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(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 28/03/2017 SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

28/3/2017

CASE NO: 16198/2015

In the matter between:-

R AGNELLI **Plaintiff**

And

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT

NKOSI AJ

INTRODUCTION

[1] This is an action for damages in respect of loss of support instituted by the first and second plaintiffs against the Road Accident Fund. The first plaintiff is the biological mother to the 2nd plaintiff.

[2] It is common cause that on the 27 June 2014 at approximately 07:30 and at Marievale a collision occurred between a motor vehicle with registration number FVB 154 GP driven by IB Mbonani ("the insured driver")and motor vehicle with registration SBC 461 GP driven by Fermo Luigi Agnelli ("the deceased") .

[3] The parties agreed to the separation of the issue of liability and quantum. The matter proceeded to trial only on issue of liability. The parties further agreed that the only issue to be determined and decided upon by the court is that of negligence. In doing so, the court has to make a ruling on the admissibility of hearsay evidence.

[4] I should also mention that the other technical evidence relating to locus standi, jurisdiction and compliance with requirements of the Road Accident fund Act and Regulations was dealt with by the parties during their first and subsequent pre trials and admitted by the defendant. I must also add that the deceased was the 1st plaintiff's husband and the natural father to the second plaintiff.

[5] The first and second plaintiffs testified and were both cross examined. No witnesses were called and the plaintiff's case was closed. There was no witness called to testify on behalf of the defendant and the defendant elected to close its case.

FIRST PLAINTIFF'S EVIDENCE

[6] The fist plaintiff testified that she was married to the deceased for 34 years and knew her husband very well. On the day of the motor vehicle collision in question, the deceased left home in the morning driving a VW Polo motor vehicle which he was driving to springs for service.

[7] Approximately 20 minutes later, her husband called her in her cellphone. She could not answer the call because she was in the bathroom .The second plaintiff answered

shortly thereafter she established that it was her husband who called she returned the call but a stranger answered her husband's cellphone and informed her that her husband was involved in a car accident. She rushed to the scene accompanied by the second plaintiff.

[8] Upon arrival at the scene, she saw her husband sitting inside an unknown car and he was bleeding from a head injury. She asked him what happened .He told her that he was travelling and the other car swerved into his side and crashed into his car. The second plaintiff was with her when her husband told her what happened.

[9] During cross examination, she admitted that she never made a written statement to the police and that she was not present when the collision took place. She further conceded that she has no knowledge of the contents of paragraph s 4.1 to 4.5 of her particulars of claim.

<u>SECOND PLAINTIFFS EVIDENCE</u>

[10] He answered the first plaintiff's cellphone on the day of the collision and it was his father on the phone. He was busy swearing angrily at someone and the line went dead. He immediately knew that there was something wrong because he knew his dad.

[11] When he and the first plaintiff arrived at the scene, he saw his father sitting in a car unknown to him he had a head injury and was bleeding. His father told the first plaintiff that the other car encroached into his lane and collided with his car. He took photos of both vehicles using his cellphone. The photos are on page 61 to 63 of the Bundle entitled "INHOUDPGAWE: MARIETE". On page 61, the top left photo depics the insured motor vehicle stationery outside the road with damage to the right side and towards

the front on the driver's side. The other photo at the top right depics the deceased's motor vehicle with damage on the driver's side at the right side of the car.

[12] He conceded during the cross examination that he cannot tell how the collision occurred.

DEFENCE CASE

[13] There was no witnessed called to testify on behalf of the defendant. The defended opted to close its case without leading evidence.

[14] It was submitted by counsel for the defendant that the plaintiffs action should fail on the basis that

1. *Plaintiff's have failed to prove that the insured driver was negligent. The first plaintiff conceded that she has no knowledge of paragraphs 4.1 to 4.5 of her particulars of claim.*

2. *Plaintiff's action depends solely on hearsay evidence in order to prove negligence on the part of the insured driver. Such hearsay is inadmissible.*

These submissions formed the thrust of the defendant's defence.

[15] I will first deal with the defendant's first submission, the alleged failure by the plaintiff to prove negligence as alleged in paragraphs 41 to 4.5 of plaintiff's particulars of claim which provide that :

4.1 "Hy teen 'n hoër spoed gery het as wat die omstandighede toegelaat het,

4.2 Hy versuim het om 'n behoorlike uitkyk te hou;

> 4.3 *Hy versuim het om die voertuig behoorlike te beheer;*
>
> 4.4 *Hy versuim het om die ongeluk te vermy deur die uitoefening van redelike sog;*
>
> 4.5 *Hy versuim het om die kotroles en ander hulpmiddels van sy voertuig op so 'n wyse aan te wend dat dit veilig was vir ander padgebruikers.*

[16] The first plaintiff is the only witness who testified about paragraphs 4.1 to 4.5 she was asked during cross examination what she meant by each of the aforesaid paragraphs. Her reply prompted the defendant to conclude that the plaintiff failed to prove negligence.

[17] She instituted this action believing that the insured driver was negligent because of what the deceased told her. According to her, the deceased's words were "*the other driver swerved into my side and crashed into my car*". Should this be proven to be true, it would support paragraphs 4.1, 4.2 and 4.3 of the particulars of claim.

[18] It was argued by the defendant that what was said by the deceased ought to have been expressly pleaded in the particulars of claim. I do not agree, the particular of claim as it stands is not excipieable because it contains the necessary averments to sustain the cause of action. In Mc Kenzie v Farmers Co – operative Meat Industries Ltd.

Adopting the definition of "cause of action "the count held that

> "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved*[1]"

[1] 1922 AD 16 at 23 also see Evins v Shield Insurance Co ltd 1980 (2) SA 814 (A) at 838 E-F

[19] "Care must be taken in any given case to distinguish the facts which probantia must be proven in order to disclose a cause of action (the facta probanda) from the facts which prove them (the facta probantia)[2]. What is alleged in the paragraphs 4.1 to 4.5 of the particulars of claim constitute facta probanda. These paragraphs relate to the

issue of negligence which must be alleged for the particulars of claim not to be excipieable. On the other hand what was said by the deceased regarding how the collision occurred, constitutes facta probantia. It is that piece of evidence necessary to prove that the insured driver failed to keep a proper lookout (para 4.2), failed to keep his vehicle under proper control (4.3) and he failed to avoid the collision when by exercise of reasonable care and skill he ought to have done so (4.4) . The fact that the facta pro bantia was not expressly pleaded in the particulars of claim may not and in this case does not render the particulars of claim excipieable. Such evidence is admissible if it is relevant and material.

[20] The question whether the plaintiff has succeeded in proving negligence on the part of the insured driver depends on whether what the deceased said to the first plaintiff is admissible or not .

[21] It is not disputed that the deceased told the first plaintiff that the insured driver swerved into his side and crashed into his car. The fact that the deceased spoke to the first plaintiff and what he said is not hearsay; however what the deceased said is hearsay when the first plaintiff repeats it in court. It is therefore the admissibility of this hearsay evidence which is placed in dispute.

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[2] Erasmus,Van Loggerenberg ,Farlma – Superior court Practice (main volume) at B1 – 156; also see Dusheiko v Milburn 1964 (4) SA 648 (A)

[22] Section 3[3] of Act 45 of 1988 [3] provides that

3. Hearsay evidence

(1) Subject to the provisions of any law ,hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

a. *each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

b. *the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings;*

c. *the court having regard to*

(i). the nature of the proceedings

(ii). the nature of the evidence;

(iii). the purpose for which the evidence is tendered;

(iv). the probative value of the evidence;

(v). the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends,

(vi). Any prejudice to a party which the admission of such evidence might entail; and

(vii). Any other factor which should in the opinion of the court be taken into account.

Is of the opinion that such evidence should be admitted in the interests of justice.

Section 3 (1) (c) is relevant to the circumstances of this case. In Makhathini v Road Accident Fund [4] the court cautioned that the factors referred to in section 3(1) (c) (i) to (vi) should not be considered in isolation because they are interrelated and overlap

[3] Law of evidence amendment Act 45 of 1988

[23] I now turn to deal with the provision of section 3 (1) (c) (i) to (vii)

23.1 The action pertains to a claim against the road accident fund for loss of support. The Road Accident Fund is a statutory body established with the purpose to compensate the victims of motor vehicle accidents.

23.2 The deceased gave an explanation to his wife in the presence of his son of what happened or put otherwise, how the accident occurred, at the scene and shortly after the collision. There is no evidence on record to contradict what the deceased said. There is further no evidence on record to suggest that the deceased had an ulterior motive and lied purely to sustain a claim against the Road Accident Fund. If the deceased was alive and gave the same explanation in court , his evidence would have been admissible and would certainly prove the alleged acts of negligence on the part of the insured driver as stated in paragraph 4.2 to 4.4 of particulars of claim .

