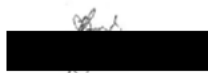




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

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



DATE: 02/07/2024

Case number: 2018/21864

Date: 2 July 2024

In the matter between:

SIBUSISO KHUMALO

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

BRAND AJ

[1] In this matter the plaintiff seeks damages from the defendant for injuries he

suffered in a motorcar accident.

[2] The parties have agreed to separate the issues of liability and damages, in terms of Uniform Rule 35. I am required only to decide the issue of liability. Here the parties further agree that the defendant is liable. However, the defendant's position is that the plaintiff was contributorily negligent during the accident, so that the damages should be apportioned accordingly.

[3] The plaintiff was a passenger in the in the motorcar when the accident happened and not its driver. He was seated in the back, directly behind the driver. The accident happened while the motorcar was driving forward. It was struck from behind by another motorcar and overturned upon impact. In the process the plaintiff was injured.

[4] Ordinarily, a passenger injured in a motorcar accident need prove only 1% negligence on the part of the insured driver for the defendant to be 100% liable for his damages. Here the parties agree that there is at least that 1% negligence. But the plaintiff admits that during the accident he was not wearing his seatbelt. The defendant submits this means he contributed to his damages through his own negligence, so that liability should be apportioned accordingly. The plaintiff disagrees. This then is the issue I must decide in this matter: whether the plaintiff in this matter through not wearing a safety belt was contributorily negligent and if so to what degree, and which apportionment of damages should follow.

[5] On behalf of the plaintiff it was submitted that, although the conduct of the plaintiff in not wearing a safety belt could constitute contributory negligence affecting the apportionment of damages, I could not decide the apportionment of damages as the defendant, on whom rests the onus to do so, had led no evidence on the manner in and extent to which the plaintiff's possible contributory negligence had affected his injuries. Accordingly, the degree of contributory negligence and concomitant apportionment of damages should be left for the court deciding quantum to determine.

[6] In support of this he cites two cases: *Loots v MEC for Transport, Roads and Public Works*¹ and *Gumede v Road Accident Fund*.² *Loots* concerned a claim for damages in the form of injuries resulting from an accident caused by a pothole in a

¹ (587/2014) [2018] ZANCHC 60 (5 September 2018).

² (49209/2017) [2021] ZAGPPHC 568 (24/08/2021).

road that the defendant in that matter had a duty to maintain. The plaintiff was the driver of the vehicle concerned. She admitted to not wearing her seatbelt when the accident happened. The evidence also showed that she was thrown from the car during the accident. Lever AJ held that in not wearing her seatbelt, she was contributorily negligent.³ However, because no evidence had been led before him on how her not wearing a safety belt had contributed to her injuries, he further held that the 'apportionment of damages arising from the failure to wear a safety belt be reserved for the court that dealt with the quantum'.⁴ Accordingly, he ordered that '[t]he plaintiff contributed to the harm she suffered by not wearing a safety belt at the material time' but that '[t]he exact apportionment of damages arising from this failure to wear a safety belt, is reserved for the decision of the court that determines the plaintiff's quantum of damages'.⁵

[7] *Gumede* in turn concerned a passenger on the back of a bakkie injured when the bakkie was involved in an accident. The defendant there raised a special plea of contributory negligence of the plaintiff, because the plaintiff was not wearing a safety belt at the time of the accident. Unsurprisingly, Bhoola AJ rejected the special plea, because the plaintiff was seated on the back of a bakkie and no evidence had been led that there was a safety belt for her to wear. However, she continued, even were there a seatbelt, the defendant would still bear the onus of proving contributory negligence (and had not done so).

[8] On behalf of the defendant in turn it was submitted that the plaintiff's proposed approach confuses the question of liability with quantum. Any contributory negligence of the plaintiff's must be determined at the liability stage of the litigation, by determining whether the plaintiff was at fault and whether that fault contributed to (is causally linked to) the injury. This is a question separate to the quantification of damages. It relied in the decisions in *Bowkers Park Komga Co-operative Ltd v SAR & H*,⁶ *Vorster v AA Mutual Insurance Association Ltd*,⁷ and *General Accident Versekeringsmaskappy SA Bpk v Uijs*⁸ as precedent for this proposition. It then proceeded to submit, with

³ *Loots* (above) at para 72.

