

/SG

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

DATE: 13/03/2009
CASE NO: 33162/2006

UNREPORTABLE

In the matter between:

TIMOTHY NDLOVU

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SERITI, J

1. Introduction

This matter came to court by way of action.

1.1 In the particulars of claim, the plaintiff Mr Timothy Ndlovu alleges that on or about 24 March 2005 at Thulamahashe main road, a motor vehicle with registration numbers MLY082GP, driven by S H Matyeka collided with him whilst a pedestrian.

He further alleges that the accident was caused by the sole negligence of SH Matyeka who was negligent in one or more of certain respects mentioned in the particulars of claim.

It is further alleged that in the accident mentioned above, he sustained certain physical injuries as a result of which he suffered certain damages amounting to a total amount of R700 000.00. The damages allegedly suffered by him, are divided into certain heads of damages, namely past medical expenses, estimated future medical expenses, past loss of income future loss of income and general damages.

- 1.2 In its plea, the defendant denied that the plaintiff was knocked down by motor vehicle with registration numbers MLY082GP as alleged by the plaintiff. In the alternative, defendant pleaded that if the court finds that the accident occurred as alleged, then the defendant pleads that the negligence of the plaintiff was the sole cause of the accident or that plaintiff's negligence contributed to the causing of the accident.

1.3 Prior to the commencement of the trial, the court was handed a statement, signed by both parties and headed "Agreed Facts for the trial". In terms of the said statement, general damages were agreed in the amount of R130 000.00 (one hundred and thirty thousand rands) and it was further agreed that the defendant will furnish the plaintiff with a certificate in terms of section 17(4)(a) of the Road Accident Fund.

Statement further mentions that the question of past and future loss of earnings and/or earning capacity is to be postponed *sine die*.

Lastly, statement mentioned that the determination of merits will have a bearing on the general damages and the certificate in terms of section 17(4)(a) of the Road Accident Fund.

Both counsel advised the court that the court is requested to make a determination only on the question of liability or merits.

2. Evidence

2.1 The first witness to testify was Mr Timothy Ndlovu, the plaintiff.

He testified that on 24 March 2005 at about 23:00 he went out to see his girlfriend at Pamela Bookshop.

On his way, at a certain incomplete building, next to Pamela Bookshop, he met Mr Sandile Matyeka. He asked Mr Sandile Matyeka about money that the latter owed him.

Visibility, at the spot he met Mr Matyeka was good as there were street lights which were on. Mr Matyeka pushed him with his hands on the face, saying that he is disturbing him and he must go away. He fell as a result of the push. He stood up and started fighting with Mr Matyeka, whilst fighting with Mr Matyeka, the latter's younger brother and Mr John Mbowani came and assisted Mr Sandile Matyeka. The latter ran to his motor vehicle. He then heard sound of a motor vehicle

approaching. The said motor vehicle was travelling on the tarred road. The motor vehicle came to him. He was outside the road, on a gravel portion. He tried to turn away but the motor vehicle hit him on his right leg. He fell down and lost his consciousness.

When the motor vehicle collided with him, he was outside the road, on the gravel portion, in front of a certain incomplete building.

After colliding with him the motor vehicle drove away.

He was later transported to the hospital.

Under cross-examination, he testified that his home is about 100 metres from the scene where he was knocked down. At Pamela Bookshop, they sell food and books. No alcohol is sold at the said place.

There is a place next to Pamela Bookshop where alcohol was sold. When he arrived at the scene, he found Mr Sandile Matyeka and his motor vehicle was

parked nearby, out of the road, in front of Pamela Bookshop, and facing the said Bookshop.

When Mr Sandile Matyeka ran towards his motor vehicle the latter's younger brother and Mr John Mbowani remained behind as they were fighting with him. Later he heard the spinning of a motor vehicle's wheels and saw a motor vehicle coming towards him. The two people who were fighting with him managed to avoid being knocked down by the said motor vehicle.

He was knocked down, outside the tarred road on the gravel portion which is in front of the incomplete building.

