IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 10973/2013

DATE: 27 MARCH 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN

MADIBO CALVIN MOSEBEKOA PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

KGANYAGO. AJ

[1] The plaintiff in this matter is claiming damages for bodily injuries arising out of a motor vehicle accident. It is common cause that the accident occurred on 27 June 2009. At the time of the accident the plaintiff was the driver of motor vehicle with registration number DML […] , that collided with motor vehicle with registration number BFL [...] driven by the insured driver.

[2] The plaintiff alleges that the insured driver was the sole cause of the accident. The defendant in its plea denies that the insured driver was negligent. In the alternative the defendant has pleaded contributory negligence.

[3] At the commencement of the trial the parties agreed to separate issues of merits and *quantum* of damages of the plaintiffs claim. I ruled that the matter proceed on the issue of merits of the claim only.

[4] The plaintiff was the only witness to testify for his case. He testified that on 27 June 2009 he was the driver of motor vehicle with registration number DML[...]. He was involved in a motor vehicle accident with motor vehicle with registration number BFL[...]. The accident occurred at about 20:00.

[5] What happened that night is that he arrived at a crossroad and stopped at the stop sign. He was travelling from a southern direction and turning to the eastern direction. The stop sign on that crossroad is for vehicles which are coming from the northern and southern directions only. For vehicles that are from the eastern and western directions there is no stop sign.

[6] After stopping at the stop sign, he looked to the left and right, and again looked to the right and left to check whether there were no vehicles. He did not see any vehicle and he proceeded to turn to the eastern direction. Suddenly a vehicle came from the eastern direction travelling to the western direction and collided with him on the right hand side of the drivers seat. The road which the insured driver was travelling from has got a curve.

[7] The insured driver came at a high speed whilst in that area the speed-limit was 60kph. He was having three passengers in his car. Two of his passengers died as a result of the injuries sustained in the collision.

[8] There was nothing he could have done to avoid that collision. After the impact his vehicle landed at the corner of the stop sign whilst the insured vehicle landed in the yard next to the stop sign.

[9] When his claim was lodged with the Road Accident Fund ("the Fund") his attorney had made him to sign several documents without their contents being explained to him. The lodgement affidavit that he had signed was not explained to him and therefore he does not know its contents.

[10] The plaintiff was cross-examined and he conceded that the lodgement affidavit that he had signed was the basis of his claim with the Fund. He conceded that his attorney wrote what he was telling him. He conceded that the insured driver was having a right of way.

[11] That concluded the evidence of the plaintiff and he closed his case. Both parties have submitted their written heads of argument and I am indebted to them. I have read their written heads of argument and have considered them in my judgment.

[12] The issues which must be determined by the court are the following:

> 12.1 whether the injuries sustained by the plaintiff has been caused by or arising out of the driving of the insured vehicle by the insured driver;

> 12.2 should I find that the injuries were sustained as a result of the driving of the motor vehicle by the

insured driver, I must determine whether the insured driver was negligent or not;

12.3 the apportionment of negligence, if applicable.

[13] It is not in dispute that the plaintiff has lodged his claim with the Fund, and that the Fund did not object to the validity of the claim in terms of section 26 of the Road Accident Fund Act 56 of 1996 ("the Act"). In terms of section 19(f)(i) of the Act, a claimant is compelled to lodge an affidavit with the Fund when he/she lodges his/her claim. The plaintiff has lodged his affidavit with the Fund and it read as follows:

"CLAIMANT'S AFFIDAVIT

I the undersigned

Calvin Madibo Mosebekoa

ID no: [...]

do hereby state under oath and say that:

1.

1 am the claimant in this matter, an adult male person presently residing at 2585 Mphalatsane c/o Landuma Shop, Paelong Free State Province. I am competent to depose to this affidavit and the facts herein contained are, unless the context indicates otherwise, within my personal knowledge and are to the best of my belief both true and correct unless stated otherwise.

2.

On or about the 27th June 2009 I was involved in a motor vehicle accident. At the time of the accident I was a driver of motor vehicle bearing numbers DML [...].

3.

On the day of the collision I was driving motor vehicle DML [...] from south to north. The road which I was driving does not have a stop sign or a line indicating that I should stop.

4.

Another motor vehicle bearing registration letters and numbers BFL [...] driven by Motlalepula Paul Sofe, was driving from east to west. On the road that motor vehicle bearing registration letters and numbers BFL

[...] there is a stop sign.

