

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

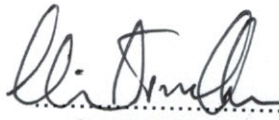
CASE NO: 97911/16

In the matter between:

LUNGELO NGEWU

Plaintiff

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	02/07/19 DATE	 SIGNATURE

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Tuchten J:

- 1 The plaintiff claims compensation from the defendant for injuries sustained by him. When the trial began, I directed that the questions whether the plaintiff was injured in a collision with a motor vehicle as alleged by him and whether, if so, the insured driver negligently caused the injuries suffered by the plaintiff be heard first and that the other questions arising in the case be postponed for later adjudication.

- 2 At some time during the period Friday 28 August 2015 to Sunday 30 August 2015, the plaintiff sustained a head injury with a brain injury in the right frontal lobe, left facial abrasions, a chest and abdominal injury with a ruptured diaphragm and hernia and bilateral lung contusions and a small haemothorax, a left distal radial fracture and a fracture of the pubic rami.
- 3 The only witness who testified as to how the plaintiff sustained these injuries was the plaintiff himself. He testified that he lived with his mother in an apartment on the corner of Paul Kruger and Jeff Masemola Streets in central Pretoria. It emerged from evidence of a later witness that the apartment is in a block called Corner Flats. The plaintiff said that he spent the evening of Friday 28 August 2015 near the Pretoria City Hall where he was able to use the free wi-fi provided by the City there.
- 4 At about 21h30, the plaintiff said, he decided to go home. He was in the process of crossing the intersection between Paul Kruger and Jeff Masemola Streets, with the traffic lights in his favour, when he saw a taxi coming towards him. The lights were against the taxi, he said, and he assumed that the taxi would stop. But it did not and collided with him in the middle of Jeff Masemola Street.

- 5 The plaintiff said he was rendered unconscious by the impact and did not regain consciousness until he woke up in hospital. He could not say in which hospital he regained consciousness. The evidence showed that the plaintiff was first admitted to the casualty unit of the Tshwane District Hospital (TDH) on 30 August 2015. He was transferred to the Steve Biko Hospital on 31 August 2015 as an emergency case. Later he was transferred to Kalafong Hospital, from which he was later discharged.
- 6 I shall deal further with the balance of the evidence presented, to the extent that it is relevant to the issues before me but I think it is important to point out that there was no evidence which directly contradicted the plaintiff's version. So the issue ultimately resolves to this: seen against the totality of the evidence, was the plaintiff a reliable and credible witness?
- 7 I am not compelled to accept the plaintiff's evidence merely because it was uncontradicted. As was said in *Siffman v Kriel*:¹

It does not follow, because evidence is uncontradicted, that therefore it is true ... The story told by the person on whom the onus rests may be so improbable as not to discharge it.

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1909 TS 538 at 543

This dictum was recently approved by the SCA in *McDonald v Young*,² which referred with approval in this regard to *Kentz (Pty) Ltd v Power*.³

- 8 Nor is there any increased burden on the plaintiff in these circumstances to prove that his version is true. Given the nature of the issue between the parties, the plaintiff bears the onus but need do no more - and, of course no less - than prove on a balance of probabilities that his version should be accepted.
- 9 The plaintiff's mother, Mrs Ngewu, testified that she by chance left her apartment on the Sunday morning at about 09h30 and went down into the street. There she saw a police van and a large crowd. She saw a police van with its back door open, with a person lying in the back of the van. She looked inside and saw that the person in the back of the police van seemed to be her son, the plaintiff, who had not returned to the apartment the previous night.
- 10 Mrs Ngewu came closer to the van and saw that the person lying inside it was indeed the plaintiff, who was lying on his back. She tried to speak to him and shook him but he did not respond. His face was covered in dried blood.

