



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: 13566/2012

In the matter between:

MOOSA KHAN

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** The plaintiff claims damages in terms of the Road Accident Fund Act 56 of 1996 (the Act) pursuant to bodily injuries sustained in a motor vehicle collision on 28 February 2004, for an amount of R807 939.00. The collision occurred at about 19h00 along Mzimkhulu/Kokstad Road. The matter was initially before the Kwazulu-Natal High Court, Durban and was transferred to this court following a court order dated 15 February 2012, which order was made by consent of the plaintiff and the defendant. The jurisdiction of this court to hear the case was agreed to by both parties.
2. Pursuant to an agreement reached at the Rule 37 pre-trial conference, the parties requested that the trial proceed in respect of the merits only and that the quantum stand over for

determination at a later stage; a request acceded to by the court.¹ Accordingly, trial proceeded only in respect of defendant's liability.

3. In the initial particulars of claim, the plaintiff gives details of the registration letters and numbers of the motor vehicles that were involved in a collision as CNL 993 (vehicle 1 driven by NP Nodada), NP 12357 (vehicle 2 driven by P Mzebetshana and NPN 75548 (vehicle 3 driven by the plaintiff).²
4. **Issues for determination.** Issues in dispute have been listed in paragraph 7 of the plaintiff's particulars of claim as whether or not the driver of motor vehicle 1, alternatively the driver of motor vehicle 2 was negligent in one or more of the following aspects: failure to keep a proper look-out; driving the vehicle at an excessive speed; failure to keep the vehicle under control; failure to apply brakes timeously or at all; failure to drive with due consideration for the other road users, in particular the plaintiff; failure to avoid the collision when, by slowing down, turning aside or stopping he could have done so; failure to avoid the collision when by exercising a reasonable care he could have done so or driving onto the incorrect side of the road thereby colliding into the plaintiff's vehicle. In essence the plaintiff alleges from the pleadings that the collision was caused solely by the negligence of a driver of vehicle 1 or vehicle 2 or both such drivers. This version is disputed by the defendant who alleges that the collision was caused by sole negligence of the plaintiff.
5. In order to determine whether the plaintiff succeeded in discharging the onus, it is apposite to consider the factual matrix upon which the matter is predicated. Four witnesses testified in total, one for the plaintiff and three for the defendant.
6. The following exhibits were handed in by agreement. Exhibit A being the Index to plaintiff's trial bundle on merits. This index comprised of a covering letter from the plaintiff's attorney to the defendant enclosing plaintiff's lodgement documentation, RAF Form 1 with medical report by Dr. Msauli, RAF Form 1 with medical report by Dr. Couveia, SAPS accident report and an affidavit by Tyrone Fynn. Exhibit B being a photo album comprising of 7 photographs handed in to show the road along which the collision took place. Exhibit C and D being

¹ See Rule 33 (4).

² See paragraph 4 of the particulars of claim – p. 5 of the index to pleadings.

plaintiff's affidavits made on 30 May 2005 and 5 February 2007 respectively. Reference will be made to some of these exhibits herein under.

7. **Plaintiff's case.** Following is the summary of evidence. The plaintiff testified that on 28 February 2004 at about 19h00, he was a driver of a Cressida motor vehicle travelling from Mzimkhulu heading towards Kokstad. The said road is a two way road with one lane in opposite directions as reflected in Exhibit B. He could not tell the exact point of impact from Exhibit B since the photos were not clear to him. He had two passengers in the car being Mthuthuzeli Shazi, seated in the front passenger seat and Nomvuyo Shazi, a girl then aged 14 (herein after referred to as Shazi) seated on the back seat. Mthuthuzeli Shazi alighted from the car shortly before the collision. At the time of the collision, he was travelling at about 70 km/h. He noticed the lights of an oncoming motor vehicle driving on his side of the road. He immediately dimmed his motor vehicle' lights as until then, they were bright. He testified that the other motor vehicle crashed into his. He did not apply brakes or try to swerve his motor vehicle to the side because by the time he noticed what was happening, the collision had already happened. He remembers nothing that happened thereafter because he lost consciousness. The next time he regained consciousness he was in Rietvlei Hospital. He does not know the number of motor vehicles his motor vehicle collided with.

8. The following came out during cross examination of the plaintiff. The details of the collision as to where it happened and everything that happened after the impact, including the description of the motor vehicle(s) he collided with were told to him by Shazi and her mother. Shazi is a family relative of the plaintiff. He had no personal recollection of the registration number plates of motor vehicle 1 and motor vehicle 2 as described in Exhibit C and D or who the drivers were. He only wrote the said details in the affidavits after he saw them in the summons that was served on him by Shazi's father. From his personal collection, he remembers colliding with one motor vehicle, not two. He only saw his damaged motor vehicle at a scrapyard after he was discharged from the hospital. He denied that his car veered out of its lane into the oncoming traffic. It was put to him that he nearly collided with the first motor vehicle, the driver of which swerved to the left to avoid his (plaintiff's) motor vehicle; that he then proceeded on the wrong lane hitting the second car on its right

destroying its right mirror, before colliding into the third motor vehicle. He disputed this version. The case for the plaintiff was closed without further evidence.

