



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No.: 26994/2020

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

05/06/2024

.....
Date

[REDACTED]

.....
ML TWALA

In the matter between:

PHUMLANI ERNEST SHABALALA

PLAINTIFF

and

**RONALD BOBROFF AND PARTNERS
INC ATTORNEYS**

DEFENDANT

JUDGMENT

TWALA J

Introduction

- [1] The plaintiff sues the defendant herein for damages arising out of the negligence of the defendant in the handling of the claim of the plaintiff for damages against the Road Accident Fund which arose as a result of a motor vehicle accident that occurred on the 8 January 2013 on the N2 between Umhlanga and Ballito in KwaZulu Natal.
- [2] The defendant is an incorporated firm of Attorneys which has been practicing as such in Johannesburg and has now been placed under the control of Johan van Staden as a curator bonis appointed in terms of the order granted by the High Court in Pretoria on the 24 March 2016.

Evidence

- [3] The genesis of this case arose in that on the 8 January 2013 at about 05H00 the plaintiff was the driver of a heavy motor vehicle bearing the registration letters and number BN 15 VB GP. The plaintiff was travelling between Umhlanga and Ballito in KwaZulu-Natal when he lost control of the vehicle and overturned.
- [4] It is undisputed that the plaintiff was driving along the N2 freeway in the area of Umhlanga and Ballito and was travelling on the left slow lane as the road which is a dual carriage way with two lanes travelling on each direction. He was travelling at a speed of about 90km/h when he noticed the rear lights of a vehicle that was stationary in his path – thus he indicated his intention to move and eventually moved his vehicle to the right-hand lane. As he was travelling almost parallel with this vehicle, it started to drive off from the stationary position.
- [5] He says he suddenly saw a vehicle approaching him from behind which started to flick its lights towards him in a manner that was indicating that he should move out

of the right-hand lane. He then engaged his indicator to signal his intention to move to the left-hand lane and started to swerve his steering to the left – thus he lost control of the vehicle. This, he says, was because the material that he had on the two trailers of the truck started to control the truck and thereafter he does not recall what happened as he was rendered unconscious and only regained consciousness in hospital.

- [6] He did not collide with any of the two motor vehicles and was not in a position to identify these vehicles and its drivers. He was hospitalised in KwaZulu-Natal for some time before he was transferred to the Brenthurst Clinic in Johannesburg under the care of Dr Sam Kasumba. As a result of the accident, he sustained injuries to his spine which have rendered him paraplegic and is now wheelchair bound.

- [7] Since he wanted to be compensated for the damages he sustained as a result of the accident, he consulted and instructed the defendant to investigate, lodge and prosecute his claim against the Road Accident Fund. The defendant accepted the mandate but failed to execute same diligently and professionally as expected from an attorney. As a result of the failure of the defendant to execute its mandate diligently, his claim against the Road Accident Fund has become prescribed. This is so because the claim against the Road Accident Fund in terms of its regulations was supposed to be lodged within a period of two years from the date of the accident, but the defendant only lodged the claim two months after the two-year period had expired.

- [8] The next witness was Ms Bove the director of the firm of Attorneys currently representing the plaintiff. Ms Bove testified mainly about how she got involved in the matter, which was initially handled by her associate, Mr Kobrin. She said she perused the file and found a file note of the defendant which stated that the plaintiff's claim has become prescribed in their hands and the plaintiff must sue them. She was not certain if there was a point in time of prescription raised when the matter was on

trial. She testified further about the responsibilities and the conduct expected of a reasonable attorney.

- [9] This concluded the case for the plaintiff. The defendant closed its case without calling any witnesses.

Discussion

- [10] It is apparent from the evidence led in this case that there are two issues which are for determination before this Court. The first issue is whether there was negligence in the driving of the two vehicles that the plaintiff was confronted with when he lost control of his vehicle and overturned. The second issue for determination is, if the plaintiff had a valid claim against the Road Accident Fund, was the defendant negligent in the handling of the claim of the plaintiff. Simply put, did the defendant handle the claim as a reasonable attorney in his stead would have handled it?

- [11] The first issue to be determined is whether there was negligence on the part of the two vehicles that were around the plaintiff's vehicle at the time when he lost control of his vehicle and overturned.

- [12] It is trite that for the plaintiff to succeed and obtain judgment in its favour, it must convince the Court that its case must be believed instead of that of the defendant. In other words, the onus is on the plaintiff to prove that the vehicle that came from behind and flickered lights at him was or partly the cause of the accident.

