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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. 6263/2018

In the matter between:

ADV. MC LOUW obo KS M[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

LINK: 3768902

DEFENDANT

JUDGMENT BY:

MHLAMBI, J

HEARD ON:

03 MAY 2024

DELIVERED ON:

05 SEPTEMBER 2024

- [1] The plaintiff sustained injuries in a motor collision that took place on 7 May 2014 in a residential area at Thaba-Nchu, Free State, when a motor vehicle, with registration number FKS [...], driven by the insured driver, KC Mathopa, collided against the plaintiff who was a pedestrian at the time. The plaintiff's action for damages based on his injuries is defended. The matter proceeded on the merits only as the parties agreed to separate the merits from the quantum.

- [2] The plaintiff called two witnesses to support his case, while the defendant closed its case without calling any witnesses. The plaintiff's uncontested evidence is that on 07 May 2014, at about 18h00, he stood on a pedestrian sidewalk close to the corner of an intersection with one street running from North to South and the other from East to West, waiting for his friend to arrive by bus from Bloemfontein. The streets in that area had no street names.
- [3] The street running from East to West is a thoroughfare, and vehicles travelling on it are not required to stop at the intersection and have the right of way. Stop signs at the intersection controlled those travelling from North to South. The plaintiff stood in front of the corner residential property at the intersection of the two streets, one running along its eastern boundary and the other on its northern boundary. The bus stop was across the street, going eastwards, opposite where the plaintiff stood, but slightly to his left. His back was close to the boundary fence on the northern side of the corner residence. He stood approximately 1,25 meters from the street on the sidewalk facing towards the bus stop. On his right-hand side and behind his back was an anchored steel pole on the corner of the property. This pole supported the fence in front of the northern boundary of the corner residence.
- [4] While waiting for the bus to arrive from Bloemfontein, he talked to people on the other side of the street. The bus would be approaching from his left-hand side, on the opposite side of the street, and would be moving from west to east. Passengers would alight on the left-hand side of the bus onto the curb. It was sunset at about 18h00, and it was getting dark. He never moved from where he stood. His next recollection was when he woke up at the hospital. He could not recall how many days he was in a comma. He did not see how the accident happened and who collided with him
- [5] Mr S M[...], the plaintiff's father, testified that on 7 May 2014, he was at home when he was called to the scene of the accident by boys who knew his son.

On arrival at the accident scene, he found his son lying face up with his head on the cement curb. His son was lying with his body in front of a bus at the bus stop. At the bus stop, the road from west to east widens before the intersection, allowing the bus to stop without causing traffic congestion. A stationary vehicle was on the sidewalk behind the bus stop. It was damaged in the middle of its front part, which was dented and bent inwards. The fenders, front bumper, side of the vehicle, and lights were also damaged. All four tyres of the vehicle were deflated.

- [6] He found brake and tyre marks that he measured 100m long on the street from the north to the south. They started on the southern side and moved north into the street to the east. He did the measurements the day after the accident, as he took his son to the hospital the previous evening. The marks started on the right-hand side of the street from the north before the stop sign at the intersection. They then moved to the left-hand side of the street, moving from south to north, before the stop sign. The marks then left the road, went up the sidewalk on the left-hand side of the street, and cut the street corner of the residential property on the left-hand corner and to the left of the stop sign.
- [7] He observed the day of the accident, at the corner property across the street from the bus stop, marks on the ground and debris from the motor vehicle's glass and parts lying in the area of an unearthed and bent steel pole embedded in a block of cement lying on the ground. Two bent steel poles were attached to either side of the central pole, which was used to anchor and stabilise the corner steel pole that upheld the fence of the corner property. The marks then went on both sides of the rundown corner steel pole, continued across the street from west to south, and ended on the opposite side of the road at the bus stop, close to where the damaged motor vehicle stood stationary on the pedestrian sidewalk.
- [8] Mr. S M[...] only knew the insured driver from seeing him. However, he knew that the criminal case against the insured driver was still ongoing, and he had

to appear in court later that month on charges relating to the accident. He drew a rough sketch to assist the court with his observations, which was handed up provisionally as exhibit A. The defendant closed its case without presenting any evidence.

- [9] The plaintiff's counsel contended that the plaintiff had, on a balance of probabilities, discharged the onus of establishing that the sole negligence of the insured driver caused the collision. The defendant's counsel argued that having considered the Plaintiff's evidence, it was the Defendant's submission that the Plaintiff had not proven that the accident was caused by the negligent driving of the insured driver as he did not have an independent recollection of how the accident occurred. The Plaintiff testified that he was not looking in the direction where the bus came from but was facing forward and concentrating on what was happening in front of him. Given that he was standing at the corner of the road, the applicant would have been able to see a vehicle approaching him from the south side and taken steps to avoid the accident. Considering that he indicated that taxis were busy on that road, he would have seen the insured vehicle approaching.
- [10] The defendant's counsel contended further that the second witness was not present when the accident occurred. The witness' sketch plan, marked Exhibit A, had no probative value as the witness made an assumption, and its probative value is outweighed by the procedural disadvantage of receiving it on the day of the trial; thus, the same should be excluded as it is prejudicial to the Defendant. As such, the Court had no evidence of how the accident occurred and no evidence of negligence on the part of the insured driver.
- [11] In conclusion, the counsel submitted that the plaintiff's claim should be dismissed with costs as no negligence could be attributed to the insured driver. Alternatively, should the court find that the insured driver was negligent, the plaintiff's claim should be apportioned at 70/30 in the plaintiff's favour.

[12] In response, the plaintiff's counsel referred to the dictum in *Galante v Dickinson*,¹ that:

"It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favors the plaintiff as opposed to the defendant."

[13] The plaintiff's evidence was uncontested, especially that he was on the sidewalk and never moved therefrom until he woke up in the hospital. Furthermore, Mr. M[...]s evidence was uncontested. His evidence corroborated the plaintiff's version of how the accident occurred by indicating the direction of the insured vehicle and where it ultimately came to a standstill. Even though he was not an eyewitness, he gave a layout of the accident scene, which aligned with his testimony. This evidence is material and helps to prove the pertinent *facta probanda*. Therefore, exhibit A, a sketch that he drew to depict the tyre marks and the direction followed by the insured vehicle until it came to a standstill, which was provisionally allowed, is admitted to evidence. There can, therefore, be no suggestion that the plaintiff was contributorily negligent as to the causation of the accident.

[14] In the circumstances, I am satisfied that the plaintiff has adduced the necessary evidence and has proved his case on a balance of probability. I find that the defendant was 100% negligent in causing the accident. There is no reason why the costs should not be awarded in favour of the plaintiff. I therefore make the following order:

ORDER:

¹ 1950(2) SA 460 (A) at 465.

1. The plaintiff succeeds with costs, with the Counsel's fees on scale B.
2. The defendant is held 100% liable for the plaintiff's proven or agreed-upon damages.

JJ MHLAMBI, J

APPEARANCES:

On behalf of the Plaintiff

Instructed by:

Mr. D Marx

Du Plooy Attorneys

BLOEMFONTEIN

On behalf of the Defendant

Instructed by:

Ms. N.P Banda

State Attorneys

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