

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no. **3259/2018**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PUMLA SHOSHA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY:

VAN RHYN J

HEARD ON:

7 JUNE 2022

HEADS OF ARGUMENT- PLAINTIFF:

25 JULY 2022

HEADS OF ARGUMENT- DEFENDANT:

12 AUGUST 2022

DELIVERED:

3 OCTOBER 2022

INTRODUCTION:

[1] The plaintiff, a 36-year old female, instituted action against the defendant in terms of the provisions of the Road Accident Fund Act¹ ("the Act") for the payment of the amount of R3 416 845.00 in damages arising from an incident which occurred on 13 May 2015. In her particulars of claim the plaintiff averred that a motor vehicle with registration letters and -number [...] (the "insured motor vehicle"), driven by I Rossouw (the "insured driver") failed to slow down and stop at the robot-controlled intersection of Church- and Cambridge Streets, Bethlehem and collided with her. The plaintiff was a pedestrian and was crossing the street at the intersection when the incident occurred.

[2] The matter was certified trial ready on 7 March 2022 and proceeded on merits and quantum. The plaintiff averred that the accident was caused as a result of the sole negligence of the insured driver of the insured motor vehicle who was negligent in one or more of the following respects:

2.1 He travelled at a high speed under the circumstances;

2.2 He omitted to keep a proper lookout;

2.3 He omitted to keep his motor vehicle under proper control;

2.4 He failed to comply with the statutory traffic rules;

2.5 He failed to avoid an accident when by exercising reasonable care he should and could have done so;

2.6 He failed to adequately apply the controls and other mechanisms of his motor vehicle in such a way that it does not pose a threat to other road users;

¹ Act 56 of 1996

2.7 He failed to adequately consider the presence, movement and clearly visible movements of the Plaintiff;

2.8 He failed to consider the rights of other road users.”

[3] As a result of the collision the plaintiff sustained severe bodily injuries including a fracture to the right tibia and fibula.

[4] The defendant denied that the accident occurred as averred and pleaded that, in the event of the plaintiff establishing that the insured driver was negligent, then the defendant pleads that such negligence did not cause or contribute to the collision which was caused by the sole negligence of the plaintiff.

[5] The defendant pleaded that the plaintiff was negligent in one or more of the following respects:

“5.1 She failed to keep a proper look out;

5.2 She ran negligently inside (sic) the road utilized by motor vehicles thereby causing the accident;

5.3 She entered the road without looking and running thereby causing the accident;

5.4 She placed herself in a position of danger thereby causing the accident;

5.5 She failed to avoid the collision when she should and could have done so.”

[6] In the alternative the defendant pleaded contributory negligence by the plaintiff and that any damages which the plaintiff may have suffered fall to be

reduced in accordance with the provisions of the Apportionment of Damages Act².

[7] On the date of the trial, the matter stood down at the request of Mrs Banda, the attorney appearing on behalf of the defendant, who awaited instructions in respect of a possible offer to settle the matter. When the matter proceeded, the court was informed by Mr Cross, who appeared on behalf of the plaintiff, in his opening address, that a settlement proposal made by the defendant included an apportionment of damages which was not accepted by the plaintiff and that the matter will proceed on trial.

ARGUMENTS ON BEHALF OF THE PLAINTIFF AND THE DEFENDANT.

[8] Mr Cross argued that the defendant has in effect conceded negligence on the part of the insured driver by submitting an offer to settle the matter. It was furthermore placed on record by Mr Cross that the insured driver is not available to present evidence. Mrs Banda argued that she will be able to elicit contributory negligence through cross examination of the plaintiff.

[9] The plaintiff did not testify nor did any other witness on her behalf. Mrs Banda confirmed that the insured driver is not available to testify and that she does not intend to call any other witnesses. Mr Cross presented argument in support of the plaintiff's claim and argued that the onus to prove contributory negligence rests on the defendant. The defendant did not adduce any evidence and therefore the court should make an order declaring that the defendant is 100% liable for the plaintiff's damages.

[10] Mr Cross then proceeded to argue the quantum of the plaintiff's claim and referred to several medico-legal reports compiled by expert witnesses and filed by the plaintiff. The necessary affidavits obtained from the experts confirming their expertise, the facts and their respective opinions as contained in the expert reports, where filed by the plaintiff. Mrs Banda proceeded to argue the quantum of the plaintiff's claim with reference to the medico legal reports filed by the plaintiff. These expert reports were handed in by agreement between the parties.

