

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NUMBER: 22986/2015

DATE DELIVERED: 1/2/2018

In the matter between:

**VONGANI KAREL NKOMBYANE obo
Minor**

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MANGOLELE AJ

- [1] In this matter the Plaintiff instituted a claim against the Defendant for personal injuries arising out of a motor vehicle collision that occurred on 23 February 2003.
- [2] The Plaintiff is the biological father of the minor child and acts in these proceedings on his behalf.
- [3] The issue of merits and quantum were separated by agreement between the parties and an order to that effect was granted separating the merits from quantum in terms of 3(4) of the High Court Rules. The matter then

proceeded on the basis of the determination of merits only. In particular, I am called upon to determine whether a collision did occur on the said date and whether the minor child was a passenger in the insured vehicle.

[4] **Plaintiff's case:**

The Plaintiff's evidence comprise of that of two of its witnesses being the Plaintiff himself and his aunt the second witness.

[5] The Plaintiff testified that he is the biological father of the minor child who is now seventeen (17) years old and resides with him. He was not present when the collision occurred but was informed by his aunt (Berselia Khati) on the same date about the accident. He remembers this incident although it happened many years ago (2003) in that he lost his mother and his son sustained bodily injuries as a result of this accident.

[6] He was informed by his aunt that they were travelling from a funeral of a family member in a combi and heading back home. On their way the driver of the insured vehicle was travelling at a high speed on a road that had potholes. It appears that the vehicle had a tyre burst as a result of having hit one pothole and the driver failed to control the vehicle which then over turned. According to him the accident happened somewhere in Bloemfontein and he did not stay in Bloemfontein by then. He recalls this incident and particularly the date since it was a tragic and a difficult incident to forget.

[7] Under cross examination, the Plaintiff stated that he is employed as a police officer based at Springs Public Order Police Unit and has been a police officer for a period of about twelve (12) years. His employment as a police officer only started after the accident. He further stated that the minor child was living with him and his late mother as a result of him having separated with the minor child's biological mother. He states that the minor child was three (3) years old at the time of the accident.

[8] Nothing under cross examination was put to this witness challenging or disputing the fact that the collision did indeed occur and further that the minor child was a passenger in the said insured vehicle. For these reasons, I find that the evidence of the Plaintiff regarding the occurrence of

the collision and the presence of the minor child in the insured vehicle as a passenger stands unchallenged.

[9] **Berseli Khati's evidence:**

This was the second witness for the Plaintiff who testified that she was a passenger in the insured vehicle together with the minor child and his late grandmother and were travelling from a funeral of her brother. She at first stated that the collision took place in 2013 and shortly thereafter stated that it was in 2003 on 23 February. She further states that she remembers this date even fourteen (14) years later because it was more like a new thing that had happened to her.

[10] Ms Khati states that she was travelling with her twin sister (the minor child's grandmother) and had lost her in that incident since she died shortly thereafter.

[11] Her testimony is further to the effect that they were travelling on this road with potholes and the insured driver was travelling at a high speed. One of the tyres burst as a result of having hit the potholes and the insured driver failed to control the vehicle and it over turned. She further stated that there were other people in the insured vehicle including her late twin sister and about four (4) children including the minor child in this matter. The witness confirmed that the minor child is the son to the Plaintiff and pointed at the Plaintiff who was sitting in court identifying him as Karel Nkombyane. The collision happened in the Free State but she does not_ know the name of the place and was around the farms. The witness further confirms having spoken to the Plaintiff informing him about the accident telephonically on the same date of the incident.

[12] Her testimony is further that after the vehicle over turned, she observed that the other occupants were flown out of the vehicle and herself and others got out of the said vehicle through the window. The police and ambulance were summoned and attended the scene and they were taken to the hospital by ambulance. At this hospital they were transferred to another hospital where they were treated for minor injuries and

discharged. Her twin sister, the minor child's late grandmother, was however admitted at the first hospital which she could not remember the name thereof, since she had sustained serious bodily injuries. She confirms having seen the police and the ambulance coming to the scene and that the minor child was also taken to the hospital in the same ambulance in which she was placed.

[13] After they were discharged from the second hospital, she requested to be taken to the first hospital to see her twin sister and found that she had sustained serious bodily injuries. According to her the accident occurred on a Sunday and her twin sister passed on the following Thursday. Subsequent to the burial of the twin sister, she took the minor child and stayed with him for a period of about two (2) years. Currently the minor child is residing with his biological father, the Plaintiff.

[14] Under cross examination, the witness was firm that the collision occurred and that the minor child was a passenger in the said vehicle. I may also state that the cross examination was not directed at attacking the fact that the collision did occur or that the minor child was indeed a passenger in the insured vehicle. General questions were asked about the injuries and medical procedures that the minor child had sustained and had to attend. This witness gave a good impression on the manner in which the accident occurred and the presence of the minor child inside the insured vehicle as a passenger.