- [13] In *GC v JC and Others*¹ the Supreme Court of Appeal stated the following:

“[40] The onus to prove these requirements rests on the plaintiff. Where a defendant is proved to have initiated a prosecution without reasonable grounds, it does not follow that he acted dishonestly, nor does it necessarily imply that she did so *animo iniuriandi*. However, in the absence of any other evidence the natural inference is that the plaintiff has

¹ (Case No 205/2019) [2021] ZSCA 012 (3 February 2021).

established both. The defendant thus bears an evidential burden to rebut this inference regarding her state of mind, including any mistake that would exclude her liability.”

- [14] I am not persuaded by plaintiff’s argument that the vehicle that was in front of him had a duty to display warning signs that it was stationary. The plaintiff has testified that he saw the vehicle when he was approaching at a distance and had ample time to indicate his intention to move and in fact moved to the right-hand lane without any problems. The warning signs are meant to warn other road users that the vehicle is obstructing the road but, in this case, the plaintiff saw the vehicle from a distance and since there was no emergency that arose, he made up his mind and decided to overtake the vehicle by moving to the right-hand lane.
- [15] The plaintiff testified that he had his vehicle under control and was in a position to bring it to a stop if he needed to, but he chose to move to the right-hand lane for he had ample time to do so. He lost control of the vehicle when he started to move back to the left-hand lane. The plaintiff did not lose control of his vehicle because he was avoiding a collision between himself and the vehicle that was flickering lights from behind him. In fact, according to his testimony, this vehicle did nothing else except to flicker the lights which he says meant he must move out of the right-hand lane.
- [16] I am unable to disagree with the defendant that the plaintiff did not testify that he looked at his rearview mirror before moving into the right-hand lane nor did he say how far in front of him was the first vehicle when he saw it for the first time. He was non-committal in this regard by merely saying it was at a distance. Further, he did not say that the vehicle that approached him from behind came at an excessive speed and that it forced him out of the way. His testimony is that he saw it flickering its lights toward him and since the vehicle that was stationary had started moving, he decided to indicate his intention to move back to the left-hand lane and thus lost control of his vehicle and overturned.

- [17] It is trite that where a party or defendant does not adduce evidence to avoid liability presents the risk that the defendant may be held liable for damages suffered by the plaintiff. In other words, if the defendant does not adduce countervailing evidence, the court may draw an adverse inference to the case of the defendant. However, the plaintiff still bears the onus to prove on a balance of probabilities that he has a case which entitles him to obtain judgment in his favour.
- [18] I accept that the defendant did not tender any evidence on the issue of negligence on the driving of the two motor vehicles. However, on the version of the plaintiff alone, there is no negligence that could be attributed to any of the two vehicles. There was nothing wrong that was done by the first vehicle which was in front of the plaintiff for he saw it in good time with its rear lights shining and avoided colliding with it. The vehicle that came from behind had done nothing wrong as well, except to flicker its lights toward the plaintiff. The ineluctable conclusion is therefore that there was not negligence in the driving of both vehicles and that the plaintiff was the author of his own misfortune.
- [19] Further, it cannot be said that the defendant was negligent in the handling of the plaintiff's claim against the Road Accident Fund in that it let the claim become prescribed in its hands. The plaintiff did not have a legitimate claim for damages against the Road Accident Fund, and therefore a reasonable attorney would not have pursued a claim for damages on behalf of the plaintiff against the Road Accident Fund. The inevitable conclusion in this case is that the plaintiff's claim against the defendant falls to be dismissed.
- [20] I agree with both counsels that this is a tragic case for a man to suffer such injuries and not receive compensation therefor. Litigation is expensive and it is almost normal that the costs of litigation follow the results. However, in the circumstances of this case where an indigent person is involved, who has not been employed since the accident in 2013, I am constrained to order that each party pays its own costs.

[21] In the result, I make the following order:

1. The claim of the plaintiff is dismissed with each party to pay its own costs.



TWALA M L
JUDGE OF THE HIGH COURT,
SOUTH AFRICA
GAUTENG LOCAL DIVISION

Date of Hearing: 27 - 28 May 2024

Date of Judgment: 5 June 2024

Appearances

For the Plaintiff: Advocate B Bhodania

Instructed by: **Bove Attorneys Inc**
Tel: 011 485 0424/7
Email: process@boveattorneys.co.za

For the Defendant: Advocate E Botha

Instructed by: **Ditsela Attorneys**
Tel: 011 072 2600
Email: jones@ditsela.com

This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the order is deemed to be the 5 June 2024