² [2011] JOL 27126 (SCA)

³ [2002] 1 All SA 605 (W)

- 11 Mrs Ngewu was concerned about the cellphone which she had bought for the plaintiff some three months earlier. This cellphone was not in the possession of the plaintiff when he was in the back of the police van and thereafter. The plaintiff elicited the help of her neighbour, Mr Malewa, who lived in one of the apartments in her block.
- 12 Mrs Ngewu concluded that the plaintiff had suffered his injuries during a robbery. She said that the police apparently also thought so. She and Mr Malewa went in the police van with the plaintiff to the TDH. They were both under the impression that the plaintiff was unconscious. Mrs Ngewu said that she could not remember when she spoke to the plaintiff for the first time after she found him in the police van and that two or three days thereafter, he was still unable to talk.
- 13 Some four weeks after the incident, Mrs Ngewu said, she asked the plaintiff for the first time what had happened to him and he told her that he had been hit by a motor vehicle. Someone then advised Mrs Ngewu that the incident should be reported to the police. On 28 September 2015, she and the plaintiff reported the incident to the police and completed the usual accident report form, in which the plaintiff reported that he had been hit by an unknown vehicle at about 21h30 on Saturday 29 August 2015 at the intersection of Paul Kruger and Jeff Masemola (formerly Jacob Mare) Streets.

- 14 Both the plaintiff and Mrs Ngewu testified that they asked about the plaintiff's cellphone, which was not in the possession of the plaintiff after he was put into the police van.
- 15 The plaintiff said in evidence that he was unable to say what had happened to him during the twelve (or 36) or so hours after he was allegedly hit by the unknown vehicle in the intersection of Paul Kruger and Jeff Masemola Streets.
- 16 The hospital records of the TDH relating to the treatment the plaintiff received there, however, conflict in certain important respects with the plaintiff's evidence. These records were collected into a bundle which formed exh A at the trial. It was common cause that the entries in exh A reflected as having been made by the nurses and doctors concerned were indeed so made by them and that where those records reflect that information was given by the plaintiff to those nurses and doctors, the information so recorded was indeed so given by the plaintiff. It was further common cause that certain test results recorded in exh A were in fact determined and that the diagnoses recorded were in fact made. Counsel for the plaintiff however did not admit that the test results were correct.

- 17 The TDH records show that the plaintiff was first seen by a recently qualified doctor, Dr Kruger, on 30 August 2015 at 17h15. Before this, at 15h30 his vital signs were determined and recorded by a nurse. At this stage, the plaintiff scored a full 15 out of 15 on the Glasgow Coma Scale (GCS).
- 18 The GCS measures a patient's responsiveness for eye movement, verbal function and motor function. For eye movement, a patient is scored between 1 and 4: one mark for a completely unresponsive patient, rising to 4 marks for a patient with full eye movement. For verbal function a patient is scored between 1 and 5 and for motor function between 1 and 6 on the same basis.
- 19 At 15h45 on 30 August 2015, a nurse recorded as follows:
- A male patient came to the unit wheeled in on a chair accompanied by his friend with a history of assault and complained of body pains. On arrival general condition seems stable. Vital signs stable ...
- 20 But at 17h00, fifteen minutes before Dr Kruger saw the plaintiff, his GCS score had dropped to 14 out of 15. The drop was reflected in his verbal function score where the plaintiff scored four out of five.

- 21 Dr Kruger recorded her findings regarding the plaintiff on a standard form used by TDH for this purpose, as follows:

30/8/2015

17h15 17 year old male gives [history] of drinking too much alcohol on an empty stomach.

Was hit [with] a belt [which caused] laceration on chin.

Very drowsy, unable to give proper [history]

From parents: [no] chronic illnesses

Fam[ily history]: [hypertension]

[no] allergies

- 22 The nurse's note made at 17h00, however records:

Patient starting to hyperventilate ...

- 23 And at 19h00, the nurse's note reads:

Patient found in the unit sleeping on a stretcher. Being fully awake and well orientated, able to tell his name. ...

- 24 Four medical practitioners gave evidence, one for the plaintiff and three for the defendant. For the most part, they were in agreement on relevant matters.⁴ Of central importance to the present case, medical practitioners on both sides agreed that the plaintiff's injuries were caused by high impact blunt trauma. Similarly both sides were in agreement or did not dispute that the plaintiff's injuries could have been caused by collision with a motor vehicle, a fall from a height or an assault. None of the medical practitioners testified that the one potential cause was more probable than the others.
- 25 On the same form upon which Dr Kruger recorded the history given to her by the plaintiff, Dr Kruger recorded that she had initiated "Special Investigations" of the plaintiff's blood and urine to test for "Alcohol intoxication [with query] recreational drugs. Samples were taken from the plaintiff at 17h40 on 30 August 2015. The results were negative for such drugs but a small amount of ethanol, the active ingredient in recreational alcoholic drinks, was found in the plaintiff's blood.

