collision with a motor vehicle.

40. As was pointed out above the general rule is that he /she who asserts must prove. In this case then plaintiff must prove the necessary in respect of the issue that has been placed before me that is that the injuries sustained were consistent with what would have occurred to a pedestrian in a motor vehicle collision. Put differently, there is only one enquiry namely whether the plaintiff, having regard to all of the evidence in

the case, has discharged the onus of proving, on a balance of probabilities, (in this matter), that the injuries relate to a motor vehicle collision.⁶

41. Put differently, at the end of the trial, after all the evidence presented has been called and tested, the Judge has simply to decide whether as a matter of inference or otherwise, he concludes on a balance of probabilities that the plaintiff was, (in this matter), injured by a motor vehicle, the injuries being consistent therewith.⁷

42. In this matter, plaintiff's evidence must be considered, as set out above, against the probabilities, and once there is an inference that the injuries were caused in a motor vehicle collision and in the absence of controverting evidence, it not being necessary for the plaintiff to prove that the inference that the injuries were caused by a motor vehicle collision was the only reasonable inference, it sufficing for him to convince the court that the inference for which he advocates is the most readily apparent and acceptable inference from a number of reasonable inferences. That being so, the defendant failing to adduce any evidence whatsoever took the risk of judgment being granted against it once the initial inference was established.⁸

43. In my view, having regard to plaintiff's evidence, however unclear it may be said to have been, it is established by the common cause facts that plaintiff sustained the injuries adverted to, these being very severe and most certainly consistent with such injuries as could have been caused by his having been struck by a motor vehicle. There is no suggestion that he was not found in the vicinity of the road that night by others, and that he was at that stage in an injured condition, and certainly such a condition that he would have been unable to move from the place where he was found to any real extent. There is simply no other probable inference that could be drawn relevant to the manner in which he was injured in the circumstances of the evidence and the common cause facts, and however lacking his evidence may have been in clarity, there was more than sufficient, in my view, to establish that the injuries sustained by plaintiff on 28 December 2011 were as a result of plaintiff being injured in a motor vehicle accident, he being struck by an unknown motor vehicle with

⁶ **Goliath v MEC for Health** 2015 (2) SA 97 (SCA) at [8] and [11].

⁷ **Goliath** (*supra*) [18].

⁸ **Goliath** [19].

unknown driver as pleaded in the particulars of claim. This also accords with plaintiff's evidence.

44. In the result:

44.1 The answer to the question posed for my determination is to be adjudicated in plaintiff's favour.

44.2 The defendant is thus held liable for plaintiff's proven or agreed damages as per the agreed minute.

ORDER

45. In the circumstances the following order issues:

1. The merits referred to in the pleadings between the parties are determined in plaintiff's favour;
2. It is declared that the injuries sustained by plaintiff on 28 December 2011, were as a result of plaintiff having been injured in a motor vehicle collision, the motor vehicle concerned being unknown and driven by an unknown insured driver.;
3. The defendant is held liable for plaintiff's proved or agreed damages;
4. The issue of the determination of those proved or agreed damages is to stand over for determination in further proceedings on trial.
5. The plaintiff's claim on the merits thus succeeds, the defence on the merits being dismissed with costs.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing for Plaintiff: Adv. D. Skoti,

instructed by Mjamba Attorneys, c/o Yokwana Attorneys,

Grahamstown.

Appearing for Defendant: Ms. V. Jeram

instructed by State Attorneys,

East London.

Date heard: 28 November 2022.

Date delivered: 24 January 2023.