There were a lot of people in front o the liquor store which was nearby and next to the incomplete building, there were few people, about four in number. There were motor vehicles parked in front of the liquor store but there were no motor vehicle parked in front of the incomplete building.

Prior to this incident, he was Mr Matyeka's agent, sending him people who wanted to register close corporations. He once worked as a site manager for the construction company owned by Mr Matyeka. He worked only for one day as they could not agree about his salary.

Next witness to testify was Mr Bheki Hlatswayo. He testified that on 24 March 2005 in the evening, he was sitting with a friend at the verandah of Phamela Bookshop. Whilst seated at the said place, he heard sounds of spinning motor vehicle wheels, he stood up and saw a motor vehicle speeding, getting into the tarred road. Said motor vehicle got out of the road and he heard people screaming. When he got outside, he noticed a person lying on the ground. Two people got into the motor vehicle that knocked down a person, and the said motor vehicle drove away. The person who was lying on the ground was Mr Timothy Ndlovu and he saw the motor vehicle knocking him down. Said motor vehicle knocked down Mr Timothy Ndlovu on the gravel in front of the incomplete building.

He further testified that when Mr Ndlovu was knocked down by the motor vehicle he was walking next to the tarred road.

Under cross-examination he testified that he cannot say Mr Ndlovu was walking but he was knocked down where people generally walk.

He arrived at the spot where Mr Ndlovu was knocked down about five seconds after the collision. He saw the motor vehicle knocking down Mr Ndlovu.

He stood up when he saw motor vehicle pulling away in a rough manner. Initially it was facing west, made a U-turn and drove towards the eastern direction. It sped away and collided with Mr Timothy Ndlovu.

Next witness to testify was Mr William Ndlovu.

He testified that on the day that Mr Timothy Ndlovu was knocked down by a motor vehicle, he was at

home. His home is about 100 metres away from the spot where Timothy was knocked down by a motor vehicle.

At some stage he went out of the house and went to the gate to smoke. Whilst at the gate, he heard a sound of a motor vehicle coming from the western direction. The said motor vehicle was spinning its wheels on the tarred road. He saw it moving out of the tarred road and he also saw a person running away from the said motor vehicle.

He further testified that he saw the said motor vehicle knocking down a person, and thereafter said motor vehicle came and passed next to the gate where he was standing.

At that time it was in the evening, street lights were on and visibility was good. At that time he did not know who is the person who was knocked down by the said motor vehicle. He learned in the morning that the

person knocked down by the motor vehicle was Mr Timothy Ndlovu.

Mr Timothy Ndlovu was knocked down by the motor vehicle in front of the incomplete building on the gravel portion.

Under cross-examination he testified that Mr Timothy Ndlovu is his brother and they stay in the same house.

When he first saw the said motor vehicle, it was on the gravel portion in front of Pamela Book store. It was facing west, it turned and travelled towards the east.

Person who was knocked down, when motor vehicle approached him, ran towards the incomplete building, motor vehicle went out of tarred road, knocked him down, came towards where he was standing and passed in front of the gate.

After knocking a person down, the said motor vehicle stopped for a short while and thereafter drove away.

There were a lot of people in front of the liquor store and bookshop, but in front of the incomplete building, there were few people, and no motor vehicles.

Plaintiff closed his case.

2.2 The first defendant's witness was Mr Sandile Matyeka.

He testified that he is a practising attorney and he has been practising as such for the past five years.

On the day of the accident, at about 23:00 and 24:00, he was from one of his business on his way to Tulamahashe. Along the main road, he saw one of his friends parked next to Pamela Bookshop, which is a tavern. He stopped and spoke to his friend.

Whilst speaking to his friend, Mr Timothy Ndlovu approached him. Mr Ndlovu was once his employee and he demanded his salary. He did not owe Mr Ndlovu any salary.

Mr Ndlovu looked drunk and he was looking for an argument. He was confrontational. He told Mr Ndlovu that if he wants to speak to him, he must come to him when he is sober. Mr Ndlovu left.