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The disagreement related to whether it was usual for members of the SAPS to place unconscious accident victims into the back of police vans for the purpose of transporting them to hospital, to unload them there and then summarily leave. In light of this disagreement, I cannot make a finding in this regard.

- 26 The results showed that while the plaintiff had not ingested recreational drugs during the period immediately before he sustained his injuries until the samples were taken, he had been drinking. One can rule out any such drinking during the period from the Sunday morning until the blood was drawn. So, while it is not possible to say how much the plaintiff had drunk, it must have been a considerable amount for there still to be ethanol in the plaintiff's bloodstream late on Sunday afternoon.
- 27 The care of patients in the casualty unit of the TDH is transferred from doctor to doctor as one goes off shift and another comes on shift. On Monday 31 August 2015, the plaintiff was received by Dr Masemola. While under Dr Masemola's care, the plaintiff told her that he had been involved in a motor vehicle accident. Dr Masemola's note reads as follows:
- [Assessment:] MVA 2 days ago [Query] head injury +
chest/abdominal pathology
[Query] Diaphragmatic rupture [illegible] large colon
- 28 The note made by Dr Kruger on the Sunday the plaintiff was admitted to the TDH was put to the plaintiff during cross-examination. He said he had no memory of having given Dr Kruger a history. The note made by Dr Masemola was not put to the plaintiff. There is no

explanation for the change of versions in the histories given to the two doctors from the Sunday to the Monday.

- 29 Counsel on both sides submitted that the evidence should be evaluated on the basis that there were two stories mutually destructive. I do so, but I bear in mind that generally the dicta bearing upon this topic deal with situations where there is conflicting eye witness evidence. In the present case, of course, there is no eye witness account which contradicts that of the plaintiff. In the present case, I must evaluate the evidence of the plaintiff and the other witnesses who gave evidence on the events preceding the plaintiff's admission to the TDH, together with what the plaintiff told the doctors and nurses in the TDH and told the police for the purpose of the accident report on 29 September 2015 and the blood alcohol test, all in the light of the probabilities.
- 30 With this in mind, I set out the principles by which such matters must be adjudicated as advanced by counsel. In *National Employers' General Insurance Co Ltd v Jagers*,⁵ it was held:

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 case of the party

on whom the onus rests. 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 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 bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the 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.

- 31 This decision has consistently been followed. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*, the SCA held:⁶

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 fact 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

- 32 There are two serious improbabilities in the plaintiff's version: firstly, that he was knocked unconscious in the middle of a busy road in central Pretoria and lay where he fell, or near to where he fell, for at least twelve hours or 36 hours, on his version, until he was discovered there by the police.
- 33 The second improbability is in relation to the plaintiff's version that he spent the Saturday (or Friday) evening *only* using the free wi-fi at the City Hall until he started waling home to Corner Flats. In fact, the plaintiff had been drinking alcohol at some time before he was found by the police and in quantities sufficient to leave ethanol in his bloodstream at 17h40 on the Sunday evening.
- 34 There was medical evidence, which I accept, that a head injury can cause memory loss. So perhaps the plaintiff was not deliberately untruthful about whether he had been drinking but forgot that he had been doing so. Even so, the failure of the plaintiff to explain how the ethanol got into his bloodstream causes me to doubt his reliability as a witness.
- 35 Then there is perhaps the most important deficiency in the plaintiff's case: his inability to explain what was recorded in the hospital records about what the plaintiff said and what was found on examination of

the plaintiff on the Sunday afternoon and evening after he was admitted to the TDH. First, there are the clinical observations of the nurses as recorded in the Vital Data section of the form on which Dr Kruger recorded the history given to her by the plaintiff. On two separate occasions that afternoon and evening, at 15h30 and 17h00, the plaintiff's GCS was assessed. On both these occasions, the plaintiff was conscious. Secondly, the history given to Dr Kruger and the nurses conflicts with the plaintiff's version. He said in evidence that he could not remember having told Dr Kruger what was recorded by her.