9. **Absolution from the instance.** At the close of the plaintiff's case, Adv Sibisi sought an absolution from the instance on behalf of the defendant. The basis for this application was that the plaintiff had not made out a *prima facie* case. This was opposed by Adv Clemens on behalf of the plaintiff. The application was premised on the fact that the evidence of the plaintiff contradicted his earlier version as contained in the particulars of claim and the affidavits he deposed and that he relied on what he was informed by other people to make out his case. This application was refused for the reason that I was of a view that there was a *prima facie* case made out by the plaintiff. Further reasons were reserved.
10. Harms JA conveniently set out the definitive approach to an absolution application in *Gordon Loyd Page & Associates v Riviera and Another*³ as follows;
The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - in these terms:
'(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)'
This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit)*) - a test which had its origin in jury trials when the

³ 2001 (1) SA 88 (SCA)

'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.

11. It follows therefore that although the plaintiff relied on what he was informed to make out his affidavits; he testified of what he personally knew and saw up to the stage when he lost consciousness. The plaintiff disputed much of the State' version when it was put to him. He also advanced an explanation on why his evidence differed from what his particulars of claim contained. Although his explanation can still be tested in evaluating his credibility, it would be wrong to suggest that his evidence does not make out a *prima facie* case worthy of a response by the defendant. For those reasons, the absolution from instance was not granted.
12. **Case for the Defendant.** Mr. Mluleki Norman Nodada (Nodada) gave evidence for the defendant. He testified that on the date of the incident he was driving a Mercedes Benz motor vehicle with registration letters and numbers CNL 993 EC from Kokstad direction towards Mzimkhulu, in the company of two passengers. He also confirmed that Exhibit B depicts the road he was travelling on. He was driving at about 60 km/h because he was about to stop and drop a passenger at Ncapancapeni – the area where the collision took place. At that stage it had started being dark though not completely. He testified that there was a white Toyota Corolla driving in front of him which suddenly swerved to its extreme left to avoid a motor vehicle driving on its lane. He also swerved to the left and stopped at edge of the road in order to avoid the same motor vehicle avoided by the Toyota Corolla. The motor vehicle in question was a Cressida driven by the plaintiff. He could not completely avoid it since it collided with his motor vehicle on its right side, crushing out the right mirror of his car. He described the collision with his car as side-swiping. Although he had stopped, the Cressida did not stop after colliding with his motor vehicle.
13. As he stepped out of his motor vehicle in order to observe the damages, he heard a banging sound of cars colliding behind him. Together with his passenger they proceeded to the scene of second collision. As he walked on, he observed pieces of glasses and brake screech marks on left side of the road. The Cressida had just collided with another motor

vehicle (a van). The two of them were however on the right side of the road, after the impact. He testified that the driver of the Cressida was trapped inside the motor vehicle, and its front was dented into him. He did not appear to be normal in his view since he seemed unconcerned about what had just happened. He also observed a passenger on the back seat. He also observed that there was liquor bottles inside the Cressida. He could not remember if it was brandy or whisky, but it was red star liquor. He testified that he then took part in attempts to rescue the Cressida driver.

14. Under cross examination by Adv Clemens, he stated that he realised after the collision that the driver of a van was Jabulani Mzebetshana whom he knew very well. He could not point the exact point of impact from the photos in Exhibit B. He could not have avoided the impact by driving further to his left because the road becomes narrower and he was at the far end. His motor vehicle was scratched on its left by the bushes after he drove out of the road to the bushes on his left. He denied that the plaintiff was driving on his right side of the road. He also stated that the Cressida lights were bright and continued without being dimmed. He stated further that the Cressida was driven at a speed faster than the 70 km/h. Although he could not tell if the plaintiff had the safety belt on at the time of the collision, he noticed that he did not have it on at the time he arrived at the scene of the second collision.
15. Mr. Jabulani Petros Mzebetshana (Mzebetshana) also testified for the defendant. He testified that on the date of the incident he was driving an Isuzu van with registration letters and numbers NP 12357. He had six passengers in the car, two in the front being his father and Mr. Cia and four at the back of a van. They were from a wedding at Ezingolweni driving along R56 from Kokstad direction towards Mzimkhulu. As they drove past the village of Ncapancapeni, a motor vehicle driving towards the opposite direction to his veered from its lane to his side of the road driven at a high speed. One of his passengers in the front shouted on him to move the motor vehicle out of the road since the oncoming motor vehicle was about to collide with them, which he did. He drove his car to his left by the edge of the road. The said motor vehicle proceeded to collide with his motor vehicle on its front right side. He then lost consciousness and only regained it when in hospital. He could not have driven any further because the road gets narrower because of the bushes on the left of the road. He conceded that the said bushes do not appear in Exhibit B but he attributed this to road works that have been undertaken since that part of the road fell

under Kwazulu-Natal, for then it was still under Eastern Cape and there were bushes with no road works.

