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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No.: 82923/2016

22/3/2019

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

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DATE

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SIGNATURE

In the matter between:

EJG HUNDERMARK

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MNGQIBISA-THUSI, J

- [1] The plaintiff, Mr Ernest Joseph Geoffrey Hundermark, has instituted an action against the defendant, the Road Accident Fund (“RAF”) for damages suffered as a result of injuries sustained in a motor vehicle collision which occurred on 12 December 2015 at around 02h00 along the Essenhout Street, Phalaborwa, Limpopo.
- [2] At the time of the collision the plaintiff was the driver of the motor cycle bearing registration number [....]. The plaintiff’s motor cycle collided with a motor vehicle driven by one Maroeska Harding (“the insured driver”).
- [3] The plaintiff alleges that the collision was caused by the sole negligence of the insured driver.
- [4] In its plea, the defendant denies that the insured driver was negligent and in the alternative pleads that the plaintiff’s negligence contributed to the collision.
- [5] The parties agreed on a separation of issues in terms of Rule 33 (4) of the Rules of Court. Accordingly, the matter proceeded on merits only and the issue of quantum is postponed *sine die*.
- [6] Further, the parties agreed that the documents discovered are what they purport to be without the content thereof being admitted. Furthermore that the court would consider only those documents referred to by a witness in evidence.
- [7] The following facts are common cause:

7.1 that on 12 December 2015 a collision occurred between the motor cycle driven by the plaintiff and the motor vehicle driven by the insured driver along the Essenhout Street, Phalaborwa, Limpopo.

7.2 that as a result of the collision the plaintiff sustained serious injuries to his right lower limb and his wrist;

7.3 that there were eye witnesses to the accident as the plaintiff was unconscious after the collision and the insured driver had left the scene of the collision.

[8] The plaintiff's evidence is as follows. On the day in question he was at a friend's house where there was a braai and left to go to a club to meet another friend. As a result of the collision, he is suffering from retrograde amnesia for the period of two hours before the collision and can therefore not recall how the collision happened. He only regained consciousness in hospital where he was informed that he had been involved in a collision. The plaintiff testified that he had tried to open a case at the local police station but was told he could not as he could not recall how the accident occurred. A few days later his father had enlisted the assistance of a private investigator to investigate the collision as there were no eye witnesses.

[9] According to the plaintiff his motor cycle was written off as it was damaged beyond repair. He testified that its side engine casing, the right crash bars,

right foot pad and right hand mirror were broken; the handle bars were bent and the front right flap was broken into pieces.

[10] Under cross examination the plaintiff reiterated that he has no recollection of going to the club to meet with a friend and how the collision happened. The plaintiff denied having taken any alcohol on the day of the collision as he was at the time part of the emergency team on the mines and was on standby. He also testified that he was wearing his helmet and that although his wife told him that he was bleeding from the ears, he had not sustained a head injury.

[11] The next witness called by the plaintiff was Mr Alwyn Jacobus Van Wyk ("Mr Van Wyk"), a regimental sergeant major at the 7 South African Infantry Battalion, based in Phalaborwa.

[12] Mr Van Wyk testified that during 2015 he was the insured driver's supervisor at the base. At the time the insured driver was a rifleman. He testified that he got to know about the collision three days after it happened when he was called by the town's chief traffic officer who inquired from him if he had a person who owned a vehicle of a certain type and colour. According to Mr Van Wyk the traffic officer informed him that an accident had occurred and at the site of the collision the police had recovered certain debris which had a certain blue colour. On checking the town's vehicle register, he had discovered that there were only two vehicles with that particular colour registered. The police had checked the first motor vehicle and found that it had no damage. On inquiring at the base if there was anyone driving a motor

vehicle with the colour mentioned, he was informed that such a vehicle was driven by the insured driver.

[13] Mr Van Wyk testified that at the time of his inquiries, the insured driver was on leave. He telephoned her and inquired from her if she had been involved in a collision on the day in question. The insured driver confirmed that she had been but was quite vague as to how the collision occurred save to say that a motor cycle collided with her. The insured driver further confirmed that after the collision she had alighted from her vehicle, checked the plaintiff who was lying on the ground and found that he was still breathing. She then left the scene. She also confirmed that she did not assist the plaintiff nor did she report the collision to the police. The insured driver informed him that she left the scene of the accident as she did not want to get involved. Further the insured driver admitted that she had drunk three glasses of brandy and coke that evening. The insured driver further told him that she had reported the accident to the police in Port Elizabeth and gave him the name and contact details of the policeman and he forwarded the details to the local police. Mr Van Wyk testified that he learnt that actually the insured driver did not report the accident but merely had a discussion with the police officer.