His younger brother Mr Joseph Matyeka and a certain Mr Alex Mnchunu approached him and asked for a lift home. He then proceeded to chat to his friend. He later proceeded to his motor vehicle with his younger brother and Mr Alex Mnchunu. They got into the motor vehicle. When he was about to put the key into the ignition, Mr Timothy Ndlovu came, tried to grab the keys. They tussled for the keys, he went out of the motor vehicle and the keys fell on the ground.

His younger brother and Mr Mnchunu came out of the motor vehicle and Mr Ndlovu punched everybody. People came and tried to separate them. Mr Ndlovu assaulted his (the witness') younger brother. They chased each other went across the street, to a shop called Laduma. He also went to the other side of the

road, took his younger brother and Mr Mnchunu, they got into his motor vehicle and he drove away.

As he was driving, he heard a loud bang on the left rear window. Mr Mnchunu told him that Mr Timothy Ndlovu broke the window. They stopped to inspect the window. He made a U-turn in order to go to the police station. As he was driving, Mr Timothy Ndlovu suddenly jumped into the road, came in front of the motor vehicle and attempted to stop the motor vehicle with his hands. The left head lamp of the motor vehicle collided with Mr Ndlovu.

He did not stop and he proceeded straight to the police station to report the matter. At the police station he told them that somebody broke his window and also threw himself in front of his motor vehicle. He went back to the scene with three police officers. At the scene, police officers told him to come back following day.

He further testified and said that “point of impact was more to the left hand side – more to the middle lane”. He was asked to depict, by pen, the point of impact on the photograph of the said road, and he made a mark on the left side of the tarred road, almost next to the verge of the road.

He further testified that he was driving slow as there were too many motor vehicles. There were also motor vehicles in front of the incomplete building. M T S Tavern is inside the incomplete building. Next to it, there is Matjeka Tavern.

He was criminally charged as a result of this incident, but he was acquitted. Mr Timothy Ndlovu, his brother and police officer who went to the scene with him testified on behalf of the state in the criminal case.

Under cross-examination he testified that at the verandah of Pamela Bookshop there were people and there are other people who saw the accident happening.

At some stage, group of people went across the road to the side of Laduma Tavern and came back to the side of the Bookshop.

Mr Timothy Ndlovu jumped towards his motor vehicle with his hands and legs open and he was facing his motor vehicle. He swerved the motor vehicle to the right hand side and Mr Ndlovu was hit by the left side front lamp of the motor vehicle.

He further testified and said "I hit him in the middle of the road. Middle of the road is where motor vehicles are driving."

When he first saw Mr Ndlovu, prior to the latter jumping in front of his motor vehicle, Mr Ndlovu was about 3 metres away from him. He was driving slow and he did not apply brakes.

Mr Ndlovu looked drunk, although he is not certain that he was drunk, but that is the impression he gained.

It was put to him by the plaintiff's counsel that Mr Ndlovu was not drunk and he replied and said that he cannot dispute the fact that Mr Ndlovu was not drunk.

He further testified that he was travelling at a speed of between 25-40 kilometres per hour. He knew that there were people crossing the street.

Under re-examination he said that he did not apply his brakes because Mr Ndlovu suddenly jumped in front of his motor vehicle and the only evasive action that he could take was to swerve the motor vehicle to the right hand side.

Next witness to be called by the defendant was Mr John Mbowani.

He testified that on the night in question, he was travelling with Mr Sandile Matyeka in the motor vehicle. Next to Pamela Bookshop they saw one of their friends. Mr Matyeka stopped the motor vehicle and

parked it across Pamela Bookshop. They went out of the motor vehicle and went to chat to their friend.

Whilst still talking to their friend, Mr Timothy Ndlovu appeared. He wanted to talk to Mr Matyeka, and the latter told Mr Ndlovu that “no we cannot talk today as it is already late, if there is something you want to talk to me come tomorrow and Mr Timothy Ndlovu left”.

Mr Sandile Matyeka’s younger brother and his friend Alex, asked Mr Sandile Matjeka to accompany them to a shop at Dingleydale, and they asked him (the witness) to accompany them and he said no, he still wants to see his friends. They went into the motor vehicle and he remained behind.

