



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

CASE NO 24655/18

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

DATE

23/09/24

SIGNATURE

MATHONSI, SOJA ORBERT

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KILIAN AJ:

Summary – motor vehicle accident – claim against the Road Accident Fund – sole negligence or joint negligence for both drivers – crucial to lead evidence in merits for wrongfulness, damages and negligence – contradiction between plaintiff and witness evidence – police report amounts to hearsay – no heads of argument.

[1] This case involves a motor vehicle accident between the plaintiff and an insured party. The accident occurred on 8 December 2017 at the traffic light-controlled intersection of Hay and Church streets. The plaintiff is suing the defendant for alleged injuries sustained as a result of the sole negligence of the insured driver. The insured party or driver is not a party to this legal action. This court has to decide whether the insured driver was the sole cause of the collision or, alternatively, that there was joint negligence on the part of both drivers and as a result apportionment of liability is sought by the defendant. The plaintiff nor defendant uploaded heads of argument after a request has been made by the court on CaseLines.

[2] At this time, in these proceedings, the court is only concerned with liability and not quantum. Quantum and/or the portion of quantum to be claimed by the plaintiff depends, in part, on the liability of the plaintiff and the insured driver.

[3] The main dispute pertaining to liability or negligence is based on the police report and short description of accident that the plaintiff and the insured driver allege that the traffic light was green for both drivers. It is thus stated that the green light was in favour of both drivers and both drivers had a right of way to pass through the intersection.

[4] The plaintiff did not lead any evidence that the traffic light was malfunctioning at the time of the collision, which is subject to probability. The plaintiff approached the case by stating that he was the only driver who had right of way. The difficulty before the court is the absence of the insured driver and, in addition, was not a party to the pleadings. The plaintiff argued that the insured driver had to obey the right of way at that crucial time. For reasons that will become clear in this judgment, the consideration of liability remains an important part of the alleged accident and liability will have a direct consequence for the quantum of this matter, but as stated previously, the quantum is not an issue in this judgment.

[5] In the plaintiff's pleadings, or affidavit, it is stated that the collision occurred at 20:15 on 8 December 2017 while driving his VW Polo along Hay Street and that he had no reason to stop at the traffic light since the light was green. The plaintiff also indicated that a pedestrian was walking parallel to Hay Street during examination in chief. The plaintiff continued he had no passengers in the vehicle and was on his way home from work. He was driving with his headlights on and was aware that the rain was drizzling. When the plaintiff passed through the traffic light, the insured driver who was travelling along Church Street collided with the middle right-hand side of the plaintiff's vehicle. The pedestrian was also hit and landed on top of the windscreen of the plaintiff's vehicle. Thereafter, the plaintiff's vehicle hit an electricity box which caused damages to the left side of the vehicle.

[6] The insured vehicle is an Opel Corsa bakkie or pick-up. According to the police report, the Opel Corsa had a passenger and the passenger and the driver had the same contact number. It is unclear whether the passenger and the insured driver are related. The plaintiff recalls during examination in chief that the colour of the Corsa bakkie was in fact white not orange – the orange was due to branding – which is contrary to the police report.

[7] Concerning the time of the accident, the plaintiff's affidavit states that the accident occurred at 20:15. The plaintiff was asked during examination in chief whether he was in agreement with the contents of the affidavit and he replied in the affirmative. No police officer was called as a witness or the officer who completed the police report. The plaintiff stated that after the accident he was admitted to hospital and was discharged the same night.

[8] The plaintiff went back to the hospital the following day. Under cross-examination it transpired that the accident occurred at 18:30 even though the affidavit states 20:15. The plaintiff realised the mistake but could not immediately go back on what he had said in his evidence. The police report also states the time as 20:15.

[9] The plaintiff also disagrees with the time of the collision repeated in the pre-trial minutes. When asked the question as to when the plaintiff first observed the incorrect time of the accident, the plaintiff responded that this happened during the course of examination in chief.

[10] During cross-examination the plaintiff stated that he noticed the insured vehicle only after the collision and that the first time he noticed the pedestrian was when the pedestrian landed on his windscreen. The plaintiff in the matter also called a witness (Mr Moses Ubisi) and during cross-examination of the witness, evidence was led that on the day of the collision the roads were not wet. The witness also testified that there was clear visibility and it was not yet dark. The plaintiff's legal representative initially indicated that another or second witness would be called but rescinded this decision.

[11] This is the evidence before me and whether the plaintiff or the insured driver enjoyed a right of way has to be determined on the merits of the witness called on behalf of the plaintiff, as well as the intrinsic probabilities of the collision, to determine whether the plaintiff was able to convince the court that he was not negligent or, alternatively, jointly liable.

[12] The witness called by the plaintiff had a very simple story to tell, however there are contradictions between the plaintiff's evidence and the witness's evidence. I am of the opinion that the contradictions are serious, taking into account the straightforwardness of how the accident or collision occurred.

[13] The plaintiff's evidence during cross-examination is that he did not see the pedestrian prior to the collision, seeing the pedestrian only when the latter landed on his windscreen. Although an alleged collision occurred between the two vehicles (and a pedestrian) the difficulty of recalling the exact circumstances of the accident is, I believe, significant in determining the merits of the case. Strengthening this opinion

are the disputes regarding the weather on that day, as the witness vividly remembers that on the day of the collision, the weather was clear and the roads were not wet.

[14] It is unclear how the plaintiff knows the witness or what his relationship to the witness is, or how the witness contacted the plaintiff after the accident, offering to testify as a witness. It could be that they are colleagues working for the same company and that coincidentally the witness happened to be on the scene of the accident.

[15] Generally, people do not volunteer to act as witnesses at the scene of an accident; if they did, it would be easier to understand the factual circumstances of how the accident occurred. In *Govender v Road Accident Fund* [2005] JOL 14128 (D) the court was able to distinguish between reliable and unreliable witnesses to determine a right of way for one of the parties. In this case, plans and photos were also presented to the court to better understand the scene of the accident.

[16] Although the right of way could not be established with certainty, a probability exists that the right of way existed for one of the parties in the *Govender* case. In the present matter, it is probable that no right of way existed for the plaintiff owing to the inconsistency of evidence concerning the weather, the time of the accident and the location of the pedestrian. Thus, the only reasonable inference to be drawn is that the witness' evidence is grossly dissimilar, except for the probability of right of way for the plaintiff.

[17] It is clear that the plaintiff and insured driver should have been keeping a good lookout for traffic and that, if both drivers had done so, the collision could have been avoided. The mere fact that a traffic light gives a right of way to one driver does not absolve the driver of the duty to keep a good lookout and exercise care for the safety of other road users. In addition, the mere fact that during cross-examination the plaintiff answered certain questions incoherently calls the honesty of the plaintiff into question.

[18] In this matter a simple accident occurred and is described in terms of a black-and-white scenario in the police report which is hearsay (see *Wilms v Padongelukkefonds* 2006 JOL17171 (T) at page 12). The possibility exists that the plaintiff could have informed the witness of the status of the traffic light, which would be a mere repetition of the evidence. The court had to request more than once that the witnesses to the matter should leave the court room.

[19] Therefore, if the witness's testimony is contrary to that of the plaintiff as to the weather, a probability exists that their friendship or relationship could be destroyed. On the other hand, there is the probability that the insured driver would not have caused danger to his passenger. It is also trite that pedestrians cross red traffic lights. In this regard I am unable to make a probable decision as to how the accident occurred or who caused the accident.

[20] A possibility also exists that the passenger in the insured vehicle could have cautioned the insured driver that a red traffic light or no right of way existed. Selke J in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 had the following to say about probabilities:

"[b]y balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

This dictum is not relevant to this matter because the police report is not supported by the police officer who completed the report or the sketch of the accident or collision. The pedestrian who landed on the windscreen is not supported by relevant evidence or the damages caused to the plaintiff's vehicle or given the discrepancies in the witness's evidence and as a result the collision has not been proven.

[21] For the plaintiff to succeed in his claim for no negligence, it must be proven that a wrongful act was committed by the insured driver, that negligence occurred and that damages directly resulted from these actions. Section 16 of the Civil Proceedings Act

25 of 1965 states that judgment can be given in any civil proceedings on the evidence of a single competent and credible witness.

[22] Why the defendant did not make any contact with the insured driver is unclear and remains an important factor for corroboration, as well as to enlighten this Court about what transpired. The time of the collision could also refer to another collision that occurred on the same date. The mere fact that the plaintiff's legal representative rescinded the decision to call the second witness means that, based on the evidence alone, the collision has not been proved. Therefore, I cannot attribute joint negligence or sole negligence to either driver despite the police report.

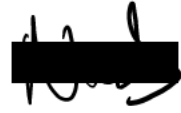
[23] In *Claude Neon Lights (SA) Ltd v Daniels* 1976 (4) SA 403 (A) the court laid down a test for granting or refusing absolution from the instance after the plaintiff concluded his case. To grant absolution of instance the court should ask itself whether the evidence presented could justify the plaintiff to continue with the case to its conclusion. This is echoed by *Christina Matshole Tshole v Road Accident Fund* Case Number: 351/2018. For the reasons stated above, the accident, joint negligence or sole negligence had not been proven.

[24] As a result the following order is made:

- 1.1 The case is dismissed due to absolution of the instance.
- 1.2 No order to costs.

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 judgment is deemed to be **23 SEPTEMBER 2023**



KILIAN AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

APPEARANCES

For the Plaintiff: Adv Lukhele

Instructed by: TW Mathebula Inc, Johannesburg

For the Defendant: State Attorney Mhlongo

DATE OF ORDER & JUDGMENT: 23 September 2024