[14] Mr Van Wyk further testified that the insured driver informed him that her motor vehicle was being repaired in Port Elizabeth and sent him photos she had taken of the damage to her motor vehicle. From the photos, he noticed that the insured driver's motor vehicle had a big dent on the driver's door, that

a step at the trunk of the vehicle was missing and that the rear right hand tyre was missing some pieces.

[15] The next witness called by the plaintiff was Mr Eugene Engelbrecht, the private investigator employed by the plaintiff's father. Mr Engelbrecht admitted that he was not an expert but was merely requested to investigate the accident as the police were unhelpful. He testified that from his investigation, he suspected that a third party was involved as the accident scene was tampered with. He further testified that at the accident scene he found some debris which was blue aquamarine in colour. He later learnt from the traffic chief that the police had made contact with the owner of the blue aquamarine vehicle which was involved in the collision. On inspection of the scene he discovered vehicle marks and an oil spill from the road to where the plaintiff is said to have landed. Mr Engelbrecht testified that a certain Mrs Audrey Khoza had informed him where the plaintiff was lying after the accident and that she had called the police and the ambulance after the collision happened. Further, Mr Engelbrecht pointed out from the sketch plan drawn by the parties as to where he surmises the point of impact might have been. According to Mr Engelbrecht, the plaintiff must have been travelling from west to east along Essenhout Street as he found debris on the side on which the plaintiff had fallen. Furthermore Mr Engelbrecht testified that he withdrew from the case after the police decided to take over the investigation.

- [16] The defendant did not call any witnesses. The defendant has not presented any version as to how the accident happened except what is stated in a pre-trial minute dated 1 August 2018 in which defendant's legal representative undertook to revert to the plaintiff on its version.
- [17] The test for determining negligence involves the questions whether (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such reasonable steps¹.
- [18] It is not in dispute that the plaintiff bears the onus of proving on a balance of probabilities that the injuries he sustained are as a result of the negligence of the insured driver.
- [19] The plaintiff came across as credible witness. There is no evidence as to how the collision might have occurred.
- [20] It is common cause that there is no eyewitness to the collision. The plaintiff has testified that he has no of the period relating to two hours before the collision. He is only recollection of the period before the accident is that at some stage during the day in question he was visiting a friend's place. As a result of the accident the plaintiff was unconscious at the scene of the accident. It can therefore not be expected of the plaintiff to give evidence on what transpired before the accident. On the other hand, the insured driver

¹ *Kruger v Coetzee* 1966 (2) SA 429 (A).

was not called by the defendant to give evidence as to how the accident occurred. According to Mr Van Wyk the insured driver is still stationed at the military base in Phalaborwa.

[21] In *Galante v Dickinson*² the court heard that:

“It is not advisable to seek to lay down any general rule as to the effect that made properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant”.

[22] There is evidence by the plaintiff and his witness Mr Van Wyk that the plaintiff's motorcycle was damaged on the right hand side. Further, according to Mr Van Wyk's evidence, he gleaned from photos taken by the insured driver of the damage to her motor vehicle that it was damaged on its right hand side. From these facts it can be inferred that the plaintiff and the insured driver were traveling in opposite directions. Further, according to Mr. Engelbrecht, the debris he found when he inspected the accident scene was found on the side where the plaintiff was lying. In the absence of any evidence from the defendant contradicting the evidence presented on behalf

² 1950 (2) SA 460 (A) at 465.

of the plaintiff, it can be inferred that the accident or the point of impact was on the lane travelled by the plaintiff. As a result it follows that the inference to be drawn is that the insured driver was the cause of the accident in that she must have veered onto the lane travelled by the plaintiff.

[23] Taking into account all the evidence before me and in the absence of any contradicting evidence from the defendant, I am satisfied that the collision was caused by the negligent driving of the insured driver and that the defendant is therefore liable for loss suffered by the plaintiff as a result of the collision. No evidence was presented by the defendant with regards to the alleged contributory negligence of the plaintiff.

[24] In the results, an order is granted in terms of the draft order marked "X".

NP MNGQIBISA-THUSI

Judge of the High Court

For Plaintiff: Adv JHP Hattingh (instructed by VZLR Inc)

For Respondent: Adv M L Matlala (instructed by Maluleke Msimang & Associates)