[15] The Plaintiff then closed his case and the Defendant also closed its case without calling a witness.

[16] I had requested the legal representatives to submit heads of argument for both parties which they did and I commend them for having complied and find the heads of argument very helpful.

[17] In argument, the Plaintiff states that the principle of uncontested evidence especially where there is no officers accident report is very trite. What the court is being requested to determine is whether there was a collision as alleged and whether the minor child was a passenger in the insured vehicle.

- [18] The Plaintiff bears the onus of proof on a balance of probabilities and I therefore have to determine whether on the evidence tendered, such onus has been discharged or not.
- [19] I have already dealt with the summary of the evidence of the Plaintiff and one witness called by him above. The following have been noted with regard to the testimony of these two witnesses both in their evidence in chief as well as under cross examination.
- [20] The occurrence of an accident on the date and place mentioned in the particulars of claim as well as the lodgement documents is confirmed. Nothing was put to these witnesses challenging their version in this regard by the Defendant. Furthermore, nothing was put to them by the Defendant suggesting that they are lying and/or not telling the truth. The cross examination of these witnesses was in the form of questions relating to the injuries sustained and possible treatment by medical practitioners and were irrelevant for purposes of issues for determination.
- [21] In its heads of argument, the Defendant seems to concede (correctly so) that indeed an accident occurred as alleged by the Plaintiff and further that the minor child was a passenger in the insured vehicle.
- [22] I agree with this concession more so in that I believe that the evidence led on behalf of the Plaintiff is the truth. As a matter of fact this evidence stands unchallenged by the Defendant and remains the only version.
- [23] The absence of medical and/or hospital records of the minor child as well as the police accident report was explained by the witnesses who further stated that they live far from the area where the accident occurred. The Plaintiff himself was not employed as a police officer at the time of the accident, which happened about fourteen [14] years before the date of trial.
- [24] Be that as it may, the evidence led clearly establishes that the accident happened as alleged by the Plaintiff and that the minor child was a passenger in the insured vehicle. This is by agreement between the parties, an issue for determination and I am satisfied that the Plaintiff

succeeded in proving this issue. I accordingly find that the Plaintiff has succeeded in discharging his onus as required. The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.

[25] The next issue for determination is that of costs.

The Plaintiff argues that the costs should follow the result and that Plaintiff should be awarded costs.

[26] The Defendant submits that a no cost order should be made as the Plaintiff is responsible for the matter having had to go on trial by failing to provide Defendant with sufficient information to enable it to consider and assess the claim.

[27] Both parties state that the matter was postponed on 25 January 2016 due to Defendant having requested the *locus standi* affidavit on the date of trial. The matter was removed for settlement, but no offer was made. It is very clear that the postponement of the matter on 25 January 2016 was occasioned by the Defendant's very late request for the *locus standi* affidavit. I am inclined to grant an order for costs against the Defendant for the postponement of the matter on 25 January 2016.

[28] As regards the 11th May 2017, I am informed by both parties that the matter could not proceed due to non-availability of judges. I am of the view that since postponement was not due to fault on the part of either party, it will only be fair to make an order for no costs in respect of this date.

[29] Although the Plaintiff submits that the costs should follow the results, the issue of costs still remains a matter of discretion to be exercised by the judge.

[30] I have been referred to the matter of Thantsa, Basil Mabuela and Road Accident Fund where Kubushi J in a similar matter awarded costs in favour of the Plaintiff.

[31] It was argued on behalf of Defendant that Mabuela's judgement is distinguishable from the current matter in that only the OAR was not made available. It was argued further that in the current matter, the Defendant had only the RAF1 and RAF4 forms, *locus standi* affidavit from which it

was supposed to assess the claim and consider its defence on merits if any.

[32] It is argued that the lodgement documents constituted very little information for the Defendant to concede the merits.

[33] There seems to be no evidence of any further appropriate steps taken by the Defendant to obtain further information that would assist in considering its position on merits. This is normally canvassed during pre-trial conferences and/or through request for further particulars.

[34] In any event the issue before me was whether the accident did occur and whether the minor child was a passenger in the insured vehicle.

[35] I am satisfied that the Plaintiff has succeeded in proving its claim on merits. I am consequently inclined to grant costs in favour of the Plaintiff.

[36] I accordingly make an order as follows.

ORDER:

1. The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.
2. The Defendant is ordered to pay the Plaintiff's wasted costs of 25 January 2016.
3. No cost order is made in respect of the appearances on 11 May 2017.
4. The Defendant is ordered to pay the Plaintiff's costs of 17th and 18th July 2017.

M S MANGOLELE

ACTING JUDGE GAUTENG DIVISION PRETORIA