

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

CASE NO. 2111/2020

In the matter between:

YANDISWA YVONNE ROMA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

LAING J

[1] This is a claim for damages arising from a motor vehicle accident that occurred on 18 July 2019 on the outskirts of Makhanda.

Background

[2] The plaintiff alleged that a motor vehicle driven by a Ms Asavela Tebe had collided with her in Jacob Zuma Drive while she had been on foot. She alleged that the collision had occurred because of the sole negligence of the driver in question, who had been negligent in one or more of the following respects: the driver had failed to keep a proper lookout; she had failed to give the plaintiff a wide enough berth; she had failed to apply her brakes; she had failed to keep her vehicle under proper control; and she had failed to avoid the collision when she could have done so if she had exercised reasonable care and skill. Consequently, the plaintiff had sustained a mid-shaft fracture of the left tibia and an open wound to her left leg, for which she had received medical treatment. She claimed an amount of R 3,880,600 for damages suffered.

[3] The defendant pleaded no knowledge of the allegations, refused to admit same, and put the plaintiff to the proof thereof. Its defence amounted to a bare denial. No contributory negligence was pleaded.

[4] The parties proceeded to trial.

Issues to be decided

[5] At a pre-trial conference, held in terms of rule 37, the parties agreed that it would be convenient for the issues of liability and quantum to be decided separately. They further agreed to limit the issue of liability to the determination of the driver's degree of negligence.

[6] The court, at the commencement of trial proceedings, ordered that the issues in question be separated. Consequently, the only issue for determination was the negligence of Ms Tebe at the time of the accident.

[7] The relevant principles are set out, briefly, in the paragraphs that follow.

Legal framework

[8] The provisions of section 17(1) of the Road Accident Fund Act 56 of 1996 ('RAF Act') stipulate that the defendant is obliged to compensate a person for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. The defendant's liability is conditional upon the injury having resulted from the negligence or wrongful act of the driver.¹ An evidentiary onus rests on the plaintiff to prove such negligence.

¹ MP Olivier, 'Social Security: Core Elements', *LAWSA* (LexisNexis, Vol 13(3), 2ed, July 2013), at paragraph 163.

[9] Contributory negligence on the part of the plaintiff can reduce such loss or damage in accordance with the provisions of section 1 of the Apportionment of Damages Act 34 of 1956 ('the Apportionment Act'), which states as follows:

'(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.'

[10] The above principles constitute a basic framework for the determination of the issue that lies at the heart of the present matter. A synopsis of the evidence presented at trial follows.

Evidence at the trial

[11] The plaintiff called just a single witness, a Ms Phumela Sintwa. She testified that, on the date of the accident, she had been returning home after taking her children to school. She had been travelling along Jacob Zuma Drive, which was a tarred road with single lanes. There had been other vehicles on the road at the same time but at some distance away. The weather had been fair, a clear day with no rain.

[12] As she was driving, Ms Sintwa had observed the plaintiff cross the road from left to right. The plaintiff had reached the other side of the road when an oncoming vehicle had swerved to the left and collided with the plaintiff between the yellow barrier line and the gravel strip. Ms Sintwa had halted her vehicle and gone to assist. She stated that

the driver had shouted at the plaintiff, asking her why she had crossed the road and complaining that she was late for an appointment.

[13] Under cross-examination, Ms Sintwa indicated that the accident had occurred on an open stretch of road, adjacent to a field. There were not many buildings in the immediate vicinity, but she had noticed a few pedestrians and cattle. There had been no other vehicles close by. Ms Sintwa estimated that the width of the road had been approximately six or seven metres and she confirmed that the plaintiff had been struck by the vehicle on the other side of the yellow barrier line.

[14] The defendant closed its case without calling any witnesses.

Discussion

[15] As a point of departure, it is helpful to reiterate a basic principle of evidence. Schwikkard points out that:

‘In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a “balance of probabilities” but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.’²

[16] The plaintiff in the present matter bears the onus of discharging the burden of proof regarding the allegation that the driver, Ms Tebe, was negligent. Her case was built on the evidence of a single witness.

[17] In that regard, Ms Sintwa displayed no apparent bias and there were no obvious contradictions in her testimony. Although her court appearance was brief, her

² PJ Schwikkard (et al), *Principles of Evidence* (Jutastat e-publications, 4th Ed, 2016), at ch32-p 628.

performance in the stand was cogent and of a good calibre. She had observed the accident directly and was an independent witness with a good recall of the circumstances at the time. Overall, Ms Sintwa was a credible and reliable witness. It is probable that the plaintiff had indeed crossed the road as described and had almost reached the gravel strip when she had been struck by Ms Tebe, who had inexplicably swerved left.

[18] From the above evidence, the court is satisfied that the plaintiff has proved that the driver had been negligent based on one or more of the grounds pleaded. Ms Tebe had either failed to keep a proper lookout or to give the plaintiff a wide enough berth when she collided with her on the other side of the yellow barrier line. If she had applied her brakes effectively or kept her vehicle under proper control or simply maintained a straight line of travel, which she did not, then the accident could have been avoided.

[19] At this stage, it is necessary to deal with the defendant's attempt to allege that there had been contributory negligence on the plaintiff's part. In argument, the defendant's legal representative contended that the plaintiff herself had failed to keep a proper lookout at the time.

Contributory negligence

[20] It was common cause that the defendant had failed to plead contributory negligence and apportionment. Nevertheless, the defendant's legal representative presumably had section 1(1)(a) of the Apportionment Act in mind when she intimated that the plaintiff's damages ought to be reduced by the extent to which the plaintiff's alleged negligence had had a bearing on the accident.

