IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT. PRETORIA

DATE: 15 September 2009
CASE NO: 14672/2007

In the matter between:

MOHLOPHEHI VICTOR MOSIA	**PLAINTIFF**
AND	
YOUSHA TAYOB ATTORNEYS	**DEFENDANT**

JUDGMENT

PHATUDI (J)

[1] The Plaintiff, Mohlophehi Victor Mosia, instituted an action against the Defendant claiming damages allegedly incurred as a result of Defendant's failure to prosecute his claim with the Road Accident Fund.

[2] At the commencement of the trial, I ordered separation for consideration of the three legged matter i.e.

(i) merits on liability of the Road Accident Fund

(ii) merits on negligence on the part of the Defendant

(iii) quantum.

[3] It has been placed on the record that the consideration of the two issues (negligence and quantum)be postponed *sine die* in the event the court find that the Plaintiff had had a legitimate claim against the Road Accident Fund. In the event the court finds that there is no claim against the Road Accident Fund, “the end of the matter” is spelt and exonerates the Defendant. The trial bundles marked A; B; C; D and E were handed in.

[4] The Plaintiff testified that he was hit by a motor vehicle on the 19 December 1999 at about 16h 15. The accident occurred on the Kliprivier-Eikenhof Road, Kliprivier, Mondeor, Gauteng Province.

[5] He said that near the scene, there is a shop opposite the railway station. The two are separated by the dual tarred road of about ±10 meters.

[6] He said he was hit by an unidentified motor vehicle from the front at the time when he was running away from the robbers who intended to rob him of his hard earned money. The said robbers produced knives. He ran for his life along the road. He kept on looking backward to check the robbers’ whereabouts and their distance from him.

[7] Members of the community looked on but were not helpful. He ran a distance of about 50 meters *(1/2* of a soccer field) [His actual wordsl.

[8] He was admitted at Baragwana hospital (now called Chris Hani Hospital) as a result thereof. He stayed at the Hospital for about a month. He confirmed that the signatures that appear on the documents on pages 7, 14 and 22 of bundle C are respectively his.

[9] The said documents are:

"(i) page 7 is an "affidavit by Claimant" dated 20 December 1999.

(ii) page 14 is an undated statement allegedly made by the Plaintiff at the Mondeor Police Station.

(iii) page 22 is a special Power of Attorney dated 15 December 1999.

[10] When questioned under cross examination on the date of the accident, the date of admission at the Hospital, and the date he was discharged at the said hospital, he stated that he was admitted at the Hospital on 19 December -1999 and remained as inpatient for a period of a month. He said he spent the entire festive season (Christmas and New Year) at the said Hospital. He however said that he recalled that he was once admitted at the same hospital sometime back. He recall that plaster of perish was put on his leg and discharged the following day. He however did not recall the actual dates of that incident.

[11] He emphatically denied knowledge and content of the "MMF1" form lodged on his behalf with the Road Accident Fund. He said that he knows nothing about the said forms. Counsel for the Defendant questioned him further on the dates that are written on the said "MMF!" form that indicate that he was admitted at the Hospital on the 19 and discharged on 20 December 1999 respectively. He then said all he knows is that he was taken to the offices of an attorney, being the Defendant herein, by a certain woman. He said that this woman took from the Hospital and accompanied him to the said attorneys. He then trusted the attorney will do what he legally had to do.

[12] He denied being hit by the motor vehicle'while crossing the road. He said he was running alongside the edge of the road at the time when the motor vehicle, hit him. He was facing the oncoming traffic. He collided with the motor vehicle. He said that he recall having ran a distance of 50 meters on the said tarred road facing the oncoming traffic. He recall to, at some stage, have seen the motor vehicle coming from a distant away facing him. He, however, does not recall how he collided with the motor vehicle

[13] He conceded that there is a sidewalk on both sides of the tar road. He denied having run into the motor vehicle. A tear dropped when put to him that he ran into the motor vehicle that collided with him.

[14] He challenged counsel for the Defendant to tell him as to who was he (counsel) with when he was attacked. He said it appears that Counsel for the Defendant was one of the assailants who intended to rob him. The interpreter had to cool him down and explain to him what is meant by “I put it to you”.

[15] He emphatically denied the content of the statements of page 7, 14 and 22 of bundle”C” respectively, as his statements. He said he was given a document with instructions to hand same over to the Mondeor Police Station by his attorney. The Police officer completed some forms who thereafter ordered him to sign where he was directed to. He impressed on me that the contents of the statement was not read back to him.

[16] He emphatically denied that the content of the said statements were the actual occurrences on the day in question.

[17] When further questioned about the contents of the statement in the form of an affidavit that appear on page 7 of bundle C,. he conceded to have signed the document bur robustly denied the contents thereto and further challenged defence counsel as to whose hand writing was it that appear on the said document.

[18] He said that he trusted the attorney so much that all that has been written by the. attorney was what he told them and not what it appears on the statements. He further said “if I knew that the contents were set out as they are, I would not have signed the document.” The Plaintiff closed his case.

[19] Mzwake Benjamin Makhuzeni, a Police officer who was at the time employed as such and deployed at Mondeor Police station testified for the defence that he completed the document that appear on page 15 of Bundle “C”. He testified that the Plaintiff is the person who reported the matter. He, however, said that what is written in the “description of the statement” was the summary of the statement the Plaintiff had. I then questioned him what he meant by the statement the plaintiff had. He reiterated that the complainant (Plaintiff) had a statement and he summarised the said statement as it appear on the description.

[20] I further enquired from him of the language they used in communicating between themselves. He said that they communicated in Southern Sotho, as both were Southern Sotho speaking. Further thereto I enquired from him if the Plaintiff had ever said any word in Southern Sotho that would have given an impression that the accident occurred “at night or that it was dark” on the day in question. He said that the complainant never said a word to that effect

[21] When asked under cross examination on how possible for him to recall the incident that occurred approximately 10 years back, he stated that he had been briefed by the defendant two (2) days before this date of trial of the facts of this case. He further said that he testifies on the basis of the brief he received from the Defendant. No other witness testified for and on behalf of the Defendant.

[22] Counsel for the Plaintiff submitted in his address that the unidentified insured motor vehicle was negligently driven by the unidentified insured driver on the basis that the driver:

> “(i) failed to keep a proper lookout and:-
>
> (ii) Presumed to be negligent by his conduct or failure to stop after the collision.”

[23] He further submitted that there is no evidence of brakes on the road as an indication that the driver applied his brakes in his endeavour to avoid the collision with the Plaintiff.

[24] Counsel for the defendant submitted that there is no onus on the part of the Defendant to proof that the collision occurred or not. He submitted further that there is no evidence of how fast the motor vehicle was at the time of the collision or when the Plaintiff started running on the tarred road.

[25] He referred me to the case of Gardian National Insurance Co v Saal (Full bench of the Cape Provisional Division;) where the Court held that in order to recover damages again at the Appellant,

> *"the onus had been on the Plaintiff to proof on the balance of probabilities that the unidentified motor vehicle had been driven negligently and that his negligent driving had caused or contributed to the collision1*

[26] The issue to be determent is whether the collision was due to the negligence of the unidentified insured motor vehicle as alleged by the Plaintiff or by that of the plaintiff as submitted by the Defendant.

[27] Negligence is defined by Cooper in his book **Delictual Liability in Motor law volume 2, 1996 by WE Cooper** as:

> "Negligence ***(Culpa)*** is the failure to exercise the degree of care and skill the reasonable man (bonus or diligence paterfamilias) would have exercised in the circumstances."

[28] The next question to consider on negligence rest on the driver's duty "to keep a proper look out." This means more than looking straight ahead. It includes an awareness of what is happening in one's immediate vicinity. The driver should have a whole view from side to side and, in the case of a road passing through a built up area, of the pavement and on the side of the road as well.

[29] The difficulty in this matter is that there is no other witness who testified other than the Plaintiff himself. His version is that he ran out of the railway station, turned right and started running on the tarred road facing the oncoming traffic. He then ran a distance of ±50 meters before the collision. He, at that time of running, kept on looking backward checking on the robbers to be.

[30] Considering the distance the distance he ran before the collision, I infer that the driver of the unidentified motor vehicle saw or is reasonably expected to have seen the Plaintiff running on the road. He, in my view, failed to exercise the degree of care and skill a reasonable driver or motorist is expected to have exercised in the circumstances.

[31] The definition of "keeping a proper look out" as set out by Cooper, "includes an awareness of what is happening in one's immediate vicinity". The evidence before me is that the accident occurred in the vicinity of a railway station and a shop. It is reasonable expected of a motorist to have a

full view of the whole road exercising an effective “proper look out” when passing a built up area like the one within the railway station and shopping complex.

[32] The reasonable motorist is required to excises the degree of alertness and concentration especially when approaching or driving through an area congested by a number of pedestrians.

[33] I, in the circumstance, infer and not presume that the driver of the unidentified motor vehicle was negligent by not keeping a proper look out. I, as a result thereof, find the unidentified driver of unidentified motor vehicle to have negligently contributed to the collision causing damage as claimed by the Plaintiff. The Plaintiff himself, on the other hand, negligently contributed to his own demise by running on the edge of the tarred road.

[34] I as a result thereof find the Plaintiff to have negligently contributed far above that of the Defendant.

[35] I find that the unidentified driver of the unidentified motor vehicle is 30 % at fault. I therefore make the following order:

[35.1] The Plaintiff has a claim against the Road Accident Fund;

[35.2] The Plaintiff is 70% negligent;

[35.3] Determination of liability against the Defendant and the *quantum* thereof is postponed *sine die.*

[35.4] The Defendant is ordered to pay the Plaintiff’s costs of this trial on party and party scale. .

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JUDGE OF THE NORTH GAUTENG HIGH COURT

<u>Heard on</u>: 2 September 2009

For the Appellant: Adv Rontgen

Instructed by: Messrs Rontgen & Rontgen Attorneys

For the Respondent: Adv F Bezuidenhout

Instructed by: Messrs Mothle Jooma Sabida Attorneys INC

Date of Judgment: 15 September 2009