When they were inside the motor vehicle, Mr Timothy Ndlovu came to the motor vehicle running and he wanted to remove the motor vehicle’s keys. He saw Messrs Sandile Matyeka and Timothy Ndlovu pushing each other. Mr Matyeka went out of the motor vehicle and he saw them wrestling for the keys. They tried to

separate them and Mr Ndlovu slapped Reginald with an open hand. Mr Ndlovu also slapped him with an open hand. By that time, they were moving to the other side of the street.

All of a sudden Messrs Joseph Matyeka and Alex Mnchunu started to fight with Mr Timothy Ndlovu. Whilst they were trying to separate them Mr Sandile Matyeka called his younger brother and Mr Mnchunu saying that they should leave. He was not fighting with Mr Ndlovu. He approached Mr Ndlovu and asked him why Mr Ndlovu is hitting him and Mr Ndlovu accused him of taking sides. Mr Ndlovu then hit him with a bottle and after that he did not see what happened thereafter. He was later taken home.

Under cross-examination he testified that he has been a friend to Mr Sandile Ndlovu for a long time. At the time of the incident there were a lot of motor vehicles parked on the side walk and some were facing the Bookshop.

Next witness to testify was Mr Joseph Matyeka. He testified that he is the younger brother of Mr Sandile Matyeka. On the night in question he arrived at the bookshop with his friend Mr Alex Mnchunu. After a while his brother Sandile arrived. He requested Sandile to accompany him to Setlhare and they went to the motor vehicle. It was Sandile, Alex and himself.

Mr Timothy Ndlovu appeared and spoke to Mr Sandile Ndlovu through the motor vehicle's window. Mr Ndlovu tried to remove a key from the ignition by putting his hand through the window. A struggle for the key ensued between his brother and Mr Ndlovu. They all went out of the motor vehicle.

He attempted to separate his brother and Mr Ndlovu. Mr Ndlovu hit him with a clenched fist. He retaliated and a fight broke out. Mr Alex Mnchunu tried to separate them and Mr Ndlovu also assaulted him. Mr Mnchunu and him started to fight with Mr Ndlovu. Mr John Mbowani came to the scene and tried to separate them. While they were busy fighting they crossed the

tarred road and went to the other side of the said road. His brother Sandile came and called him and Mr Alex Mnchunu and said that they should leave.

They went into the motor vehicle and the motor vehicle reversed, turned left and went to the western direction. They heard sound on the left rear window. They travelled for a short distance and they heard window pane falling down.

His brother decided to make a U-turn in order to go to the police station. There were people on either side of the road. Mr Ndlovu then jumped into the road with his hands open, as if he wanted to stop the motor vehicle. Mr Sandile Matyeka swerved away in order to avoid knocking him down and he again jumped to the direction of the motor vehicle and the motor vehicle knocked him down. He was hit by the left front light.

They did not stop and went straight to the police station.

Mr Ndlovu jumped from left hand side of the road. He jumped in front of the motor vehicle. The point of impact is in the road, about 3 metres from the left edge of the tarred road.

There were many people in the vicinity.

Under cross-examination he testified that Mr Ndlovu jumped twice prior to the motor vehicle colliding with him. He further testified that the point of impact is in the middle of the road.

He does not know if the street lights were on or not, because most of the time the street lights in Thulamahashe are not working.

Under re-examination he testified that the point of impact is on the tarred road, about 1½ metres from the left edge of the road.

Defendant closed its case.

3. Findings

Certain facts are common cause between the parties.

Those facts are the following:

- On the night in question, Mr Ndlovu and Mr Sandile Matyeka had an altercation and a fight broke out.
- The incident took place near Pamela Bookshop and it was late in the night at about midnight.
- Mr Ndlovu was knocked down by a motor vehicle driven by Mr Matyeka.

As far as visibility in the vicinity is concerned Messrs T and W Ndlovu testified that the street lights were on and visibility was good. On the other hand, Mr Sandile Matyeka first testified that the street lights at Tulamahashe are normally out of order, but when he was pressed for a direct answer, he conceded that the area was well light.

Mr Joseph Matyeka when asked whether the street lights were on or not he said “I do not know if the street lights were

on or not, because most of the time street lights in Tulamahashe are not working”.