⁴ *Loots* (above) at para 73.

⁵ *Loots* (above) at para 74.

⁶ 1980 (1) SA 91 (E).

⁷ 1982 (1) SA 145 (T).

⁸ 1993 (4) SA 228 (A) 235.

reference among others to *Uijs*⁹ and *Ngozo v Road Accident Fund*¹⁰ both that the plaintiff was in not wearing a safety belt at fault (ie negligent) and his negligence was at least in part causally linked to his injuries. On this basis it prayed for an order that the defendant was liable for 80% and the plaintiff for 20% of any proven or agreed to damages.

[9] As I understand it, the plaintiff and defendant are not far apart. Although presented in a somewhat garbled fashion, the plaintiff's position is also that contributory negligence is part of the issue of liability (ie the merits) and not linked to quantum. It boils down to a disagreement on whether enough evidence was placed before me on the basis of which to decide the attribution of negligence in relation to the harm caused; ie, whether or not the defendant had met its onus concerning that. I do not read the conclusion reached in *Loots*, cited by the plaintiff as anything other than on the facts of that case, no evidence was before the court at that time to determine to what extent the plaintiff's admitted negligence contributed to her harm.

[10] This means that before me is a question of evidence: do I have enough before me on which to decide a) whether the plaintiff was at fault, and b) if so, to what degree his negligence had contributed to his harm? I conclude that I do concerning a), but not concerning b).

[11] Only the plaintiff gave evidence at the hearing of this matter. He readily admitted under cross examination that he was not wearing a safety belt at the time of the accident, although there was a safety belt on the seat he occupied to wear. There is a duty on a passenger in motorcar to wear a safety belt to mitigate any harm that may arise should there be an accident.¹¹ In deciding not to or neglecting to put on the safety belt, the plaintiff clearly 'deviated from the norm of the bonus paterfamilias'.¹² It is clear, in other words, that he was negligent.

[12] However, the manner and extent to which his negligence contributed to his harm is not clear from the evidence. When the motorcar overturned upon impact from behind, the plaintiff was on his own evidence not thrown from the car. Instead, he remained within and was injured inside the car. Although he was found outside the car

⁹ Above.

¹⁰ [2016] (21866/2012) [2013] ZAGPJHC 390.

¹¹ *Ngozo* (above) at para [79].

¹² *Vorster and Another v AA Mutual Insurance Association Ltd* 1982 (1) SA 145 (T) at p 151H.

by medical personnel that attended the accident, this was because bystanders after the accident removed him from the overturned car and placed him outside.

[13] The plaintiff's position is different from what pertained in *Ngozo*. In that case, the plaintiff was thrown from a moving taxi because the sliding door had opened, and he was not wearing a seatbelt. There was in other words clear 'but for' causality between that plaintiff not wearing the safety belt and his injuries, caused when he fell out of the moving taxi. There is no such clarity pertains in this matter. I cannot determine from what was placed before me through the plaintiff's evidence and also elicited from him under cross examination by counsel for the defendant the manner and extent to which his not wearing a safety belt contributed to his harm.

[14] Accordingly, although I conclude that the plaintiff was contributorily negligent, I cannot and do not determine in what manner and to what degree. I leave that to the court determining the quantum.

[15] In the circumstances, I make the following order:

1. The defendant is liable to compensate the plaintiff for the proved or agreed damages he suffered in the accident on 26 December 2013.
2. The plaintiff contributed to the harm he suffered by not wearing a safety belt at the time of the accident.
3. The exact attribution of contributory negligence and consequent apportionment of damages is reserved for decision by the court that determines the quantum of damages.
4. The defendant is to pay the costs of this action to date.



JFD Brand
Acting Judge of the High Court
Gauteng Division, Johannesburg

APPEARANCES

Counsel for the plaintiff:	Mr LL Mathebula
Instructed by:	S Mosungwa
Counsel for the defendant:	Mr L Mtshemla
Instructed by:	State Attorney
Date of the Hearing:	29 February 2024
Date of Judgment:	2 July 2024