16. Under cross examination by Adv Clemens, the following came to light. He was sober and he had not consumed any alcoholic beverages. He was travelling at a speed of 70-80 km/h since it was drizzling and the road was wet and there are animals along that road. He denied that the plaintiff was travelling at a speed of 70 km/h saying it was faster than that. He also denied that the impact took place on the right side of the road saying it took place on the left but both motor vehicles landed on the right side after the impact. The road was not busy, for there were only three motor vehicles being his, that of Nodada and the one driven by the plaintiff. He had driven a long distance behind the motor vehicle driven by Nodada and at the time of the impact, it was about 200 to 250 meters ahead of him. Although he knew Nodada personally, he was only told after the collision that he was the driver of that motor vehicle. He could not see if Nodada's motor vehicle collided with the plaintiff's.
17. Hopewell Thembalihle Cia was the last witness for the defendant. He is one of the two passengers who were seated in the front of a van driven by Mzebetshana. He was seated on the left while the driver's father was seated in the middle. He saw the lights of a motor vehicle driven the opposite direction coming directly to their motor vehicle. He immediately shouted to Mzebetshana to pull out of the road to avoid the collision which he did. Just as he finished shouting and the driver had complied, the oncoming motor vehicle further drove out of its lane into theirs colliding into their motor vehicle. At the time of collision, Mzebetshana had already moved the car out of the road and his car had straightened up though still moving. After the impact the cars landed on the right side of the road. With this evidence, case for the defendant was closed.
18. **Submissions:** Adv Clemens addressed the court asking that the version by the plaintiff be accepted. He argued that there were inconsistencies in the defendant's version making it improbable. To this end he pointed out the Mzebetshana testified that the plaintiff's motor vehicle left its lane after crossing Nodada's motor vehicle which is not in line with Nodada's version. Adv Sibisi countered this saying the improbable version is that of the plaintiff and the claim should be dismissed with costs. To this end he pointed out that the plaintiff gave a

number of versions, being his evidence before the court and his evidence as tendered by the affidavits.

19. **Evaluation.** It is common cause that the plaintiff was driving along R56 (Mzimkhulu/Kokstad Road) when he was involved in a motor collision. It is also common cause that he collided with a motor vehicle travelling along the opposite direction. It is equally not disputed that he lost consciousness as a result of the injuries sustained in this collision. There appears to be no dispute that Nodada and/or Mzebetshana are the insured drivers.
20. There is however a dispute as to how many motor vehicles the plaintiff collided with that day. The side of the road where the collision took place is also disputed. The speed at which the plaintiff and /or Mzebetshana was/were travelling is also disputed.
21. I do not consider either of the versions of how the collision occurred to be inherently improbable. Yet, it is obvious that both versions cannot be correct. The plaintiff alleges that he remembers colliding with just one motor vehicle and that the point of impact with that motor vehicle was on his side of the road while Mzebetsahana and Nodada allege that they all collided with the plaintiff's car and that it was on their side of the road. Accordingly the court is dependent on the credibility of respective witness and the probabilities in order to make a finding on issues disputed.
22. The plaintiff could not tell how many motor vehicles he collided with because he lost consciousness after the collision with the only motor vehicle he could remember colliding with. Both Nodada and Mzebetshana allege he collided into their motor vehicles. Although the plaintiff could not deny colliding into two motor vehicles, he denies the version of Nodada that he collided with his motor vehicle, side swiping its right before colliding with the motor vehicle driven by Mzebetshana. The obvious reason for his stance is that if he was involved in a collision with more than one motor vehicle, then the second collision must have happened after he lost consciousness due to the first collision.
23. The plaintiff's affidavits handed in as Exhibits C and D reflect that at the stage he deposed of the same, he believed the version that he collided with two motor vehicles. Nothing in the affidavits suggests that he was writing facts he was not sure of. To the contrary, he is said to have sworn to the statements knowing and understanding the contents of the declarations

which were true and correct. He now distances himself from his affidavits' contents for the reason that he only wrote what he was informed of. But if he remembered what happened at the stage of deposing those affidavits the same way he appeared to remember when he gave evidence in court, one would expect of him to avoid writing what he knew to be incorrect; unless he only had the recollection of the events at a later stage. One has to keep in mind that Exhibits C and D were made some 22 months apart from each other. It is unlikely in my view that the plaintiff would repeat something he knew was not in line with his recollection some two years apart unless he also believed it to be so. The only other possibility would be that he did not know what happened on the date of the incident altogether.