My view is that, if one takes into account the abovementioned evidence the probabilities are that the version of Mr Timothy Ndlovu and his witness, on this point, is the correct one. There is no reason not to accept their version on this point.

Mr Timothy Ndlovu testified about how he was knocked down by the motor vehicle on the gravel portion of the road, just in front of the incomplete building which is along the said road. On this point his version was corroborated by Mr William Ndlovu, and to some extent by Mr Bheki Hlatswayo.

On the other hand, Mr Sandile Matyeka testified that the collision occurred on the tarred road. In fact he said “point of impact was more to the left hand side – more to the middle lane”. When asked to depict the point of impact on a photograph, he made a mark depicting point of impact, on the left side of the tarred road, almost next to the verge of the tarred road. Mr Sandile Matyeka further testified and

said that he collided with Mr Ndlovu in the middle of the road. He further said that middle of the road is where motor vehicles are driving. Mr Joseph Matyeka testified that the point of impact was in the road about 3 metres from the left edge of the road.

From the evidence, it appears to me that Mr Sandile Matyeka does not tell the court with certainty, where, on the road his motor vehicle knocked down Mr Ndlovu. His brother's evidence on this point is not helpful, as Mr Sandile Matyeka, during his testimony, mentioned that collision occurred in the middle of the road.

The most probable version is that of Mr Ndlovu and his witnesses.

Mr Sandile Matyeka testified that Mr Ndlovu jumped into the road and attempted to stop the motor vehicle with his hands. His brother testified that Mr Ndlovu jumped into the road in front of the motor vehicle, motor vehicle swerved, he jumped again towards direction of motor vehicle, and the motor vehicle knocked him down. Mr Sandile Matyeka did not

mention that Mr Ndlovu jumped twice in front of his motor vehicle.

Mr Ndlovu together with his witness testified that the point of collision is on the gravel portion in front of the incomplete building. This version, in my view, is the most probable version. I cannot find any reason for Mr Ndlovu to have behaved in the manner described by Mr Sandile Matyeka and his witness, particularly in the light of the fact that he was sober.

On the other hand, Mr Sandile Matyeka could have been angry with Mr Ndlovu after their altercation and fight, and consequently, he wanted to knock down Mr Ndlovu with his motor vehicle.

The other disturbing factor with the version of Mr Sandile Matyeka is that his evidence is contradictory and contradicts his witnesses evidence on material issue. He testified that when Mr Ndlovu approached him, he did not want to talk to Mr Ndlovu as the latter was drunk. He later under cross-examination conceded that Mr Ndlovu was not drunk.

Mr Sandile Matyeka testified that Mr Joseph Matyeka and his friend asked him a lift home and Mr John Mbowani testified that Mr Joseph Matyeka and his friend asked Sandile to accompany them to Dingleydale and Mr Joseph Matyeka testified that he asked Sandile to accompany him to Setlhare. There is also a difficulty about how Mr Ndlovu allegedly jumped in front of the motor vehicle prior to being knocked down.

My view is that the plaintiff has proved his case and he is entitled to all his proven damages.

Apparently, an offer, dealing with quantum was made by the defendant about five days prior to the trial and same was accepted on day of the trial.

The plaintiff's counsel, correctly so submitted that if the plaintiff is successful, he is entitled to costs which costs will include qualifying fees of his two experts, namely Drs Lekalakala and Mayayise.

The court therefore makes the following order:

1. Defendant should pay the plaintiff the plaintiff's proven damages.
2. Defendant should pay the plaintiff's costs, which costs will include the qualifying fees of Drs Lekalakala and Mayayise.

W L SERITI
JUDGE OF THE HIGH COURT

33162/2006/sg

<u>Heard on:</u>	4 March 2009
<u>For the Plaintiff:</u>	Adv M G Mashaba
<u>Instructed by:</u>	Ntshembo Manganyi Attorneys, Pretoria
<u>For the Defendant:</u>	Adv M Van Antwerpen
<u>Instructed by:</u>	Gildenhuys Lessing Malatji, Pretoria
<u>Date of Judgment:</u>	13 March 2009