5.

When I was about to complete the intersection motor vehicle bearing letters and numbers BFL[...] failed to stop at a stop sign and collided with the right and midfront and right mid back of the motor vehicle 1 was driving.

6.

I verily state that the collision was occasioned by the sole negligence of the driver of motor vehicle bearing registration letters BFL [...] when he failed to stop at a stop sign.

7.

As a result of the collision I sustained injuries as mentioned in the statutory medical report of the RAFfrom 1 and the clinical notes attached hereto."

[14] At the trial the plaintiff gave a completely different version from the one that appears in the affidavit filed with the Fund. The plaintiff is now disowning this affidavit and blames his attorney. No supplementary affidavit or fresh affidavit was ever lodged with the Fund to rectify this discrepancy. The attorney who prepared the affidavit was not called as a witness by the plaintiff to verify this aspect.

[15] In terms of section 19 of the Act, liability is excluded in the event the third party refuses or fails to submit an affidavit or statement in terms of section 19(f). Section 19(f) requires the third party to submit an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out. The purpose of the statement or affidavit is to furnish the Fund with sufficient information to enable it to investigate the claim and determine whether or not it is legitimate. The investigation of the plaintiffs claim was based on the affidavit which he is now disputing its contents.

[16] The plaintiff conceded under cross-examination that the attorney who prepared the affidavit wrote what he was telling him. The attorney who prepared the affidavit was not called to defend himself. In *Motswai* v *Road Accident Fund* 2014 6 SA 360 (SCA) the court held that judges must be astute not to pontificate or be judgmental about persons who have not been called to defend themselves. Therefore in my view it is opportunistic for the plaintiff to resile from his affidavit without calling the attorney to defend himself. It is therefore my finding that the attorney wrote what was related to him by the plaintiff.

[17] It is clear that the evidence that was presented to this court is materially different from what has been stated in the affidavit in all material respects. The evidence tendered in court contradicts the plaintiffs

affidavit that was submitted to the Fund to investigate his claim.

[18] It has now been established that the affidavit in terms of section 19(f) of the Act which has been logged with the Fund by the plaintiff does not depict the correct information of how the accident occurred. According to the plaintiff the accident occurred the way he had explained at court. The evidence presented at the court shows that the insured driver had a right of way. In *Milton* v *Vacuum Oil Co of SA Ltd* 1932 AD 19 at 205 the court stated:

> " *Where there are two streams of traffic in a road in opposite directions, a person in a vehicle proceeding in one direction is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. A person travelling in one direction can assume that one travelling in the opposite direction will continue his course, but he may only assume that until he is shown a clear intention to the contrary. When a clear and undoubted warning is given, then there is no longer any room for the assumption that the other person will continue in his former course."*

[19] The plaintiff under cross-examination testified that he saw the insured vehicle when he was leaving the stop sign. Despite being aware that the insured vehicle had a right of way, he still proceeded to turn, instead of stopping and allowing the insured vehicle to pass. Under cross-examination the plaintiff could not present a proper picture of how the accident occurred. At some stage he stated that the collision occurred after he had already turned. When it was put to him that if he had already turned the damage should have been in the front of the vehicle, he changed his version and stated that the insured vehicle had changed lanes. When asked whether he saw the headlights of the insured vehicle he stated that he saw them when he was leaving the stop sign. When it was pointed to him that according to the point of impact on the sketchplan, he had already turned to the eastern direction, he agreed with the sketchplan and further stated that he saw the insured vehicle when he left the stop sign and that the insured vehicle was at the curve at about 20 metres.

[20] Taking into consideration what the plaintiff has stated in his affidavit in terms of section 19(f), the evidence which he had presented at court which does not give a clear picture of how the accident happened, that leaves me with no option, but to conclude that the plaintiff is untruthful about how the collision occurred. This aspect impacts adversely upon his credibility.

[21] Under the circumstances in my view the plaintiff has failed to prove negligence on the part of the insured driver. I am of the view that the defendant is entitled to absolution from the instance.

[22] In the result I make the following order:

1. The defendant is absolved from the instance with costs.

M F KGANYAGO

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

10973-2013

HEARD ON: 06 MARCH 2015

FOR THE PLAINTIFF: MR. BALOYI

INSTRUCTED BY: CHUENE ATTORNEYS

FOR THE DEFENDANT: CH BADENHORST

INSTRUCTED BY: