



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Not Reportable

Not of interest to other Judges

CASE NO: 4945/2016

In the matter between:

S'MANGALISO HENDRY NGWENYA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Heard: 30 January 2017

Delivered: 31 March 2017

Coram: Makgoka J

Summary: Road Accident Fund – contributory negligence – plea - section 1(1) of the Apportionment of Damages Act 34 of 1956 - defendant pleading contributory negligence but praying for the dismissal of the plaintiff's claim instead of reduction of the plaintiff's damages – absence of a prayer for apportionment not a bar to court granting it and reducing the plaintiff's claim.

ORDER

1. The issues of liability and quantum are separated in terms of rule 33(4) of the Uniform Rules of Court;
2. The defendant is liable to pay the plaintiff 80% of his proven or agreed damages;
3. The determination of the plaintiff's damages is postponed *sine die*.
4. The defendant is ordered to pay the plaintiff's costs for this separated portion of the trial.

JUDGMENT

MAKGOKA J

[1] This is an action for damages in terms of the Road Accident Fund Act, 56 of 1996, as amended (the Act). The plaintiff claims an amount of R1 250 000.00 as a result of the injuries he sustained on 25 October 2014, allegedly as result of a motor vehicle collision driven by Mr Selby Ncube (the insured driver). The plaintiff, then 33 years old, alleges that he was a pedestrian when a motor vehicle collided with him.

[2] In its plea, the defendant denies the plaintiff's allegation that the injuries he sustained were a result of a motor vehicle collision. In the alternative, and in the event it is found that the collision occurred as alleged, the defendant denies

any negligence on the part of the insured driver. In the further alternative, the defendant pleads that the collision occurred as a result of the joint and/or contributory negligence of the plaintiff and the insured driver.

[3] Ms *Tshoma* appeared for the plaintiff, while the defendant was represented by Mr *Legong*. The parties requested a separation of the issues of liability and *quantum*, to which I agreed, as I considered it convenient that the issues be determined separately. Accordingly, the trial proceeded only on the issue of liability. Only the plaintiff testified, as the defendant closed its case without calling any witnesses.

[4] The plaintiff's evidence is briefly this. On 25 October 2014 at approximately 04H55 in the morning he was in Durban walking along Gardener Street towards the Pine Street intersection. He had attended a party at a nearby place the previous day, where he had consumed some alcohol. However, he was not drunk. As he approached the traffic light-controlled intersection he was talking on his cellphone. The traffic light turned green in his favour. A few steps into the intersection, he completed his conversation and put the cellphone in his pocket. There were other people in the vicinity. Someone who was walking in the opposite direction removed his cellphone. He turned to pursue that person, who was within arm's length. He grabbed that person and wrestled with him. This occurred in the middle of the road. As he was wrestling with that individual, a vehicle emerged from 'a blind spot' - where he could not see it coming - and collided with him. He momentarily lost consciousness as a result of the collision. The scene of collision was busy as it is situated near a nightclub.

[5] During cross-examination the plaintiff was questioned on the contents of an extra-curial statement made to the police, in particular paragraph 5 thereof. It reads:

‘During [the] impact I was on the post office side of the road, a little bit in the middle of the road. I assumed that the driver of that motor vehicle was not from a far distance. I assumed that he/she started his/her motor vehicle nearby from the post office parking or Havana Tavern parking’.

[6] Although Mr *Legong*, counsel for the defendant, initially argued that there was no evidence that what collided with the plaintiff was a motor vehicle, this was not seriously pursued. It eventually became common cause during argument that the plaintiff’s injuries were as a result of a motor vehicle collision. But in any event, from all the surrounding circumstances, it is clear that he collided with a motor vehicle. It is difficult to argue otherwise. The accident occurred in the middle of the road. That aspect out of the way, the main issue remains whether there was any contributory negligence by the plaintiff.

[7] In this regard, Mr *Legong* argued that the plaintiff’s evidence as to what really happened between him and the person who stole his cellphone was unclear and not satisfactory. Added to that, so was the argument, it should be borne in mind that the plaintiff had consumed alcohol a few hours before, and had created a danger by wrestling with the suspected thief in the middle of the road. The plaintiff was not observant at all, and his focus was on the suspect. Counsel submitted that the plaintiff could, and should, have avoided the collision but failed to do so. This, argued counsel, is supported by the fact that other road users foresaw the danger and avoided it.

[8] In considering the matter, I have to keep in mind that it was the uncontroverted evidence of the plaintiff that the scuffle between him and the suspect occurred within a very short space of time, and at all relevant times the traffic light was green in his favour. I did not gain any impression that the plaintiff was deliberately misleading the court. What I consider credible about his evidence is that he freely and fairly admitted that he had consumed alcohol earlier before the collision – something prejudicial to himself. He could easily have lied about it with the knowledge that there was no countervailing evidence. Although he was at times long-winded and often garrulous, I accept the essence and thrust of his evidence.