24. It does not make sense at all that the plaintiff at one stage believed the version on how the collision took place to the extent of penning it into his own affidavit, only to come and distance himself therefrom when he gave evidence in court. The only conclusion one can infer from this is that he could be distancing himself not because it did not happen that way, but because it could hinder his chances of success in the claim against the defendant. Equally I do not see any basis for Nodada to come and claim that his car was also collided with if it did not happen. Police accident report suggests that there were indeed three motor vehicles involved in a collision which is in line with the defendant's version and the plaintiff's version as contained in his affidavits.
25. The plaintiff was not alone at the time of the collision. There is a witness who went on to tell him what happened after he had lost consciousness in the name of Shazi. This witness is said to be still available and the plaintiff opted not to call her. I do not have reasons on record as to why she was not called as a witness. The plaintiff however indicated that the version as to how the collision took place, or the number of motor vehicles involved, he obtained it from the summons issued against him by Shazi's father against him. Shazi's father was not there. The only conclusion to be inferred is that whatever was in the summons which the plaintiff now distances himself from, must have been the information Shazi gave her parents. The likelihood is that had the plaintiff avoided calling her because he knew she was not going to corroborate him. Whatever the reason might have been; failure on the part of the plaintiff to call the only eye witness who was in his car dealt a fatal blow to his version.
26. The court accepts the defendant's version as a true version. The court finds that the plaintiff collided with two motor vehicles after narrowly missing the third motor vehicle.

27. I do not agree that the versions by Nodada and Mzebetshana reflect any form of inconsistency. Nodada testified on how the plaintiff drove the motor vehicle at the time of impact with him whereas Mzebetshana testified of the same conduct by the plaintiff, but at the stage of impact with his car. Bearing in mind that these cars were some distance from each other, estimated up to 250 meters from each other; I do not see the basis upon which such argument can be made.
28. The next dispute is the side of the road in which the collision took place. If the version of the plaintiff is to be believed, it would imply that three drivers decided to drive on the wrong side of the road, encroaching into the plaintiff's lane. If that version is to be believed, there would have to be an explanation on what the three drivers may have been avoiding on their own side of the road. There is no evidence about anything the drivers may have been avoiding. From the evidence before the court, there is nothing they had to avoid. It is therefore highly improbable for the three drivers to have just veered out of their own lane for no apparent reason. For this reason, I accept the version that the plaintiff is the one who veered out of his side of the road to the side where Nodada, Mzebetshana and the other unidentified driver were driving.
29. The argument for the plaintiff to the effect that where the car landed after the impact should give guidance on where the point of impact was is rejected in that such a conclusion cannot be made without expert evidence. Without evidence on the positioning and the speed of each of the motor vehicles, the directions the motor vehicles would take after the impact would remain everybody's guess.
30. The last aspect is whether the two insured driver did everything within their means to avoid a collision. As a general principle, a driver who is faced with a sudden emergency is required to exercise reasonable skill to avoid the imminent danger.⁴ One man may react very quickly to what he sees and takes in, whilst another man may be slower. It is however undoubtedly the duty of every person to avoid an accident but if he reacts reasonably, even if by a justifiable error of judgment, he does not choose the best cause to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa.⁵ Both

⁴ *Mac Lauchlan v Barnes* 1954 (4) SA 503 (SR) at 508.

⁵ *Goode v SA Mutual Fire and General Insurance* [1979] 4 All 572 (W).

insured drivers testified how they drove out of the road to the verge and/or the end of the road where there were bushes to avoid the plaintiff's car. I am of the view that the two drivers did all that was humanly possible faced with the emergency created by the plaintiff.

31. It is trite that a party seeking to recover damages must prove that the insured driver's negligent conduct caused the harm giving rise to the claim.⁶ Back to the facts of this case, I find that the plaintiff drove his motor vehicle on the wrong side of the road, facing oncoming motor vehicles, narrowly missing one and colliding with two of them. It would appear the plaintiff was the author of his own misfortunes. I am therefore driven to conclude that the plaintiff failed to establish negligence on the part of the defendant.
32. The plaintiff's action is accordingly dismissed with costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	30 April 2013
Judgment Delivered:	31 May 2013
For the Plaintiff: Instructed by:	Adv. Clemens De Jager Clemens & Associates Pretoria
For the Defendant: Instructed by:	Adv. Sibisi Nompumelelo Radebe Inc Durban

⁶ Guardian National Insurance v Saal 1993 (2) SA 161 (C) at 162