

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. 4226/06

In the matter between:

ANIL MAKAN

Plaintiff

and

CI BUDHRAM

Defendant

JUDGMENT

Delivered: 24 February 2015

BALTON J

[1] The plaintiff instituted action against the defendant for damages to the his BMW motor vehicle in a sum of R322 279,07. The parties agreed that the matter will proceed on liability with quantum to be determined at a later stage.

[2] In paragraph 4 of the particulars of claim the plaintiff alleges that:

On or about 6 February 2006 and at Blair Atholl Road, Westville, at or near the intersection with Jan Hofmeyer Road, a collision occurred between the plaintiff's motor vehicle and motor vehicle ND [...], there and then been driven by an employee of the defendant, known only to the plaintiff as Mohamed, acting within the cause and scope of his employment with the defendant.¹

¹ Page 4 of indexed pleadings

[3] In paragraph 3 of the plea dated 10 July 2006, the defendant, in response to paragraph 4 of the particulars of claim states:

Save for the admissions hereinafter made, each and every allegation contained in the plaintiff's summons and particulars of claim are denied as if specifically traversed herein.

In so far that an accident occurred on the 6th February 2006, the rest of this paragraph is denied and the plaintiff is put to the proof thereof.²

[4] It is *inter alia* common cause between the parties that:³

- 4.1 The plaintiff was the registered owner of a BMW motor vehicle, with registration number STX [...].
- 4.2 The vehicle ND [...] was driven by one Craig Glynn Gwillam, also known as Mohamed and/or Goolam (Mohammed).
- 4.3 The collision was caused solely, alternatively, partly, due to the negligent driving of Mohamed.
- 4.4 The summons in this action was served on the defendant on 25 April 2006.
- 4.5 The defendant was at all material times relevant to this action, a member of Clivo's Enterprises CC (Clivo's).
- 4.6 The defendant, in his plea served on the plaintiff on 10 July 2006, denied ownership of motor vehicle ND [...], that he was the employer of Mohamed at the time of the collision and put the plaintiff to the proof of both issues.

² Page 13 of the indexed pleadings

³ Page 50, 51 and 52 of the bundle Index to Notices

4.7 The plaintiff was advised of Clivo's involvement in this action on 5 February 2010.

4.8 Clivo's was finally deregistered on 16 July 2010.

4.9 The plaintiff became aware of Clivo's deregistration on 4 March 2011.

[5] The parties have agreed that the issues are:

5.1 Whether the plaintiff has sued the correct party; and

5.2 Whether the defendant ought to be held liable in terms of sections 26, 64 and/or 65 of the Close Corporation Act 69 of 1984 (the Act).

[6] The plaintiff testified that on 6 February 2006 his mother, who was driving his motor vehicle, was injured in the accident. He arranged for an ambulance to transport her to the hospital and did not speak to anyone at the scene. He travelled in the ambulance with his mother and Mohamed who had also sustained injuries. He could not recall if Mohamed discussed the accident while travelling in the ambulance. Later that day he completed an insurance claim form⁴ in which he referred to the accident report form⁵. At the time he did not have Mohamed's details.

⁴ Pages 6 and 7 of exhibit A

⁵ Pages 8 to 11 of exhibit A

[7] On 7 February 2006 he phoned the defendant who confirmed that he was the owner of ND 422 670 and they shared insurance details. He did not have any further contact with the defendant. His claim was subsequently repudiated by his insurance company.

[8] In cross-examination he stated that:

8.1 He may have had general discussions with Mohamed in the ambulance and was clear that they did not discuss the accident.

8.2 Mohamed indicated that he was working for the defendant but was unable to recall whether that conversation took place before Mohamed boarded the ambulance or while he was in the ambulance.

8.3 The defendant was at the scene and “if I recollect correctly, he (Mohamed) said that is my employer”. He was however, unable to recall if Mohamed mentioned the name of his employer.

[9] This evidence differed from his evidence-in-chief where he stated that he was unable to recall if he spoke to Mohamed about the accident. He was unable to explain his different versions and was an unimpressive witness in this regard.

[10] It was pointed out to him that his evidence-in-chief differed from the version in his amended replication to the defendant’s plea, which reads⁶:

⁶ Page 22 of the pleadings para 1.1

1.1 The defendant represented to the plaintiff and others:

1.1.1 That he was the owner, alternatively the person who bore the risk of loss and cost of repair of the motor vehicle with registration number ND [...] at the time of the collision as pleaded.

1.1.2 That one “Mohamed” also known as Craig Glynn Gwillam (the driver of motor vehicle with registration number ND [...] at the time of the collision) was his employer.

[11] He was unable to recall whether he advised his attorney about Mohamed in 2011 and agreed that it was unlikely that his attorney would have pleaded that if he had not advised him about it.