² Act 34 of 1956.

[11] On 18 July 2022 the legal representatives of the parties were requested to submit written heads of argument in respect of the issue whether the plaintiff has proved that the negligence or other wrongful act of the insured driver caused the accident taking cognisance of the fact that the defendant did not concede the merits of the claim and the plaintiff did not present any evidence regarding the merits of her claim during the trial. The heads of argument were filed on the dates as indicated in the heading of this judgment.

[12] In the heads of argument, Mr Cross submitted that the starting point is to determine whether the plaintiff has succeeded in establishing that the insured driver acted negligently. The question stands to be answered in the affirmative in favour of the plaintiff by virtue of the following: only the plaintiff adduced evidence in relation to negligence. Evidence may be presented by means of *viva voce* evidence, documentary evidence or evidence in the form of *ex facie curia* admissions. He further argued that the plaintiff's evidence was presented in the form of the compulsory section 19 (f) of the Act affidavit setting out the details of the accident.

[13] It is therefore submitted that the offer made by the defendant on the day of the trial settled the issue of negligence. Mr Cross contended that the defendant's version is thus that it does not take issue with the negligence of the insured driver and that the only issue that remains is the contributory negligence (if any) of the plaintiff. In this matter, the evidence was therefore also presented in the form of an *ex facie curiae* admission contained in the offer that the defendant admitted that the negligence of the insured driver caused the accident

[14] On behalf of the plaintiff it was argued that the onus to prove contributory negligence rests on the defendant. The defendant did not adduce any evidence to convince the court of the contributory negligence of the plaintiff. Once the negligence of the insured driver has been admitted and the defendant bears the onus to prove contributory negligence, the failure to do so, concomitantly result in a finding in favour of the plaintiff. On behalf of the plaintiff it is contended that the court should make an order declaring the defendant to be 100% liable for the plaintiff's damages.

[15] Mrs Banda submitted in her heads of argument that the plaintiff's version of how the accident occurred, as contained in her affidavit in terms of section 19 (f) of the Act, was not admitted as evidence tendered in the trial. In the Minutes of the Rule 37 Pre-Trial Conference it was recorded that the plaintiff intends to tender evidence by means of affidavit as contemplated in Rule 38(2) Uniform Rules of Court in respect of five expert witnesses and requested the defendant to respond by indicating whether the defendant objects to the proposed action. The names of the witnesses listed did not include the plaintiff. The defendant did not agree to the proposal made by the plaintiff.

[16] Rule 38(2) provides that the witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

[17] Mrs Banda argued that although the defendant made an offer in settlement of the plaintiff's claim, such offer was made without prejudice. Plaintiff rejected the defendant's offer, hence the matter proceeded to trial. No evidence was presented in the form of an *ex-facie curia* admission. In the circumstances, plaintiff has not proved her version of the events as to how the collision occurred nor that the insured driver was negligent. The burden of proof rested upon the plaintiff in respect of the negligence of the insured driver and the plaintiff failed to discharge such burden. As such, absolution from the instance should be granted.

THE APPLICABLE LEGAL PRINCIPLES AND DISCUSSION.

[18] Generally, evidence for either party must, in both criminal and civil cases, be given orally by the witness in the presence of the parties. Evidence essentially consists of oral statements made under oath or affirmation. The purpose of this practice is that parties should have an opportunity to confront the witnesses who testify against them, and should be able to challenge the evidence by questioning

the witnesses where they and the court can also observe the demeanour of the witness for purposes of assessing his or her credibility.

[19] The terms “burden of proof” and “onus of proof” refer to the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that the claim or the defence, as the case may be should succeed. In **Pillay v Krishna and Another**³ it was described as follows:

“The only correct use of the word ‘*onus*’ is that which I believe to be its true and original sense (cf D 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be...”.⁴

[20] The burden of proof in an action will not necessarily fall on the one party alone, but each of the parties may bear a burden of proof in relation to different issues. In **Pillay v Krishna** the general approach was explained as follows:

“If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states... as follows: ‘He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute’. The *onus* is on the person who alleges something and not on his opponent who merely denies it.”⁵

[21] Where there are a number distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof. These issues have nothing to do with each other, save of course that the second will not arise until the

³ 1946 AD 946.

⁴ at 952-3.

⁵(*Supra*) at 951-2.

first has been discharged.⁶

[22] In **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**⁷ Corbett JA (as he then was) explained the distinction between the burden of proof properly so called and the evidential burden as follows:

“As was pointed out by Davis AJA in *Pillay v Krishna and Another* 1946 AD at 952-3, the word onus has often been used to denote, *inter alia* two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) at 715 Ogilvie-Thompson JA called it ‘the overall onus’. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (‘weerleggingslas’). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.”

[23] Rules 39(5) and (9) of the Uniform Rules of Court, read together, provide that the party who bears the burden of proof has the right to adduce evidence first. Rule 39(13) provides as follows:

“Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.”

⁶ *Pillay v Krishna supra* at 953.

⁷ 1977 (3) SA 534 (A) at 548.

[24] The “onus to adduce evidence” as it is used in the Rules 39(11) and (13) is no more than the duty to adduce evidence and does not necessarily coincide with the burden of proof. While the incidence of the duty to adduce evidence will often coincide with the incidence of the burden of proof, or with the incidence of the evidential burden, what is referred to in the Rules is something that is conceptually quite different. The onus to adduce evidence has no bearing upon the evaluation of the evidence. It is merely a procedural duty that is imposed upon one or other of the parties to enable the trial to be conducted effectively. In general, and as a matter of logic, the party who bears the burden of proof will have a duty to adduce evidence first on those issues upon which he or she bears that burden, but the pleadings may alter the position.

[25] On 30 November 2021 a pre-trial conference in terms of the provisions of Rule 37 was held between the legal representatives of the plaintiff and defendant. In terms of paragraph 8 of the signed Minutes of the Pre-trial Meeting, the parties agreed that each of the parties bears the onus of proof in respect of the allegations made by them and the duty to begin rests on the plaintiff. In terms of paragraph 11 of the said minutes, the parties agreed that with regards to the status of the discovered documents, the documents are what they purport to be and may be used in evidence, without any admissions as to the contents thereof.

[26] Regarding the issues in dispute, it was agreed that the following two aspects remain in dispute:

26.1 whether the plaintiff has suffered any damages;

26.2 whether the damages suffered by the plaintiff was caused by the negligence of the defendant.

[27] In paragraph 17 of the Minutes of the Pre-trial Meeting, the defendant was specifically asked to admit that the collision occurred on 13 May 2015 at the intersection of Church- and Cambridge Streets, Bethlehem and took place when the driver of the vehicle with registration numbers and letters FFB 958 FS was driven by I Rossouw when it collided with the plaintiff. The defendant replied that any

admissions are limited to the defendant's plea.

[28] The plaintiff furthermore requested the defendant to admit or deny that the insured driver was negligent in one, more, or all the grounds alleged in the plaintiff's particulars of claim. The defendant replied that any admissions are limited to the defendant's plea. The defendant was requested to concede the issue of merits based on the negligence of the insured driver. The defendant replied as follows: "Plaintiff is put to the proof thereof".

[29] In a civil case the standard of proof is proof upon a balance of probability. Proof of a fact means that the court has received probative material with regard to such fact and has accepted such fact as being the truth for purposes of the specific case. However, evidence of a fact is not yet proof of such fact⁸ - as the court must still decide whether or not such fact has been proved in accordance with the standard of proof required.

[30] Liability generally depends upon the wrongfulness of the act or omission relied on by the plaintiff. In order to claim compensation for patrimonial loss, a claimant should establish that he or she sustained harm which was wrongfully caused by the defendant. Wrongfulness, in cases against the RAF is inferred from the fact that the third party negligently caused the accident. The statutory nature of the liability is such that the RAF insures the third party "for any loss or damage which the third party has suffered as a result of any bodily injury to himself ... if the injury ... is due to the negligence or other wrongful act of ... the insured driver"⁹. The test for negligence is as set out in the matter of **Kruger v Coetzee**.¹⁰

[31] Thus, once negligence of the insured driver is proved, wrongfulness is generally assumed. It must then be shown that the loss suffered by the claimant is due to the negligent/wrongful act in issue. Included in a bundle, marked "Merits" in the court file, is a copy of an affidavit deposed to by the plaintiff on 11 November 2016. The original affidavit deposed to by the plaintiff was not handed up as an exhibit during the trial and for purposes hereof it is assumed that the original affidavit

⁸ R v V 1958 (3) SA474 (GW).

⁹ Road Accident Fund Act 1996 (as amended): S 17(1).

¹⁰ 1966 (2) SA 428 (A) at 430E-F.

was submitted with the claim form as required by the Act. Mr Cross, in his argument regarding the quantum of the plaintiff's claim mentioned that certain scars on the plaintiff's leg was visible to him when he consulted with her on the day of the trial. It is therefore assumed that the plaintiff was at court and available to testify in her own case.

[32] Mrs Banda disputed the admissibility of the affidavit deposed to by the plaintiff. The admissibility of evidence and the weight of evidence are two different concepts not to be confused. In **South African Criminal Law and Procedure**¹¹ it is explained as follows:

“If what is adduced can in law properly be put before the court, it is admissible. It is only once it has been or could be admitted that its persuasiveness, alone or in conjunction with other evidence, in satisfying the court as to the *facta probanda* has to be considered.

[33] Fisher J held as follows M S v Road Accident Fund¹²:

“Rule 33 deals with the correct manner for the recording of admissions or statement of issues. Compliance with these rules should be insisted on by courts unless compelling reasons exist for departing therefrom. Lack of formality leads to a slipshod approach to the conduct of the trial, which serves only to pander to the wont of many legal representatives to get in and out of court with as little trouble to themselves as possible and maximum returns.”

[34] There are two basic rules governing the admissibility of a document, namely the original document must be produced and the document must be authenticated. None of these two principles, have been complied with in the matter at hand. The argument that the plaintiff has succeeded in establishing that the insured driver acted negligently is being rejected by the defendant on the basis that the plaintiff did not testify during the trial and thus did not make out a prima facie case. I agree with the

¹¹ A V Lansdown 7 J Campbell: Vol V, Criminal Procedure and Evidence (1982) at 720.

¹² (10133/2018) [2019] ZAGPJHC 84.

defendant's submission in this regard. The applicant furthermore relies on the offer made by the defendant during settlement negotiations on the day of the trial in support of the argument that the defendant admitted that the negligence of the insured driver caused the accident.

[35] Courts enforce the principle that: "Statements made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute may not be disclosed in evidence without the consent of both parties."¹³ The defendant objects against the disclosure and the admissibility of the fact that a settlement proposal was made by the defendant which could be construed as an admission of the negligent conduct of the insured driver. It is trite that communications exchanged between litigants in the course of legal proceedings in a bona fide endeavour to settle their differences are protected from subsequent disclosure at the trial and from admission to evidence.

[36] In *Naidoo v Marine & Trade Insurance Co Ltd*¹⁴ Trolip JA observed that the rule is based upon considerations of public policy to encourage resolution of disputes:

"The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation."

[37] Also on this point, I agree with the contention made by Mrs Banda. The fact that an offer in settlement of the plaintiff's claim was made by the defendant is of no consequence and is inadmissible as evidence¹⁵. In any event the offer was not accepted by the plaintiff and is therefore irrelevant to the proceedings.

¹³ The South African Law of Evidence, 2nd Edition, DT Zeffert, AP Paizes at p 700.

¹⁴ 1978 (3) SA 666 (A) at 677C-D.

¹⁵ *Kotzé v Suidwestelike Transvaalse Landboukoöperasie* [2005] 2 All SA 232 (SCA).

[38] I agree with the contention made on behalf of the defendant that the plaintiff failed to place evidence before court to enable the court to evaluate the evidence as a whole and to determine whether the plaintiff has discharged the onus of proof. In the circumstances the plaintiff failed to adduce any evidence pertaining to the negligence of the insured driver. There is no prima facie evidence and thus proof before the court that the insured driver was negligent in any respect or that the insured driver thus caused the accident. At the conclusion of the whole case no evidence was placed before the court by either of the parties in respect of the merits. In the result the plaintiff failed to discharge the burden of proof and absolution from the instance should be granted.

[39] As to the issue of costs, there are no good reasons for not ordering the plaintiff to pay the defendant's costs.

[40] ORDER:

1. Absolution from the instance is granted.
2. The plaintiff is ordered to pay the costs of the defendant.

VAN RHYN J

On behalf of the Applicant:
Instructed by:

Adv. C.G. CROSS
DU PLOOY ATTORNEYS

On behalf of the Second Respondent:

Instructed by:

MRS. P. BANDA

RAF STATE ATTORNEYS