[9] Having said that, it is clear from the plaintiff's evidence that there was some culpability on his part. Although the traffic light was green in his favour, he had a responsibility to ensure that he, in his pursuit of the suspect, did not create a danger to himself and others. I therefore conclude that the plaintiff's conduct contributed to the collision. There remains to be determined the percentage of the apportionment. Before I determine that, I have to dispose of the residual argument by Ms *Tshoma*, counsel for the plaintiff, that this court is not competent to apportion any contributory negligence because there is no formal prayer in the defendant's plea for it. Counsel did not cite any authority for her proposition. The defendant's plea reads as follows in the relevant part:

'In the further alternative, and should the honourable court finds that a collision as alleged did occur, [and] that the driver of the insured vehicle was negligent and that his negligence caused or contributed to the collision aforesaid, all of which is still denied, then and in that event, the defendant pleads that the plaintiff was also negligent and that the collision occurred as a result of the joint and/or contributory negligence of the plaintiff and the driver of the insured vehicle.'

[10] The defendant's plea ends with a simple prayer for the plaintiff's claim to be dismissed with costs. There is, therefore, no specific prayer in the alternative for the plaintiff's claim to be reduced to the extent of the plaintiff's contributory negligence, in accordance with the plea. It is this omission that Ms *Tshoma* submits bars the court from making any order of apportionment.

[11] Section 1(1) of the Apportionment of Damages Act 34 of 1956 reads:

'Where any person suffers damage which is caused partly by his own fault and partly by fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the Court to such extent as the Court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.'

[12] In *Van der Merwe v Fourie* 1959 (3) SA 568 (E) the court was confronted with a similar situation, and a similar argument to the one advanced by Ms *Tshoma* on behalf of the plaintiff. It was there held that the absence of a prayer for the reduction of any damages proved did not deprive the court of competence to consider an apportionment of liability in terms of section 1. O' Hagan J explained at 572B-D:

'Mr. *de Wet* argued further, however, that in the absence of a prayer for a reduction of any damages proved, it was not competent for the Court to consider an apportionment of liability in terms of sec.1. I am unable to accept this argument. No doubt the alternative pleas were excipiable by reason of the prayer for dismissal of the plaintiff's claim – as was held in *Shange's* case, *sup. cit.*, but the plaintiff did not choose to except thereto. Instead of excepting he went to trial on the issues raised by the pleas, and upon a determination of those issues the court must give judgment in accordance with the imperative direction of sec.1 of the Act. There is in fact nothing in the... Act or Rules which obliges a defendant to attach a prayer to his plea...

At the trial stage of the instant case the magistrate (if he had found 'fault' on the part of the plaintiff as well as the defendant) would have had to disregard the prayer for dismissal of the claim, and it would have been his duty to consider the question of apportionment. As far as this Court is concerned, I have already held that the issue of the plaintiff's fault has been sufficiently raised on the pleadings; it has been found that the collision was caused partly by the fault of the defendant and partly by the fault of plaintiff, and it remains to deal the question of the reduction of the damages proved by the plaintiff.'

[13] *Van der Merwe* is on point and on all fours with the present case. I respectfully agree with the reasoning adopted there. The court would be placing form above substance were the defendant to be deprived of a statutorily-entrenched right to claim a reduction of the plaintiff's damages simply because of the absence of a prayer for apportionment, despite contributory negligence having been expressly raised in the plea. I must therefore, on the authority of *Van der Merwe*, simply ignore the defendant's prayer for the dismissal of the plaintiff's claim, and proceed to determine the percentage with which the plaintiff's damages should be reduced.

[14] Taking into consideration the evidence on record and all the objective facts, set out in paras 7-9 above, I conclude that the plaintiff, in relation to the insured driver, should carry 20% of the blame for the collision. Therefore, his damages should accordingly be reduced to that extent. With regard to costs, the plaintiff has been substantially successful. He is entitled to the costs of this portion of the separated trial.

[15] In the result the following order is made:

1. The issues of liability and quantum are separated in terms of rule 33(4) of the Uniform Rules of Court;

2. The defendant is liable to pay the plaintiff 80% of his proven or agreed damages;
3. The determination of the plaintiff's damages is postponed *sine die*;
4. The defendant is ordered to pay the plaintiff's costs for this separated portion of the trial.



TM Makgoka
Judge of the High Court

APPEARANCES:

For the Plaintiff:

I E Tshoma

Instructed by:

Sehoana Motsepe Attorneys, Johannesburg

Dolamo Attorneys, Pretoria

For the Defendant:

A L Legong

Instructed by:

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