



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

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

Date: 17 July 2024

Signature:

Case No.4477/2021

Adv H KRIEL N.O. (Curator ad litem to:

JAN HENDRIK JACOBUS ENGELBRECHT)

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAHOMED AJ

This matter was before me on both merits and quantum. Having heard the preliminary arguments, on the special plea of prescription and having had regard to the order granted for the appointment of a curator, I ordered that the issues be separated, that counsel address me on the special plea of prescription and on the

defendant's liability. It is common cause that the plaintiff was appointed as curator for Jan W Engelbrecht ("the patient"), who is an adult male and who resides at Heckpoort in Magaliesburg. He was involved in two accidents the first alleged to have occurred on 2 January 2004 at 8.30pm on a private farm, when he was a passenger in a vehicle which was driven by his friend Theo Roos. He did not report the accident, he did not notice any injuries and did not seek medical attention. He did not lodge a claim with the defendant. He was 17 years old and at school on the date of this accident. The second accident occurred, on 28 October 2011 within the vicinity of a police station, in Magaliesburg,¹ the police arrived within minutes of the accident and an officer completed an accident report on the scene. The police officer recorded that the passenger was uninjured, again he found nothing wrong with himself, he did not lodge a claim with the defendant. He was 24 years old at the date of this accident. He was a passenger in a vehicle which was driven by his friend Glen Harding. On 19 February 2020² a curator was appointed as per an order of this court, a claim was lodged on 14 August 2020 and a summons was served on 3 February 2021.³ Having heard the submissions on behalf of each party and having had regard to the order of appointment of the plaintiff as curator, I dismissed the plea of prescription and ordered that the parties address me on the aspect of liability, the quantum is postponed sine die.

¹ CL 047-27.

² CL 001-2

³ CL 031

THE EVIDENCE

1. Counsel for the plaintiff Mr P Uys informed the court that the evidence of his witnesses on the liability albeit short, is necessary. The patient's mother did not witness the accident but contributes to a complete understanding of events that occurred, counsel submitted that "the credibility of the witnesses and their evidence is critical to the determination of the matter on the probabilities." The patient did not seek medical attention after either of the accidents, he did not think it was necessary. The chronology of facts⁴ reads that in 2014 the patient was diagnosed with a personality disorder.

Jan Engelbrecht

2. Mr Jan Hendrik Englebrecht ('the patient') testified that he is unemployed, and he could not remember when he was last employed. He lived on a plot with his parents in Hekpoort West where he tends to his sheep. He did not know about claims for personal injury until he met an attorney Tobi, who told him that he could assist him with a claim, if he had suffered injuries from a motor vehicle accident.
3. He testified that in January 2004 he was on a camping trip with friends, on a private farm, they were celebrating the end of their school year. He was

⁴ CL014-13

a passenger in a vehicle which was driven by his friend Theo, together with two other friends. He sat in the middle of a single cab bakkie when Theo lost control of the vehicle and knocked into a tree. As he got out the bakkie, he noticed a few adults who lived nearby had come over to assist them, and they took them all to their home, where they spent quite a bit of time. He testified that he hit his chest on the dashboard of the vehicle and his head on the windscreen, that evening however he did not think it was serious at the time. On the next day, Theo's parents came over and took them all to Dr Martin's rooms. Dr Martins examined them all and gave him tablets for pain. During cross examination he testified that his friend who sat on his left suffered a cut on his knees and that Dr Martin said nothing more to them on the day.

4. He further testified that he injured his chest because when he breathes, he feels a tightness in his chest. He testified that on the day after the accident they inspected the vehicle and, he saw "an imprint of his head" on the windscreen, he found blood on the windscreen" where he had hit his head. He only told his mother about the accident, after she inquired about the tablets she found in his cupboard. He told her of the accident and assured her that he had not sustained any injuries. He did not know that he was to have reported the accident to the police nor that he must see a lawyer. He thought all was well as he found nothing wrong with himself.

5. He testified further that on 28 October 2011, he was a passenger in a car driven by his friend Glen Harding, when he was involved in another accident (“the second accident”). They were travelling on a road in the Magaliesburg area in the morning, when Glen tried to overtake a vehicle, the insured driver indicated to turn left but executed a right turn and that vehicle knocked into the left of their vehicle, which spun and hit a light pole. The accident occurred about a kilometre away from the Magaliesburg police station, the officers were on the scene in minutes, he did not recall much else and does not know who completed the accident report. He testified that he hurt his head on the left side. He did not seek any medical attention at the time because he did not find any injuries, he thought he was fine.
6. During cross examination, the testified that Dr Martin did not inform him of any further treatment he may require, he did not seek any further medical treatment he did not think there was anything to worry about. It was put to the witness that he had never attended at Dr Martin’s, as the doctor in his letter⁵ replied that he did not recall the witness and did not keep records longer than 5 years, the witness maintained that he was attended to by Dr Martin. The patient persisted that he was involved in an accident in 2004, in which he sustained an injury to his head and chest. He testified that he approached the driver of the vehicle in the first accident, to assist him with

⁵CL 047-89

his evidence, however Tobi's mother refused to assist him, she told him it was a long time ago and preferred not to get involved.

7. It was put to the witness that if he sustained a significant head injury, he would have sought medical treatment, he denied that he was not injured. He testified that after the accident he completed matric, and his teachers expressed no concerns in regard to his performance at school. He testified that after the first accident he took lessons in photography and attended a professional hunting course. His evidence was that he could not find work for a long while, after the accident however Mr Ngomana pointed out to him that he was employed in 2005 as supervisor on a private game farm, a few months after the accident, as he set out in his chronology⁶ on file, which information only he could have provided to his attorneys. He testified that even after the second accident he felt all was under control, he got on with his life.
8. He testified that he had not read the accident report, but he confirmed his name appeared under the heading, of "persons not injured" in the accident.⁷ Mr Uys objected to a reference to the accident report, as hearsay unless the defendant was going to call the police officer who completed the report, although he conceded that the report was discovered. The witness testified that he did not seek any medical help

⁶ CL 047-143

⁷ CL 047-28

after the second accident as he did not injure himself and therefore he did not lodge a claim with the defendant. He testified that on this occasion he told his mother that he was in an accident but assured her that he was not injured.

9. During re- examination, the patient rejected the note in the accident report that he was uninjured and persisted with his stance that he injured his head on the side in the second accident. Mr Uys proffered that the chronology was prepared by his attorneys and the defendant's argument on the patient's memory is misplaced. Counsel referred the court to the chronology that, on 7 January 2014 he was examined by Dr Lowrens, who referred him to a sister Van der Merwe, for medical assistance. It was submitted that the witness is on medication, he does not know names of medication, and that he attends at a state mental health clinic in Krugersdorp. The patient testified that he has not seen records of this hospital, he testified that he gets aggressive and anxious since the accidents. He testified that his anger and memory problems started after the first accident and that he constantly forgets to take his medication, the second collision exacerbated his memory problems.
10. The patient testified that David Nortje, was one of his friends who joined him on the camping trip. Although David was not in the vehicle when the accident occurred, the patient relied on his evidence on the collision which occurred in January 2004. The patient testified that Theo Roos drove the

vehicle, he sat next to him in the middle, and his friend Botes sat on his left in the single cab bakkie. The fourth person sat at the back.

11. During re-examination, he testified that he no longer goes to the clinic, they send his medication to the pharmacy where his mother is employed. He recalled his first employer Martiz, but he could not remember the reason for leaving his employment. He worked at a second job but cannot recall why he left. He stopped working at a third place of employment, because they did not like his work. Thereafter he worked as a taxidermist but stopped because he no longer enjoyed the business. He prefers to play music and does not want to work because he fears he will be angered by others, and he will get aggressive.

Letitia Engelbrecht

12. Mrs Engelbrecht testified that the patient is her son, and in 2004 he went camping with friends. She stated that about a day after he returned from camping, she found prescribed medication in his cupboard. She inquired about it, and he told her he was involved in an accident the day before and he was attended to by a Dr Martin who gave him pain medication because his chest and head were aching. She did nothing more about it, because he assured her, he was fine. She did not report this collision. The patient reported to her that Theo drove the vehicle and knocked into a tree. He did not remember much else about it, he reported that his head and chest

was hurting however he appeared well to her. She testified that in 2011 the patient told her he was involved in the second accident, he did not injure himself and he appeared to be fine, he did not report any pain when she inquired from him. She testified that she did not think it was necessary to seek medical help even on this occasion as he was fine.

13. In cross examination, she conceded that she could not assist the court as she did not witness the accident. She found out about an accident when she inquired from her son about the medication in his cupboard, she could not recall the name of the medication as it was a long time ago. She did not seek any medical help, on this occasion either, as she found no injuries and he assured her he was fine. She was told that the police were on the scene and therefore she did not report it. In reply to the court's question, she reiterated that she would have attended to him if she found something wrong with him, she saw no injuries and she would have taken him for medical help if he needed it.

David Nortje

14. Mr David Nortje testified that he was one of the party of young men at the campsite on the night of accident. He and his friends had gone on a fishing trip. He could not recall the date; it may have been in January 2003 or 2004⁸. His friends drove to the gate on the plot they were camping on; to collect

⁸ CL 047-134

the fourth friend whose father had dropped him off at the gate, he did not join them to the gate. He noticed the vehicle was returning as he followed the lights of the vehicle through the trees as it travelled toward him, and he heard a loud crash. He testified that he was about 200 to 300 meters away from the point of impact and he rushed out from behind the trees to the vehicle when he saw the occupants of the vehicle climbing out. He testified that Theo was driving because he gave him the keys. In cross examination he testified that he saw Theo Roos, Isaac Botes, Jan Engelbrecht, and Anton Naude climbing out. It was a very dark night, he did not see the accident happen, the bakkie went off the road and crashed into a tree.⁹ He testified that the patient was a passenger. Counsel informed the court that the witness deposed to an affidavit on 8 May 2024. In cross examination he conceded that he could not tell how the accident occurred, and that he could only testify about what he saw after the accident occurred. In response to the court's questions, he testified that he did not notice anyone was injured and after the incident they all continued to fish. On the next day he informed his parents of the accident, and they contacted Theo's parents, who arrived, and they helped pull the car out of the ditch. Theo's mum later took everyone involved in the accident to a doctor. He testified that they were fishing on a Saturday and on Sunday they pulled the vehicle out of the ditch. He met everybody on the next day at school, they all were fine and healthy. The witness testified he could not recall if anyone else

⁹ CL 047 -134 par 4

from the neighbourhood had come to them to assist when the accident occurred, he testified it was a long time ago.

Glen Harding

15. He testified that he used to live on a plot in Magaliesburg, he currently resides in KwaZulu Natal. He testified that on the morning of 28 October 2011 he was driving to a friend's function, and the patient was his passenger. He testified that he noted a Hyundai in front of him indicated to turn left, as he tried to overtake from the right, the vehicle turned right and nicked the left rear of his vehicle, he lost control of the vehicle and knocked into a traffic light.
16. He testified that the police arrived soon after and one of them completed an accident report at the scene. After the collision, although a bit of a blur, he recalled he went to inspect the damages to the vehicles. He testified that he did not injure himself, however he recalled the patient reported to him that he hurt his neck or his head. He testified that he settled the damages with the driver of the other vehicle when he had to pay for the damages to the insured's vehicle.
17. During cross examination the witness testified that the police arrived within 5 minutes of the accident, the police spoke to him and the driver of the other vehicle, the police officer completed the accident report at the scene

and they observed both him and the patient, as well as the occupants in the other vehicle. He testified that he cannot be sure as to where the patient injured himself, he testified that he did not see the patient get injured, because he was focused on trying to avoid the collision. The patient told him he hurt his neck, or back or head. He did not seek medical attention himself, as he was not injured. He testified that the patient did not receive any medical attention at the scene, however he could not tell if he sought any medical help after the accident. After the accident things were a blur and he could not remember how he got home from the scene, he remembered that the vehicle was towed. He testified that both he and the patient wore seatbelts and conceded that he was unable to assist the court about the injuries that the patient sustained. He was shocked after the collision everything had blurred and he could not tell if he travelled with the patient after the accident. He testified that he and the patient are friends, they were previously business partners, and he was willing to assist him.

ARGUMENTS

18. Mr Uys submitted that the RAF expects proof as would satisfy the Fund and this creates much frustration working with such a body. He submitted that the four witnesses who gave evidence for the plaintiff, left no doubt in his mind about their reliability, they presented corroborative evidence against a plea of a bare denial and the defendant has proffered no version

on the first accident. The defendant sees its defence through the third special plea, the court must decide on the probabilities. Counsel referred to the judgments in **Galante v Dickinson and Trust Bank of South Africa Ltd v Senekal**¹⁰ and submitted that the *defendant must adduce evidence sufficient to destroy the prima facie proof, and that to cast suspicions on the correctness of facts and mere theories and hypothetical suggestions will not avail the defendant, its defence must be founded on some substantial foundation of fact.* It was argued that the defendant offers no substantial facts in defence, only that it does not believe the patient because the patient failed to report the accident and has never sought any medical assistance after this accident in 2004.

19. Mr Uys submitted that Nortje corroborated the patient's evidence. The patient lacked knowledge that he was to report the accident or that he was to lodge a claim.

19.1. Counsel submitted that this court must decide whether the two accidents occurred and whether the drivers were negligent and whether the patient was involved in the accidents.

20. It was further submitted that Nortje's evidence confirmed that Theo was the driver and that the accident occurred, as he heard a crash and approached the vehicle and he saw Theo was the driver. Uys argued that

¹⁰ 1950 2 SA 460 A, 1977 2 SA 587 W at 593

those involved did not think it necessary to report the incident as the accident took place on a private farm and all the persons involved were youth who were on a social event. The parents took them to a doctor on the next day and noted that there were no obvious injuries. There can be no doubt that the patient was a passenger, and the vehicle was driven by Theo, who drove negligently, as the vehicle left the road and crashed into a tree. Mr Uys proffered that the RAF expects a paper trail and a police accident report, but strange things happen in practice and reality.

21. Counsel argued that the discrepancies in the evidence should be expected, and the witness made concessions when he was required. Nortje was an independent witness and there is no reason for the court to reject his evidence on the probabilities. The evidence was corroborated and has a ring of probability to it.
22. Counsel submitted that the patient's mother was a reliable witness, there was no reason on probabilities why her evidence should be rejected. Dr Martin stated that he could not assist the plaintiff as he did not keep records that far back, the patient's mother did not find anything wrong with him, and he assured her he was fine. The patient's evidence that he suffered anger outbursts since the accident was not challenged and therefore the version stands. Counsel proffered that the usual custom in collision cases is that there must be a paper trail, but that should not be held against this plaintiff, he thought there was nothing wrong with him.

23. Mr Uys in heads of argument¹¹ correctly sets out that the burden of proving negligence and liability of the defendant rests with the plaintiff, who must convince the court through credible evidence that the plaintiff's version is more probable, than that of the Defendant. A judge must decide if the truth has been told upon weighing the evidence. Counsel referred the court to the judgment in **Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others**¹² , where the court must assess the probabilities or improbability of each party's version on the disputed facts. The credibility and probability must be considered together. The probability comes from the mother who found the medication and Nortje's evidence that he gave Theo the keys, it was his car and that they were taken to a doctor who found nothing wrong.
24. Counsel argued that the accident occurred on a private farm and vehicle was their private vehicle, there was nothing for the police to investigate and therefor their failure to report the accident is of no more. The police were not involved because they were young men who were at a social event and none of them was injured. It was further argued that the defendant has not been prejudiced in the first collision and it failed to investigate the second collision, when all the evidence was placed before them a while ago. Mr Uys argued that the defendant did not call a single witness or conduct any inquiry regarding the accidents, it simply left it for the plaintiff to prove its

¹¹ 014-23 at 23

¹² 2003 1 SA 11 SCA at 5

case. Counsel reiterated that the test is on the probabilities and the defendant has no version, on the first collision therefor the plaintiff presents prima facie evidence. Harding's evidence about the second collision, was clear and he relied on memory, the discrepancy in the pleading on time is not material. Furthermore, it was argued that the defendant in cross examination did not contradict the witnesses, it simply raised doubts, the plaintiff's witnesses' evidence was not seriously challenged. The plaintiff's version on probabilities must stand that the first collision occurred, that there was causal negligence of the first driver, that the patient was a passenger, who suffered a headache and chest pains, because of the accident. Regarding the second collision there is direct evidence of the driver who testified that he was negligent and knocked into a traffic light. Mr Uys submitted that the causation aspect of the matter will be ventilated in the quantum trial and that the plaintiff on the probabilities had succeeded in establishing the liability of the defendant.

25. Mr Ngomana submitted that the first collision never occurred, he argued that none of the plaintiff's witnesses observed that accident and are of no assistance to the court. He argued that Mrs Engelbrecht learnt of the accident from the patient two days later, when she inquired about the medication she found in his cupboard. Nortje, in his evidence stated that he watched the vehicles lights from behind trees, he was about 200 to 300 metres away from the point of impact, it was a very dark night, he heard a crash and went to investigate, and found the car had knocked into a tree

and he saw the occupants alighting from the vehicle. There is no direct evidence by the driver of the vehicle on the collision. It was further submitted that only the evidence of the patient is before the court about the first accident and that the court must approach this evidence with caution, he has a curator appointed due his mental state.

26. It was submitted that the Mrs Engelbrecht offered no reasonable explanation for failing to report the accident to the police, or to lodge a claim. Her evidence was that she saw nothing physically wrong with him and he had pain medication, there was no need to seek medical attention, she saw no injuries. It was argued that the patient testified at trial that on the next day he went to inspect the car and he saw the imprint of his head on the windscreen and blood on the screen. He testified that he suffered an open wound, however neither Ms Engelbrecht nor Nortje observed any injuries or an open wound on his head. Nortje testified that he did not observe that any of the occupants sustained injuries on the night. He testified that after the accident they all continued to fish into the night. Mr Ngomana argued that Nortje did not testify that a neighbour assisted them, when questioned on this event he proffered a name of a person but later testified that he cannot recall anyone assisting them on the night. Counsel submitted that the evidence of both witnesses is unreliable and the court must note that Theo's mother refused to assist the patient in court in regard to the accident as she was not willing to be involved in the matter that happened a long time ago. Mr Ngomana proffered that even Dr Martin was

unable to assist the patient, when in his reply to the plaintiff's request for clinical records dated 6 May 2024¹³ he wrote that he could not recall treating Englebrecht and that he did not keep records for longer than 5 years.

27. It was submitted that there is no evidence of the injuries sustained by the patient in either the accident that occurred 20 years ago, nor the accident that occurred 13 years ago. In both incidences the patient failed to seek medical attention. The information in an accident report and treatment of injuries is critical for the defendant to assess a claim and its liability. The defendant cannot be criticised for leaving the issues for the plaintiff to prove its case and to discharge its onus, given the long delay in lodging a claim, anything could have caused the injuries as alleged over the period of 20 years since the first accident. Mr Ngomana reminded the court that the police arrived at the scene of that second accident within 5 minutes of occurrence and as per the witness testimony, they spoke to all involved and recorded that the patient JW Engelbrecht was an "uninjured passenger." It was further submitted that Glen Harding did not observe the patient being injured, his evidence was that he was focusing on avoiding the collision, he only recalled that the patient told him that he had hurt either his head or neck or his back. Furthermore, it is improbable that the patient sustained an injury of any significance, as Harding testified that they both

¹³ CL 047-89

wore seatbelts, they were both restrained when their vehicle knocked into a traffic light, no further evidence was before the court regarding the damages to the surrounding area of the vehicles.

28. Mr Ngomana referred the court to Harding's affidavit¹⁴, which he deposed to only on 7 May 2024, a few days before the hearing of this matter. He argued that the plaintiff has known of the events of the accident when he was appointed a curator in 2019 and then again when the claim was lodged in 2020, yet he a trained legal practitioner failed to submit the documents within a reasonable time for the defendant to investigate the claim, he failed to comply with the requirements of the Act. Furthermore, the plaintiff offered no reasonable explanation for the long delay in furnishing the defendant with his affidavit, nor any reason why this affidavit was only procured a week before the hearing of this matter. Mr Ngomana submitted that Mr Uys's criticism of the defendant is misplaced, more particularly as both legal representatives regularly litigate against the defendant and must know the processes involved and the reasons thereto.

29. Section 24 of the Act¹⁵ obliges the plaintiff to substantially comply with supporting documents within a reasonable time, to enable the administering of the claim, for investigating the accidents which occurred decades ago and for the benefit of the court. Mr Ngomana argued that the

¹⁴ CL 047-90

¹⁵ 56 of 1996

defendant is gravely prejudiced by the delay in the submission of documents, the accident report was signed off in 2011, and in the plaintiff's possession since 2019 and he failed to furnish the defendant with the documents in reasonable time. Furthermore, it was submitted the plaintiff as curator must surely have known that a claim was to be lodged in the future, he provides no reasonable explanation to this court for his delay, the patient should not be allowed to hide behind the fact that he was unaware of the law, even after being involved in an accident for the second time. The defendant cannot be expected to investigate events that occurred 14 years prior to submission of the documents and there is a paucity of information which was no help to the defendant decades later.

30. Mr Ngomana argued that the evidence of the patient under curatorship must be approached cautiously, he was appointed a curator due to diminished mental capacity, he testified on events that occurred decades ago and he presented no direct evidence about the first accident. Nortje was not a reliable witness when he was unsure if they were assisted by others on the night, he mentioned a name and then retracted his evidence. Regarding the second accident, Harding testified that the police engaged with each of the drivers and observed them both and Harding accepted the information in the accident report, there can be no logical reason for the patient to place the contents of that accident report in dispute, it was submitted that the information that the passenger was uninjured must be accepted as correct.

31. The plaintiff in particulars of claim alleged the second accident occurred on 7 February 2014 but the accident report records the accident occurred 28 October 2011, the pleadings differ significantly from the objective evidence and is unreliable. The patient's evidence is unreliable, he testified failed to take the court into his confidence when he testified that he did not recall his employment history however the chronology of events which was drafted a few days before the matter was heard, included his history which only he could have provided to his attorneys. It was submitted he did not have a problem with his memory.
32. In reply Mr Uys rejected the argument of the plaintiff's non-compliance with s 24, he submitted that the defendant was furnished with the identity of the driver in the first collision much earlier and it did nothing to investigate the collision. Mr Uys proffered that persons with brain injuries can assist in evidence, he brings evidence which has a ring of probability, the contradictions, in the pleadings is external and is negated by the corroborative evidence of witnesses.

JUDGMENT

33. Mr Uys submitted that Jan Engelbrecht the patient was competent to testify at this trial. Although there were four occupants in the vehicle in the first accident, the driver was not before court, the patient testified that he contacted the driver's mother who refused to assist him at the trial

regarding an event that occurred a long time ago, she preferred for her son not to be involved.

34. The evidence of a single witness must be approached with caution but *“the exercise of caution must not be allowed to displace the common sense.”*¹⁶

The onus of proving liability and negligence, of the defendant lies with the plaintiff, whose credibility is paramount. He must demonstrate that his version is more probable than the defendants, the plaintiff must provide clear and convincing evidence to discharge his onus.

35. The defendant has not proffered a version, Mr Ngomana, argued that the defendant could do little or nothing given the passage of time since the incidents occurred and due to the paucity of the evidence eventually placed before it. The tick box exercise that Mr Uys criticises is the only procedure as legislated and must be substantially complied with for the defendant to investigate a claim. It was submitted that there were material discrepancies in the testimonies of the plaintiff’s witnesses and that their evidence was unreliable.

¹⁶ Zeffert, Piazes, Skeen, Law of Evidence fn 54 ,per Schriener JA, R v Nhlapo (10 November 1952 AD),

36. In **Stellenbosch Farmer's Winery Group Ltd and Another v Martell Et Cie and Others**¹⁷, the court provides guidance on the approach to disputed issues and stated:

"to come to a conclusion on the disputed issues a court must make findings on:

- (a) The credibility of the various factual witnesses,*
- (b) Their reliability; and*
- (c) The probabilities.*

As to (c) this necessitates analysis and evaluation of the probabilities or improbability of each party's version of each of the disputed issues. In the light of the assessment of (a) (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. ... The hard case, which will doubtless be the rare one, occurs when a court's credibility findings, compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

37. A court must consider the conspectus of the evidence, in determination of the probabilities. Only the testimony of the patient was before this court regarding the way the first accident occurred. Nothing prevented the plaintiff from issuing a subpoena for the driver to attend court to testify in that regard. In the absence of any accident report or medical records regarding the injuries sustained in an accident, the evidence of

¹⁷ 2003 1 SA 11 SCA at 5

independent witnesses becomes more critical for the court to be fully apprised. Even if the defendant did not proffer a version, the court would have had the benefit of evidence in cross examination of the driver on the events that led up to the accident and the events thereafter to determine the defendant's liability. This court has nothing that would establish the negligence of the driver in the first accident.

38. The patient testified that he did not seek medical help for the injuries he sustained in the first accident in 2004, he saw "nothing wrong with him." During cross examination he testified that he injured his chest on the dashboard and that his head hit the windscreen and that on the next day when he inspected the vehicle, he saw the imprint of his head on the windscreen and blood in the area. On his version he sustained an open wound to his head. Nortje testified that none of the occupants of the vehicle on the day were injured, and after the accident they continued with their fishing. Letitia Engelbrecht testified she did not seek any medical assistance she did not notice that Jan was injured anywhere, she testified that if she did see he was injured, she would have sought medical attention. There was no evidence that Dr Martin attended to any open wound, that he may have cleaned it or applied a bandage to it. The patient testified that he gave him tablets for pain. The patient provided conflicting evidence on his injuries; his evidence was unreliable. He exaggerated events, he testified that his friend who sat to his left injured his knee on the dashboard, Nortje denied that anyone of the occupants sustained injuries.

39. The patient was not forthcoming on his employment after the accident. Mr Ngomana referred to the chronology which was filed on his behalf and put it to him that only he could have provided the information to his attorneys. The witness failed to respond and insisted that he was unemployed after the second accident for a long while, he was unable to secure any work. The patient also exaggerated the way in which the second accident occurred, when he stated that *“the car spun on impact and hit a pole”*, Harding did not testify that the car spun, he testified that he lost control of the vehicle which went off its path and hit a traffic light.
40. This court noted the plaintiff’s long delay in complying with the requirements in s 24 of the Act. An accident report was completed on the date of the second accident in 2011, it was furnished to the defendant only years later, in 2019. No reasonable explanation was before the court in that regard, it is noteworthy that the patient’s legal representatives are established practitioners and have worked with the defendant and it procedures for many years. I also noted that the attorney requested medical records regarding the injuries in the first accident from Dr Martin only on 6 May 2024,¹⁸ a few days before the hearing of the matter. It seems odd that when he was mandated to represent the patient, he failed

¹⁸ CL 047-89

to procure a critical piece of information. I am of the view that the plaintiff has failed to provide clear and convincing evidence to discharge his onus.

41. If an accident did occur which resulted in bodily injuries, the logical initial step to take would be to source the relevant information to support any claim. This was only done some 20 years after the event and a few days before this matter was before this court. It is noteworthy the Ms Engelbrecht's affidavit in the curator application refers to the accident which occurred in February 2014, the confusion goes to the reliability of her evidence. The impression gained is that the plaintiff held back with critical information, such as even Harding's affidavit, and failed to comply with the requirements of the Act, so that a proper assessment and investigation of the claim could have been done.
42. Glen Harding's evidence on the way the second accident occurred was contradictory. He testified that the insured driver knocked into the rear left of his vehicle, he lost control and knocked into a traffic light, whereas in his affidavit, which he deposed to on 7 May 2024, a few days before the hearing of this matter, he stated that he knocked into the insured driver.¹⁹ In this regard the plaintiff again failed to provide any reasonable explanation for the long delay in submitting this affidavit to the defendant to ensure compliance with s 24 of the Act. There are three versions before

¹⁹ CL 047-90 para 5

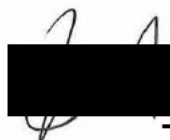
this court on the manner in which the second accident occurred, the evidence is unreliable.

43. Having regard to the evidence of Glen Harding, that both he and the patient wore seatbelts on the day it is improbable that the patient would have sustained an injury of any significance, having regard to the way the accident occurred and that they were both restrained. Harding did not notice any injuries on the day and the accident report, which was completed in their presence, records that the passenger, the patient, was uninjured, he did not dispute this entry in the accident report, and I am of the view that it is in the interest of justice that the evidence be allowed to stand, a court has a discretion in the admission of hearsay evidence. In this instance, it would be wholly unreasonable to expect the defendant to trace the police officer, and what purpose would it serve, he surely could not be expected to recall events of decades ago.
44. The witnesses for the patient cannot be independent, they were his friends and his mother and their evidence must be approached cautiously. Besides none were able to provide this court with direct evidence on the first accident and the negligence of the driver. I find that the plaintiff failed to discharge the onus and cannot succeed on the facts before me.

45. Accordingly, I am of the view that no accident occurred in 2004 and the multiple versions of the second accident, before the court, cannot assist the plaintiff in discharging its onus, therefore the claim must fail.

I make the following order:

1. The special plea of prescription is dismissed.
2. The defendant shall pay the costs thereof.
3. The plaintiff's claim is dismissed.
4. The plaintiff shall pay the costs of trial, on a party and party scale.



MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 17 July 2016.

Date of Hearing: 13-16 May 2024

Date of Judgment: 17 July 2024

Appearances:

For Plaintiff: Adv P Uys

Instructed by: Edeling Van Niekerk Inc

Email: gary@evninc.co.za

For Defendant: Mr T Ngomana

State Attorney