[12] When it was put to him that the defendant did not tell him about the employment relationship between himself and Mohamed, he stated that he was unable to recall if the defendant had done so or whether he had asked the defendant if he was Mohamed’s employer. He was adamant that either Mohamed or the defendant must have given him that information.

[13] He was unable to recall any of the details in that regard. He stated that at the time he phoned the defendant his main concern was whether the defendant was the owner of ND [...]. It is clear that his interest at that time was purely for insurance purposes. He only had one conversation with the defendant and was unable to recall if he had discussed Mohamed’s employment with him at all.

[14] When it was put to him that the details of Mohamed pointing to his employer appeared to be a recent fabrication, he stated as he was being cross-examined his memory of the events on that day became clearer. The plaintiff was an unimpressive witness who appeared to bolster his case in cross-examination. Important aspects of his version were left out in his evidence-in-chief. When he was unable to answer any questions he repeatedly stated that he did not recall what had happened.

[15] The plaintiff was unable to provide clear evidence of his interaction with Mohamed at the accident scene or in the ambulance. His evidence was contradictory and was tailored as he testified. The plaintiff was accordingly an unsatisfactory and unreliable witness.

[16] Even if this court had to accept in favour of the plaintiff that the accident claim form reflected the defendant as the owner, this court cannot ignore the fact that the vehicle registration form indicates the correct owner. The onus is on the plaintiff to have satisfied himself that the correct party had been sued. Proper investigation or preparation prior to institution of summons would have called for the licencing details of the offending motor vehicle.

[17] The plaintiff relied on the accident claim form to establish that Mohamed was employed by the defendant. The registration form indicates that Clivo's

was the owner. The obvious inference to be drawn is that Mohamed was driving in the course and scope of his employment with Clivo.

[18] In **COOPER AND ANOTHER NNO V MERCHANT TRADE FINANCE LTD 2000 (3) SA 1009 (SCA)** Zulman JA set out the rule in respect of the drawing of inferences in civil cases and held that:

If the facts permit of more than one inference, the court must select the most 'plausible' or probable inference. If this favours the litigant on whom the onus rests, he is entitled to judgment. If, on the other hand, and inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof....

The mere fact that the person who made the disposition does not give evidence does not ipso facto mean that one must infer that there was an intention to prefer. So, for example, in **GERT DE JAGER (EDMS) BPK V JONES NO EN MCHARDY NO** the debtor did not give evidence. This notwithstanding, Rumph JA nevertheless, after remarking that it was the defendant who knew best what his intention was in regards to this decision, still examined the probabilities in order to determine whether the inference of an intention to prefer was justified in the particular circumstances of the case.

[19] The major obstacle which the plaintiff is unable to overcome is that it did not do the groundwork prior to institution of summons.

[20] It was submitted on behalf of the plaintiff that the defendant is estopped from denying his ownership or employment of Mohamed based on the telephone call that the plaintiff made to the defendant. The plaintiff's evidence in this regard was contradicting and unsatisfactory. The plaintiff was unable to satisfy the court that the defendant represented to him that Mohamed was his employee. The plea dated 10 July 2006 alerted the plaintiff to the fact that the

defendant was denying ownership of the vehicle and being Mohamed's employer. The plaintiff failed to take any reasonable steps in this regard.

[21] It was submitted on behalf of the plaintiff that the defendant is responsible in his personal capacity in terms of sections 24, 64 and 65 of the Act.

[22] From the plea the plaintiff was aware on 10 July 2006 that ownership was in dispute. Due diligence and or proper preparation would have demanded an investigation into ownership of the vehicle. Plaintiff has failed to provide any reason as to why this was not done or even considered.

[23] The main difficulty in this case is that summons was issued without proper investigation into the ownership of the vehicle. Reliance on the motor accident claim form was insufficient in light of the denial of ownership in the plea. The Court agrees with Advocate Broster who appeared on behalf of the defendant that the accident claim form was just one document in the factual context of the documentation *in casu*.

[24] Further, as stated above, the plaintiff was not a satisfactory witness. His evidence did not in any way assist his case at all. This court is unable to draw an adverse inference from the defendant's decision not to testify. The

plaintiff was unable to satisfy the court that he had sued the correct party or that the defendant is liable in terms of the Act.

[26] The following order is made:

The plaintiff's claim is dismissed with costs.

BALTON J

Appearances:

Date of Hearing : 17 November 2014

Date of Judgment : February 2015

Counsel for the Applicant : Adv. CB Edy

Instructed by : Henwood Britter & Caney

Counsel for the Respondents : Adv. J-P Broster

Instructed by : Leon Pillay & Co