



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 13541/2017P

In the matter between:

S MAKOBA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

ORDER

I make the following order:

1. The defendant is liable for 100% of the plaintiff's proven damages.
 2. The defendant is to pay the plaintiff's costs of suit.
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JUDGMENT

Mathenjwa AJ

Introduction

[1] This is a third party claim brought by the plaintiff in his personal capacity. The plaintiff is claiming damages from the defendant, arising from injuries which he sustained from an accident involving a motor vehicle with registration number [...] (the vehicle), that occurred on 15 September 2015 at approximately 10h00 on the Ntuthunga Road, Kwambonambi, KwaZulu-Natal.

[2] The liability of the defendant arises from section 17(1) of the Road Accident Fund Act 56 of 1996 which obliges the defendant 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 of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee. . . ’

[3] During the course of the rule 37 pre-trial conference, it was recorded by agreement that the issues of merits and quantum would be separated pursuant to the provisions of rule 33(4). Therefore, only the merits will be determined and the quantum stands over for later determination.

The plaintiff’s version

[4] The plaintiff called two witnesses. The first witness was Mr Thulani Nene who testified that he was walking on the Ntuthunga road, away from the T-junction when he came across the vehicle which was driving at high speed

towards the T-junction. At the time the vehicle emerged, he had just taken a foot path towards his homestead which is near the scene where the accident took place. As the vehicle drove past him, he turned back, looked at the vehicle and saw the plaintiff standing and holding steel at the back of the vehicle. The plaintiff is well-known to him, but not related to him. The vehicle stopped and the plaintiff proceeded to the tailgate of the vehicle. As the plaintiff was alighting, the vehicle pulled off and the plaintiff fell down. He went to the plaintiff's grandmother to report the incident. When he returned to the scene, the plaintiff and the vehicle were no longer at the scene.

[5] The plaintiff, Mr Siyabonga Makhoba, testified that he was walking from the local clinic on the road to his home when the vehicle emerged. He waved the vehicle down to stop. It stopped and he boarded the vehicle at the back through the tailgate. When the vehicle was approaching the place where he had to get off, he indicated by his hand to the driver of the vehicle that he was going to alight ahead. The vehicle stopped and he proceeded to the tailgate to alight from the vehicle. As he was alighting from the vehicle, while his one leg was outside the vehicle and the other leg still in the vehicle, the vehicle drove off. Consequently, he fell down and lost consciousness, and recovered consciousness when he was at the Inkosi Luthuli hospital. Both witnesses testified that at the place where the vehicle stopped, there was a footpath leading to the plaintiff's home, and that the vehicle stopped about 100 metres towards the T-junction.

The defendant's version

[6] The defendant admitted that the plaintiff was a passenger in the vehicle that was involved in the accident, and that the plaintiff had sustained bodily injuries, but denied that the defendant was the sole cause of the accident. The defendant called two witnesses. The first witness was Mr Mthandeni Makhathini, who was the driver of the vehicle. He testified that while he was driving on the Ntuthunga

road, the plaintiff waved the vehicle down, where after he stopped and gave the plaintiff a lift. He did not know the plaintiff and did not know where he would get off. When he was approaching the T-junction, he slowed down and suddenly observed the plaintiff jumping off and falling down from the moving vehicle. He stopped the vehicle, proceeded to the plaintiff who was lying on the ground, and asked him why he had jumped off from the moving vehicle. The plaintiff apologised, and was assisted by Mr Madlala, who was his (Mr Makhathini's) co-employee and a passenger in the vehicle, to pick up the plaintiff and transport him to the local clinic. There was no one, including the plaintiff's witness, Mr Nene, at the scene when the accident occurred. He learnt of the particulars of the plaintiff from his clinic card. He used that information to trace the plaintiff's home and reported the incident to the plaintiff's grandmother.

[7] Mr Sizwe Madlala testified in support of the defendant's version. He did not testify on the cause of the accident, but testified that after the accident, he and Mr Makhathini approached the plaintiff who was lying on the road. Mr Makhathini asked the plaintiff why he jumped off from the moving vehicle and the plaintiff apologised. He also testified that at the time of the accident, the plaintiff's witness was nowhere near the scene.

Analysis of the evidence

[8] There are two mutual destructive versions that were placed before this court. On the one hand, the plaintiff's version is that the vehicle stopped to enable him to alight from the vehicle and then pulled off while he was in the process of alighting, thereby causing him to fall down and sustain injuries. On the other hand, the defendant's version is that as the vehicle was approaching the T-junction, it slowed down and the insured driver suddenly observed the plaintiff jumping off from the moving vehicle, falling down and sustain injuries.

[9] It is trite law that in a civil case, as in the present case, the plaintiff bears the overall onus of proof on preponderance of probabilities. In considering the issue of onus and the approach used by courts when they are faced with two mutual destructive versions, Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-F held that:

'In a civil case the *onus* is obviously not as heavy as it is 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 expressing the techniques generally employed by courts in resolving two irreconcilable versions, it was held in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) para 5 that:

'... 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.'

[10] Turning to the credibility of the witnesses, the plaintiff was a credible witness, as there were no contradictions in his evidence. He stood firm on his version under cross-examination. His evidence on the cause of the accident is corroborated by the evidence of Mr Nene, who was an independent witness. There were also no contradictions in Mr Nene's evidence. On the other hand, the evidence of the defendant's witnesses was not satisfactory in various aspects. The evidence of Mr Madlala does not corroborate the evidence of the insured driver, Mr Makhathini's, in a material way on the cause of the accident, but supports his version of what happened after the accident. He confirmed what was stated by Mr Makhathini that after the accident, they both approached the plaintiff who was lying on the road, that Mr Makhathini asked the plaintiff why he jumped off the moving vehicle and that the plaintiff had apologised.

[11] Mr Makhathini's evidence that he learned from the plaintiff's clinic's card about the particulars and home address of the plaintiff, is irreconcilable with his evidence that the plaintiff was conscious after the accident, and when he was attended to at the clinic. When asked by the court why he had to learn from the plaintiff's card about his particulars and home address, as according to his own testimony, the plaintiff was conscious and able to talk, he initially stated that he did not ask the plaintiff because he was in severe pain, and later stated that he asked the plaintiff, but that he did not respond. The contradiction by the witness on this issue supports the version of the plaintiff that when he fell, he lost consciousness and could not talk.

[12] Furthermore, the evidence of the plaintiff that he was alighting from the vehicle through the back tailgate is more probable than the evidence of the defendant that the plaintiff jumped over the rails on the side of the truck. When asked by the court how long the rails were on the side of the truck, the witness stated that depending on the size of a person, the person can alight from the side of the truck over the rails with ease, but others cannot jump over the rails unless the rails are removed. The court observed that the plaintiff was a tiny and short person. It is highly improbable that he would jump over the rails when alighting from a moving truck, instead of alighting from the tailgate where he could easily alight from the vehicle without the hassle of jumping over the rails. Furthermore, the failure by the insured driver to report the accident to the police is not reconcilable with the conduct of a driver who was not hiding anything about the details surrounding the accident. He confirmed that he was aware that when a vehicle was involved in an accident involving serious injury of a person, as in the present case, he was required to report the accident to the police. However, he did not report the accident even though he knew that the plaintiff was unable to report the accident to the police.

[13] Mr Ndamase, for the defendant, referred this court to *Tshongoyi v Road Accident* [2015] ZAECELLC 13, which he contended supports the defendant's version. The factual circumstances of that case are distinguishable from the case before this court. In *Tshongoyi* para 7, it was not in dispute that the plaintiff threw herself out of a running vehicle as the driver of the vehicle allegedly had passed the drop off point, '... she became out of her mind with fear because she had seen children being kidnapped on television'. In the present case, the plaintiff was not threatened, and could not fear anything that would compel him to jump off the moving vehicle.

[14] What is now left to consider is whether the insured driver was negligent in causing the accident. The test for determining negligence was expressed in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G, where Holmes JA held that: 'For the purposes of liability *culpa* arises if -

- (a) a *diligens paterfamilias* in the position of the defendant -
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.'

In applying this test to the present case, it is reasonable to infer that a reasonable driver, in the position of the insured driver, would have foreseen that after having briefly stopped the vehicle, and by failing to pay attention to and afford the plaintiff an opportunity to completely alight from the vehicle, that this would have caused the accident and thus would have taken steps to prevent the accident.

[15] For these reasons, I reject the version of the defendant, and accept the version of the plaintiff that the accident was solely caused by the negligent driving of the insured driver, who drove the vehicle off whilst the plaintiff was in the process of alighting the vehicle.

Order

[16] In the result the order is made as follows:

1. The defendant is liable for 100% of the plaintiff's proven damages.
2. The defendant is to pay the plaintiff's costs of suit.

MATHENJWA AJ

DATE OF HEARING : 8 June 2021
DATE OF JUDGMENT : 6 August 2021
FOR THE PLAINTIFF : Adv Moola
Instructed by Moses Naidoo & Associates
Suite 107, 10th floor
Mercury House
320 Smith Street
Durban

FOR THE DEFENDANT: Adv Ndamase
Instructed by Govindasamy, Ndzingi and
Govender Inc.
211 Burger Street
Pietermaritzburg
3201