[21] In *AA Mutual Insurance Association Ltd v Nomeka*,³ the erstwhile Appellate Division considered the situation where a defendant had failed to plead apportionment. The plaintiff had asserted that the defendant was precluded from relying on the

³ 1976 (3) SA 45 (A).

Apportionment Act and the court was prevented from applying the provisions thereof where it had held that the plaintiff was partly at fault. Viljoen AJA stated as follows:

‘The weight of the decisions is, therefore, that provided the plaintiff’s fault is put in issue, an apportionment need not be specifically pleaded or claimed. This is the correct view, in my opinion.

The Act has become part of our law of delict. It has supplanted the former all-or-nothing effect of the common law in this respect. I agree... that upon a determination of issues properly raised in the pleadings the Court must give judgment in accordance with the imperative direction of section 1 of the Act.’⁴

[22] The reasoning of the court has been followed in subsequent decisions.⁵ Counsel for the plaintiff in the present matter referred to *Ndaba v Purchase*,⁶ where Hugo J held:

‘...no allegation is made that the collision was caused by any negligence on the part of the Plaintiff. That being so it seems to me that the case resolved itself into a so-called one percenter and that no question of contributing negligence or apportionment of damages could arise. That Magistrate in his judgment referred to the case of *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (AD) but I think that he misunderstood that case. In that case it was held that it was not necessary for a Defendant to plead an apportionment of damages provided (and this is important), *provided* that the negligence of the Plaintiff had been placed in issue. In that particular case the plea in this regard read as follows:

⁴ At 55 D-E.

⁵ See, for example, *Ndaba v Purchase* 1991 (3) SA 640 (N); *Gibson v Berkowitz and another* 1996 (4) SA 1029 (WLD); and *Harwood v Road Accident Fund* 2019 JDR 1768 (GP). See, too, the discussion in Klopper HB, *The Law of Collisions in South Africa* (LexisNexis, 8ed, 2012), at 92 and 148; and Harms LTC, *Amler’s Precedents of Pleadings* (LexisNexis, 9ed, 2018), at 274.

⁶ Referred to above, n 5.

- “(a) Defendant denies that the said collision was due to any negligent driving of the insured vehicle by the said Mrs Holdsworth and denies that she was negligent in the respects alleged or at all.
- (b) Defendant pleads that the collision was due solely to the negligent driving of the plaintiff himself he being negligent and at fault in one or more of the following respects...”

On that basis and because of the form of this pleading the Court held that a formal plea in the apportionment of damages was not necessary. The crux of the finding is found in the following passage at page 55:

“The weight of the decision is therefore that provided that Plaintiff’s fault is put in issue an apportionment need not be specifically pleaded or claimed. That is the correct view in my opinion.”⁷

[23] From the above, it is incumbent on the defendant to place in issue the plaintiff’s negligence at the stage of pleading. This establishes the basis of the defendant’s case and outlines the nature of the trial proceedings to follow. If the defendant has not pleaded negligence on the plaintiff’s part, then it cannot subsequently ask the court for the apportionment of damages.

[24] Counsel for the plaintiff in the present matter also referred to *Harwood v Road Accident Fund*,⁸ where Van der Schyff AJ held as follows:

‘It is trite that in trial proceedings parties must formulate their cases and the issues on which evidence must be led, in their pleadings.⁹ A defendant cannot, at the trial, rely on a defence, *in casu* sudden emergency, which is not pleaded.

⁷ At 64.

⁸ Referred to above, n 5.

⁹ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A), at 107C-H.

Neither can a plea of apportionment of damages be considered in the absence of specific allegations concerning the plaintiff's negligence.'¹⁰

[25] In the present matter, the defendant never pleaded that the plaintiff failed to keep a proper lookout. The defendant never pleaded any form of negligence at all. Consequently, the questions of contributory negligence on the plaintiff's part and the resultant apportionment of damages in terms of section 1(1)(a) of the Apportionment Act do not arise.

[26] The relief to be afforded to the plaintiff is discussed below.

Relief and order

[27] It was necessary for the plaintiff to have proved a bare minimum of negligence (a so-called '1%') before the provisions of section 17(1) of the RAF Act could be triggered. The court is persuaded, based on the evidence presented by Ms Sintwa, that the plaintiff has indeed done so successfully.

[28] There can be no possible apportionment of the damages to be awarded for the reasons already discussed. The driver's sole negligence was the cause of the accident and the damages that followed.

[29] Regarding costs, the plaintiff has been entirely successful in relation to the determination of liability. There is no reason why the usual order should not follow.

[30] In the circumstances, the following order is made:

- (a) the defendant is held liable for payment to the plaintiff of 100% of her damages, as ordered or agreed upon by the parties, because of the

¹⁰ *Harwood*, referred to above, n 5, at paragraph [6].

injuries suffered by the plaintiff in the motor vehicle accident that occurred on 18 July 2019, along Jacob Zuma Drive, at Makhanda;

- (b) the defendant is directed to pay the plaintiff's party-and-party costs on the High Court scale, as taxed or agreed upon by the parties, such costs to include the costs of trial on 1 December 2022 and 29 March 2023; and
- (c) the defendant is directed to pay interest on the costs described in (b), above, at the prevailing legal rate, calculated from the date of *allocatur* until the date of payment.

JGA LAING
JUDGE OF THE HIGH COURT

Appearance:

For the plaintiff: Adv KD Williams, instructed by Morné Struwig Inc, c/o Whitesides Attorneys, 53 African Street, Makhanda (ref: Mr G Barrow / C12593)

For the defendant: Ms V Jeram, State Attorney, c/o Yokwana Attorneys, 10 New Street, Makhanda (ref: ROMA / Z01 / CJ)

Dates of hearing: 1 December 2022 and 29 March 2023

Date of judgment: 27 June 2023