23.3 I agree with Adv Venter that the probative value of the evidence in casu is of a high value. The fact that the deceased spoke to the first plaintiff in presence of the second plaintiff at the scene, makes it probable that the deceased may have told them how the accident occurred. Both plaintiff's evidence was criticised on the ground that they have a vested interest in the case and would therefore protect their interest at all costs. I do not agree, the plaintiff's were impressive on the witness stand. Their evidence was clear and logical, it was not exaggerated. Of significant note is the fact that the second plaintiff testified that when he heard his father swear on the phone he immediately knew that there was something wrong. The most reasonable inference to be drawn is that there was a sound father and son relationship to an extent that the son knew his father temperament, nature and behaviour. Further, of significant note is the fact

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[4] Makhathini v Road Accident Fund 2002 (1) SA 511

that the first plaintiff was married to the deceased for 34 years. In her testimony she said "I knew my husband "She is therefore in a better space to confirm whether the deceased lied when he told her how the accident happened. There is no evidence on record to suggest that he lied.

23.4 The purpose of the hearsay evidence is clearly to establish negligence on the part of the insured driver and consequently to hold the defendant liable to compensate the plaintiff. If it is held to be admissible, it would have to be considered in light of the alleged negligence as stated on the particulars of claim. The second plaintiff took photos of the vehicles at the scene. He conceded, and correctly so, that he cannot testify about how the accident happened. The plaintiffs did not appoint an accident reconstruction expert who could have found the photos helpful for his postulations. The hearsay evidence is the only source of proving negligence.

23.5 I am not persuaded that the defendant will be prejudiced if the hearsay is admitted into evidence. To the contrary, it will be in the interest of justice to admit such evidence. The defendant failed to call any witnesses to testify. This matter was before court for trial on a previous occasion. It was postponed at the request and instance of the Defendant because the insured driver was not in attendance. Subsequently and during a further Pre-Trial Conference, the defendant indicated that it would be leading the evidence of the insured driver and the Accident Reconstruction Expert. During this trial, they were both absent and no reasonable explanation was given. The defendant is a statutory body established to compensate motor vehicle accident victims. It, therefore, has a duty to investigate each claim submitted to it. It must further ensure the attendance of its witnesses in court. Failure to do so militates against the very object of the Road Accident Fund Act and is undesirable. In casu the defendant has nothing on record to challenge Plaintiff's evidence. In this case, any prejudice claimed by the defendant is self manufactured. If the defendant's witnesses were in court they would probably have given evidence either resisting plaintiff's claim and in particular, such evidence to demonstrate that the deceased was not telling the truth or evidence corroborating the hearsay evidence.

In Road Accident Fund v Klisiewitz, Hewe.JA had this to say at para 42; [5]

> *"A special cost order is therefore not only appropriate but necessary. The Fund exists to administer, in the interest of the road accident victims, the Fund it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed*

In Madzunye and Another v Road Accident Fund [6]Maya JA stated that,

> *"......the respondent, which relies on the public purse for its existence and does not, therefore, have unlimited financial resources, conducted itself"*
> *In a manner which cannot be reconciled with the requirements set out in the Klisiewitz case. This is particularly so having regard to the fact that the intention of the act, in terms of which the respondent functions, is to give the greatest possible protection to victims of negligent driving of motor vehicles.*

[5] Road Accident Fund v Klisiewitz [2002] ZASCA 57 (29 May 2002)
[6] MAdzunye and Nother v Road Accident Fund 2007 (1) SA 165 (SCA) AT PARA 17-18

[24] The Defendants repeated failure to call its witness whose evidence would have been material constitutes a compelling justification for drawing a negative inference. Firstly, the insured driver is the one who was involved in the motor vehicle with the deceased. He would have been very helpful to the court and the parties. Secondly, the Accident Reconstruction Expert would have at least formulated an expert opinion of how the accident happened. Their failure to testify leads me to draw a negative inference, that both defendants' witnesses must have known that there is no defence to the plaintiff's claim.

[25] I have already expressed my view on the reliability of evidence of both plaintiffs. Their evidence is reliable truthful and as already said, impressive. They both conceded that they did not know how the accident happened. They had not exaggerated in an attempt to convince the court. They allowed the fate of their claim against the defendant to be decided only on hearsay. They were prepared to take that risk. They did not contradict themselves on any material evidence. They were both consistent.

[26] In S v Ramavhele, Schultz JA said:

> *"A judge should hesitate long in admitting or relying on hearsay evidence or even significant part in convicting an accused unless there is compelling justifications for doing so".*

I am persuaded that the hearsay statement qualifies in terms of section 3 (1) (c) of the Law of Evidence Amendment Act to be admitted into evidence. This evidence as I have mentioned before has the effect of proving allegations contained in paragraphs 4.2 to 4.4 of the particulars of claim. I therefore find that on the balance of probabilities the plaintiffs have discharged the onus of proving negligence on the part of the insured driver and consequently succeed in proving the merits in their favour.

[27] I have been furnished with the draft order prepared by the plaintiffs and I have perused it. I make the following order.

1. The defendant is liable to pay 100% of the first and second plaintiffs proven or agreed damages

2. The draft order is made and order of court.

N NKOSI

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA