

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No: 2341/2021

In the matter between:

MZWAMADODA NAMBA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MBENENGE JP

[1] This is an action wherein the plaintiff seeks to recover damages from the defendant, consequent upon a motor vehicle collision in which the plaintiff was allegedly hit by an unidentified motor vehicle (the unidentified vehicle) whilst a pedestrian, on 09 August 2019, between 19:30 and 20:00.

[2] It was alleged, in the plaintiff's particulars of claim (prior to the amendment thereof), that the accident took place near Njoli road, Kwazakhele, Gqeberha and that, as a result of the injuries the plaintiff sustained in the collision¹, he was transported by ambulance from the scene of the accident to the Dora Nginza Hospital, Gqeberha for treatment and, at a later stage, the Livingston Hospital.

[3] The action is founded on the alleged negligence of the driver of the unidentified vehicle (the unidentified driver), who is said to have been negligent in failing to keep a proper lookout; driving the unidentified vehicle at an excessive

¹ The plaintiff claims to have sustained severe bodily injuries, more particularly, a supracondylar fracture of the right knee and fracture of the right femur.

speed in the circumstances; failing to apply brakes of the unidentified vehicle timeously or at all; failing to avoid a collision when, by the exercise of reasonable care and skill, he/she could and should have done so; failing to have any or proper regard to the road surface; approaching the path of travel of the plaintiff who was a pedestrian at a time when it was both dangerous and inopportune to do so, without certifying himself/herself that he/she could do so with safety, and without having adequate regard to the safety of other users of the road, in particular, the plaintiff; failing to sound a warning of his/ her oncoming approach; and failing to stop after colliding with the plaintiff.

[4] The defendant pleaded lack of knowledge of the collision and that, in the event of it being found that the collision did occur, then in that instance, there was contributory negligence on the part of the plaintiff on the grounds that he failed to keep a proper lookout before crossing the road; crossed the road at a time when it was unsafe to do so; and failed to avoid a collision when, by exercise of reasonable care, he could and should have done so. In effect, the defendant put the plaintiff to the proof of his claim.

[5] The parties reached agreement² that the issue of merits and that of quantum would be separated, with the merits being dealt with first and quantum standing over for determination at a later stage.

[6] The commencement of the trial was beset by an unfortunate skirmish. The plaintiff was of the view that at merits stage, negligence and causation could further be separated, with causation standing over for determination as part of the quantum trial. As one would have expected, no agreement on this was reached.

[7] The skirmish was resolved with counsel for the plaintiff eventually conceding, correctly so in my view, and on the authority of *Phumzile Mnisi v Road Collision*

² The Case Flow Management Checklist for Trial Readiness is signed only by the plaintiff's attorney and bereft of the requisite endorsement of trial readiness by a judge.

Fund, and Seven Similar Matters,³ that the enquiry into negligence and causation ought to be conducted as part of the trial on the merits.

[8] The following remarks by Roelofse AJ in *Mnisi*⁴ are informative:

[31] Fischer J⁵ proposes a four-stage enquiry at para 12 of her judgment:

“First: did the negligence of the third party driver cause the collision? If both plaintiff and the third-party driver were negligent blame may be apportioned on the basis of a percentage allocation in terms of the Apportionment of Damages Act (I shall call this first phase the merits enquiry).

Second: Did the plaintiff sustain the pleaded injuries in the collision? (this is the first causation enquiry).

Third: How have these proven injuries affected the plaintiff? (this is the second causation enquiry).

Fourth: How should the plaintiff be remunerated for the effects of such injuries on the plaintiff? (this is the quantum determination first phase).”

[32] I respectfully agree. However, when a concession on the “merits” is made by the RAF, plaintiffs (or their advisors) often neglect the first and second causation enquiries by proceeding directly to the quantum determination phase. They neglect to prove that the injuries were indeed sustained in the collision and merely rely on expert reports to show the effect of the injuries upon the plaintiff. Often, the expert reports are founded upon what the plaintiff tells the expert. The expert then proceeds on the basis of the plaintiff’s subjective information. . . All of these subjective advices from plaintiffs is most often difficult or impossible to verify objectively. In such instances, the court is at a disadvantaged if the plaintiff is not seen and heard by the court.

[33] In the first and second causation enquiry, the plaintiff must prove that the injuries she/he sustained were as a result of the collision (which by now has already been determined to have been as a result of the negligent driving of the insured driver – the merits and quantum enquiry) and the effect of the injuries upon the plaintiff. The causal link between the negligent driving of the insured driver and the effect of the insured driver’s wrongful act must be proven in accordance with the normal rules of evidence unless the RAF makes concessions or admissions in this respect. Concessions and admissions may be made at the pre-trial or case management stage or even

³ (1823/2019, 2583/2019, 315/20, 208/20, 4082/9, 4432/19, 2382/19; 4067/19) [2022] ZAMPMBHC 23 (01 April 2022).

⁴ *Supra*.

⁵ In *MS v Road Collision Fund* [2019] 3 AllSA 626 (GJ).

at the trial (that is if the RAF appears!). Therefore, in the absence of concessions or admission by the RAF, the injuries that were sustained by the plaintiff and the effect thereof upon the plaintiff must be formally and properly proven on a balance of probabilities.'

[9] Against this background, I made a formal order directing a separation of the merits and quantum, on the understanding that the issue of causation would be enquired into at merits stage.

[10] The plaintiff was called to testify. On the evening of 09 August 2019, he was walking across Daku Street, near Njoli road, in the direction of Dr Nqini's Surgery. At that point, the road has two lanes of travel in each direction. Before stepping off the pavement so as to cross the road, he observed motor vehicles approaching from the right side, and waited for them to drive past so that he could cross the road to safety. Once the motor vehicles had driven past, the plaintiff saw the unidentified vehicle coming a distance away from his right, and observed that it was safe for him to cross the road. He had taken two steps into the road before being hit by the unidentified vehicle on his right side. As a result of that, he fell down on the road and was unable to rise because of an injury to his right knee. He said the unidentified vehicle did not hoot to warn him prior to the collision. He observed the unidentified vehicle's rear lights. As the unidentified motor vehicle left the scene at a high speed and did not stop after the collision, it appeared to be a silver Citi Golf. His brother, Madoda Namba, came to his assistance and carried him from the scene of the collision homeward.

[11] As the plaintiff walked into the courtroom to occupy the witness stand, the court observed that he walked with a limp and used one crutch to mobilise. According to the plaintiff, the injury he sustained has resulted in him being unable to work, unable to walk without assistance, and unable to run. He requires the aid of the crutch in order to maintain balance. Since the accident, he has experienced pain in his right leg and relies on daily pain medication for relief. He has difficulty performing household chores and is unable to lift heavy objects. He presents with a surgical scar on his injured leg due to an operation he underwent.

[12] The plaintiff was cross-examined. He testified that his brother got to know of what had befallen him from the people who saw him on that fateful evening. He does not drink alcohol. He was not picked up from the scene of the collision by an ambulance. He could not account for the allegation made in his particulars of claim that he was transported by ambulance from the scene to the hospital. Upon his arrival home, he slept. On the next day, 10 August 2019, his brother took him to the Dora Nginza Hospital, where he was admitted. He recalls attending Dora Nginza on a subsequent date due to his knee injury. The affidavit deposed to in terms of section 19(f) of the Road Accident Fund Act 56 of 1996⁶ was handed up as an exhibit. In the affidavit, the plaintiff mentions, *inter alia*, that the Officer's Accident Report⁷ refers to '25 August 2019' as having been the date of the collision, instead of '09 August 2019'. He was in the company of his brother when the accident was reported to the police.

[13] In his testimony, Madoda Namba, the plaintiff's brother, confirmed the date of the collision as having been 09 August and that the collision occurred in the vicinity of Dr Nqini's Surgery in Njoli road. He was told by people in the area that his brother had been involved in a collision. He attended to the scene and found the plaintiff seated near a small bus stop on the pavement. The plaintiff informed him that he had been hit by a silver Citi Golf motor vehicle. He carried the plaintiff homeward on his shoulder, as he could not walk. On the following morning, he and the plaintiff attended Dora Nginza Hospital. The plaintiff was examined on Sunday, 11 August 2019. The doctor who examined him bandaged his leg and gave him some pain killers. They were told to return to the hospital on Wednesday. Upon their return, the plaintiff was transferred to the orthopaedic section of the Livingstone Hospital for surgery to his right leg. The brother visited the plaintiff at Livingstone Hospital. He observed surgical incisions on his right knee. Since his discharge from hospital, the plaintiff has required the aid of a crutch in order to walk.

⁶ The section reads:

'The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—
if the third party refuses or fails—

(i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter
and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are
fully set out; or

(ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the
claim concerned, within a reasonable period after having come into possession thereof;'

⁷ The OAR.

[14] Under cross-examination, Mr Namba said he accompanied the plaintiff when the accident was reported to the police. He, too, could not account for the allegation made in the particulars of claim that the plaintiff had been transported by ambulance to the hospital, maintaining that he carried the plaintiff on his shoulder from the scene of the accident homeward.

[15] Doctor P R de Bruin, an orthopaedic surgeon, prepared a medico-legal report on the plaintiff, which was served on the defendant under cover of a notice in terms of rule 36(9)(b) on 29 September 2023. Despite such notification, the defendant objected to the doctor being called to testify on two bases namely, first, that the doctor's testimony would be predicated on hospital records that had not been presented by the plaintiff and, second, that the report of the doctor is based on an assessment that occurred in September 2023 after the plaintiff had already testified.

[16] The objection was overruled, and the doctor allowed to testify. To begin with, the service of the rule 36(9)(b) notice was not objected to as constituting an irregular step. Moreover, and in any event, the doctor did not need the impugned hospital records to arrive at his opinion. He testified that, by examining the radiology images he had requested with the history that the plaintiff gave, and the clinical examination conducted, it was evident that the plaintiff had sustained a supracondylar fracture of the femur, which is not common, as it occurs in instances where there is both an axial load and rotational force. Such injury, he said, is generally resulting from a high-energy mechanism, such as a motor vehicle collision. He opined that the plaintiff's injury accords with being struck by a motor vehicle from the right side. The plaintiff's leg is shortened; hence he has a permanent limping gait. During his examination of the plaintiff, the plaintiff experienced pain localised to his right knee area. He suffered a major orthopaedic injury and has long-term functional restrictions.

[17] Prior to the hearing of argument, the plaintiff sought an amendment of the particulars of claim so as to –

- (a) refer to '*Daku street*' and '*Njoli road*' as being the place at which the collision took place;

- (b) delete the reference to the insured driver '[driving] *onto the cement pavement colliding with plaintiff*'; and
- (c) mention that the plaintiff was assisted from the scene of the collision by his brother and taken by his brother the following day for treatment to the Dora Nginza Hospital, Gqeberha.

[18] These amendments effectively brought the version testified to by the plaintiff within the purview of the plaintiff's particulars of claim, in all material respects.

[19] At no stage was the court made to understand that the amendments were *mala fides* or that allowing the same would result in prejudice on the part of the defendant.⁸ Little wonder, therefore, that the defendant did not object to the amendments, all of which were allowed as germane to the principal question for determination, namely, whether or not any accident had occurred as a result of the negligent driving of the insured driver causing the plaintiff injuries.

[20] The enquiry at the conclusion of a civil trial remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant.⁹

[21] The plaintiff is not relieved of the onus resting on it merely by reason thereof that the defendant has proffered no version. Where, as here, there's only one version, it does not mean that the plaintiff's version must inevitably be accepted. Indeed, there's no obligation on a court to accept an improbable explanation of events merely because no other positive explanation is presented or because the alternative seems to the court to be even less probable.¹⁰

⁸ Compare *Moolman v Estate Moolman* 1927 CPD 27, at 29; also see *Embling v Two Oceans Aquarium (CC)* 2000 (3) (SA) 691 (C) at 694G-H.

⁹ *Stacey v Kent* 1995(3) SA 344 (ECD) at 352H – I.

¹⁰ *Van Meyereren v Cloete* 2021 (1) SA 59 (SCA), where it was held, at para 13, that:

'The fact that the judge did not feel able to reject their evidence did not mean that he was obliged to accept it. The issue was whether on a balance of probabilities theirs was the only explanation for the dogs escaping. Unless that conclusion be reached Mr Van Meyereren did not discharge the onus of proof and the defence should have failed.'

[22] In assessing the probabilities of the plaintiff's version, in this matter, it should be borne in mind that the primary issue which arises for determination relates to whether the plaintiff's injuries arose from a motor vehicle collision, and not some other cause.

[23] On a proper assessment of the relevant facts, it is probable that the plaintiff was walking from KFC in the direction of Dr Ntini's surgery and was struck by a motor vehicle in the circumstances testified to by him. That the injuries he sustained are consistent with being struck by a motor vehicle finds support from the evidence of Dr de Bruin.

[24] The discrepancy in the plaintiff's testimony regarding how he was assisted from the scene of the collision and the inconsistency embodied in the OAR insofar as it points to '*25 August 2019*' as being the date on which the collision occurred are, in my view, inconsequential. They were cured by the amendments made to the particulars of claim which the defendant did not object to.

[25] By way of summation, the plaintiff checked for motor vehicles coming from his right side. He waited for the motor vehicles to pass so that it would be safe for him to cross the road. He observed the unidentified vehicle approaching from his right side while it was a distance away from him. From the evidence, it can be safely inferred that the insured driver was speeding, did not hoot to warn the plaintiff of his presence, did not keep a proper lookout for other road users, including the plaintiff, and failed to adjust his driving accordingly so as to avoid the collision when, with reasonable skill and care, he/she could have done so.

[26] The court was, at the outset, advised that the defendant had no version to put forward because, absent the relevant ambulance records, the defendant could not confirm that the collision did take place. Upon being advised that the defendant did not have the records sought, Ms *Naidoo* contented herself with cross-examining the plaintiff's witnesses with the view to merely testing their credibility. It was, for instance, never put to the plaintiff that the collision did not happen on 09 August 2019 or at all in the vicinity of where the plaintiff described it to have occurred, or that the plaintiff was not hit on his right-hand side. Nor was the plaintiff's brother

challenged regarding his testimony that he came to fetch the plaintiff and assisted him homeward because he could not walk.

[27] It is timely to refer to *President of the Republic of South Africa and two others v SARFU*¹¹ insofar as it deals with cross-examination and the duties and obligations of a cross-examiner. The court remarked:

‘That the institution of cross-examination not only constitutes a right it also poses certain obligations. As a general rule it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point to direct the witnesses attention to the fact by questions put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, whilst still in the witness box of giving an explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross examination the party calling the witness is entitled to assume that the unchallenged witnesses testimony is accepted as correct.’

[28] It must, therefore, be concluded that the negligence of the driver of the unidentified vehicle caused the collision in which the plaintiff was injured.

[29] None of the defendant’s pleaded averments of negligence were put to the plaintiff during cross-examination. No testimony warranting any apportionment of the claim was tendered. The defendant has neither proved contributory negligence on the part of the plaintiff nor shown a causal connection between the collision and the conduct of the plaintiff.

[30] In the result, the answer to the question at hand must be adjudicated in favour of the plaintiff, with the result that the defendant ought to be held liable for the plaintiff’s proven or agreed damages.

[31] There is no reason why costs should not follow the result. The matter did not proceed on 04 October 2023 due to my non-availability. The parties are in agreement that the costs of that day should be in the cause. I cannot fault the agreement. I need to add a dimension to the issue of costs. It had been hoped that judgment would be delivered by 12 April 2024, but that did not come to pass until

¹¹ 2000 (1) SA 1 (CC) at para 61

rule 67A of the Uniform Rules came into operation.¹² For the sake of caution, on 22 April, I invited counsel to chambers as I was of the view that the rule applies prospectively.¹³ Counsel shared this view.

[32] I, therefore, grant the following order:

1. The defendant is held liable to pay the plaintiff 100% for such damages as the plaintiff is able to establish, suffered in and as a result of the collision that occurred at or near Njoli Road and Daku Street, KwaZakhele, Gqeberha on 09 August 2019.
2. The defendant shall pay the plaintiff's costs incurred to date, such costs to include –
 - 2.1.1 the costs involved in attending an inspection *in loco* with the plaintiff's attorney and one counsel;
 - 2.1.2 the costs of the report of Dr de Bruin filed in accordance with rule 36(9) (a) and (b) of the Uniform Rules of Court;
 - 2.1.3 the qualifying and attendance costs of Dr de Bruin for 15 January 2024;
 - 2.1.4 the travelling costs incurred on behalf of the plaintiff in respect of the attendance at trial of Dr de Bruin;
 - 2.1.5 the trial costs of 17 and 18 August, 04 October 2023 and 15 January 2024; and
 - 2.1.6 the costs of the interpreter, where so incurred.
3. The defendant shall pay interests on the plaintiff's taxed or agreed costs at the prevailing prescribed interest rate *per annum*, calculated from a date 14 days after *allocatur* to date of payment.

S M MBENENGE
JUDGE PRESIDENT OF THE HIGH COURT

¹² The primary purpose of Rule 67A is to allow the court to exercise control over the maximum rate at which counsel's fees can be recovered under a party and party costs order.

¹³ *Mashavha v Enaex and Others (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024).

Appearances:

Counsel for the plaintiff:

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Instructed by:

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Counsel for the defendant:

R Naidoo

Instructed by:

The State Attorney
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Dates heard:

17 & 18 August 2023
15 January 2024

Date delivered:

30 April 2024