- 36 Then, as I have noted, a nurse recorded that at 19h00 that evening, the plaintiff was well orientated and able to supply the nurse with his name.
- 37 This evidence of Mrs Ngewu and Mr Malewa, as well as that of the plaintiff, in summary that the plaintiff was unconscious when he was admitted to the TDH and for some days thereafter, is irreconcilable with the version arising from the hospital records that the plaintiff was from at least 15h30 on the day of his admission, conscious and able to give a history of what had happened to him.

- 38 As to events testified to by Mrs Ngewu and Mr Malewa: either they were deliberately untruthful about the plaintiff's state of consciousness or the plaintiff feigned unconsciousness. There seem to me to be only these two logical possibilities. Perhaps, if the plaintiff feigned unconsciousness, he did so because he did not want to disclose to his mother how he became injured and how he came to lose his cellphone. But I do not want to speculate in that regard. It is enough for present purposes that the plaintiff's version that he was unconscious when he was admitted to hospital cannot be correct, at least from 15h30 onwards.
- 39 The change in version given to the doctors at the TDH is significant. Of all the three possible causes of the plaintiff's injuries, only the possibility that he was struck by a motor vehicle through the fault of the insured driver would entitle the plaintiff to compensation. In his particulars of claim attached to his summons dated 16 December 2016, the plaintiff claimed damages of R8 100 000. In amended particulars of claim dated 6 May 2019, the plaintiff increased his claim to R11 687 000. The change in version might well have arisen from the plaintiff's desire to receive compensation for his injuries.

- 40 I must say something about the plaintiff's demeanour as a witness. As Van den Heever J so memorably observed in *R v Haefele*:⁷

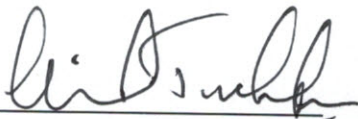
... the word demeanour does not merely signify the appearance of a witness in the box; whether he gives his testimony with assurance, sometimes amounting to impudence, or whether he has the sheepish look which one would expect from a liar; it means much more; it signifies that which distinguishes the living word from mere written records and it includes such matters as a momentary hesitation and an intonation of the voice and a thousand considerations which one may enumerate ...

- 41 I bear in mind that the plaintiff had suffered a moderate to severe head injury and that he was almost 18 when he was injured and 21 when he gave evidence. He might have felt overwhelmed by the experience of being in a court and being cross-examined.
- 42 But for all that, I must say that he made a poor impression on me. My impression of the plaintiff was that he did not appear to be telling the truth as he recollected it. He constantly had to be asked to speak up or repeat what he had said and he appeared to be embarrassed by what he was saying. Indeed, at one stage during the plaintiff's evidence I asked him whether he was embarrassed by what he was saying. His answer was that he was not embarrassed.

- 43 I do not attach much weight to the fact that the plaintiff appeared to be a poor witness. Some witnesses just are good witnesses. That does not always mean that they are telling the truth and are reliable. Some are just bad witnesses, in the sense that their delivery of their versions does not appear to carry conviction. But demeanour is a factor to be considered and the cases say that a good demeanour can carry the day in a case where the probabilities do not favour the party bearing the onus.
- 44 I am troubled too by the plaintiff's testimony that he sustained the injuries on the Friday. I have described how the plaintiff said that he had been struck by a motor vehicle on the Saturday in his report to the police. But in his statutory demand to the Road Accident Fund on form RAF1, signed by the plaintiff on or before 26 January 2016, the plaintiff said that the incident happened on the Friday. In his particulars of claim, too, the plaintiff alleged that the incident happened on the Friday. There is no explanation for this conflicting evidence.
- 45 In all these circumstances, I cannot find that the plaintiff was probably truthful in his account of how, when or where he sustained his injuries. Even if the plaintiff sustained his injuries by being struck by a motor vehicle, which as I have said I am unable to find, I am not convinced

on a balance of probabilities that he sustained them in the manner, at the time or at the place to which he testified.

- 46 The plaintiff therefore cannot succeed. I make the following order: the plaintiff's claim is dismissed with costs.


NB Tuchten
Judge of the High Court
2 July 2019