

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable
CASE NO. 2425/2021

In the matter between:

ABDUL ISAAC MJADHU

Plaintiff

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

LAING J

[1] This is a claim for damages arising from a motor vehicle accident that occurred on 10 September 2020 in the Graaff-Reinet district. The plaintiff was a pedestrian at the time and suffered injuries to his ankle, knee and head; he claimed damages in the amount of R4,500,000. The defendant's plea amounted to a bare denial. The matter went to trial for determination of liability only.

Summary of the evidence

[2] The plaintiff testified that he was from Malawi and had been resident in South Africa since 2007. He was hitchhiking when he was struck by a motor vehicle from behind, rendering him unconscious. He spent six days at the Midlands Hospital in Graaff-Reinet. The plaintiff went on to refer to the relevant hospital records in terms of

which he was described as Mr Ali Mjekula. He explained that the person who admitted him, Mr Alick Tebulo, confused his name; 'Ali' was merely a nickname because of his Muslim faith, and 'Mjekula' was the surname of the plaintiff's brother. The plaintiff's actual name was Mr Abdul Isaac Mjathu, as depicted in his passport.

[3] The next witness was Mr Tebulo. He was also from Malawi and had been resident in South Africa since 2014. He testified that he knew the plaintiff through the latter's brother, Mr Sandi Mjekula. On the date in question, Mr Tebulo was returning home from work when he heard a loud 'bang' from a collision that occurred on the side of the main road, close to where he was walking. He ran to the scene and discovered the plaintiff. Consequently, Mr Tebulo called an ambulance and gave the plaintiff's details to the emergency personnel, using an incorrect name. In that regard, Mr Tebulo explained that an unknown person of Muslim faith in Malawi was sometimes called 'Ali' in Malawi, and he had merely assumed that the plaintiff carried the same surname as his brother, 'Mjekula'. Under cross-examination, Mr Tebulo stated that he had witnessed the motor vehicle strike the plaintiff. He went on to confirm that Mr Ali Mjekula and Mr Abdul Mjathu were one and the same person. To questions put to him by the court, Mr Tebulo testified that the scene where the accident occurred was a straight stretch of road and that conditions had been clear at the time; the accident took place between 18h00 and 19h00, at dusk. The plaintiff was hitchhiking, standing behind the yellow line on the side of the road. It seemed to Mr Tebulo that the motor vehicle intended to come to a halt, to offer the plaintiff a lift.

[4] At the conclusion of the witnesses' testimonies, counsel for the plaintiff submitted, by agreement, the affidavit of Dr Sizwe Nkosi. He stated that he was the Clinical Manager at the Midlands Hospital and had completed portions of the medical records pertaining to the plaintiff. He confirmed that the plaintiff had been admitted under the name of Mr Ali Mjekula and that he had suffered a head injury, a fracture of his left ankle, and an abrasion to the back of his knee. The plaintiff had been discharged after six days in hospital.

[5] The defendant led no witnesses.

Issues for determination

[6] The issues to be decided are straightforward. The first pertains to the identity of the plaintiff considering the different name given to the person who was admitted to the Midlands Hospital on the date in question. The second pertains to the plaintiff's contributory negligence, if any, and the possible application of the Apportionment of Damages Act 34 of 1956. The third and final issue is whether the plaintiff has proved his claim in delict.

[7] The relevant principles are mentioned briefly below.

Legal framework

[8] The provisions of section 17(1) of the Road Accident Fund Act 56 of 1996 ('the RAF Act') stipulate that:

'(1) The Fund or an agent shall—

(a) ...

(b) ...

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee...'

[9] From the above, a plaintiff must prove that the injury or death that forms the subject of his or her claim for compensation was because of negligence or another wrongful act. The law of delict applies. In *Septoo v The Road Accident Fund*,¹ the Supreme Court of Appeal confirmed, per Mbatha AJA, that:

‘The underlying basis for the Act² is the common law principles of the law of delict. A claimant must therefore prove all the elements of a delict before it can succeed with its claim in terms of the Act.’³

[10] The application of the principles to the facts follows.

Discussion

[11] Both the plaintiff and Mr Tebulo would have had an inherent bias towards a description of events that produced a favourable outcome. There were, nevertheless, few if any contradictions in their versions. The obvious discrepancy between the plaintiff’s real name and that appearing in the hospital records was adequately explained by Mr Tebulo, which was in turn corroborated by Dr Nkosi’s affidavit. The testimonies were cogent and of good calibre. The plaintiff was admittedly rendered unconscious by the collision, preventing him from testifying about what occurred directly afterwards, but Mr Tebulo was in the immediate vicinity to have seen and heard what happened; his version was undisputed and corroborated that of the plaintiff. There was nothing to undermine the quality, integrity, and independence, of the testimonies. Both the plaintiff and Mr Tebulo were credible and reliable witnesses; it is probable that the circumstances of the accident and the events thereafter were as they described.

¹ 2017 JDR 1913 (SCA).

² Road Accident Fund Act 56 of 1996.

³ *Septoo*, n 1 above, at paragraph [3].

[12] During the proceedings, counsel for the defendant suggested that the plaintiff had already entered the road and commenced to cross when the accident occurred. There is no evidence to that effect. In the absence of any facts to the contrary, the plaintiff's version that he had been standing on the side of the road, hitchhiking, must be accepted. The court has already found that he was a credible and reliable witness. His version, moreover, was supported by Mr Tebulo's version, which placed the plaintiff at the side of the road at the time of the collision.

[13] This led, in turn, to the issue of contributory negligence. Counsel for the defendant contended that hitchhiking at dusk, next to a main road used by speeding motor vehicles, created an obvious danger for the plaintiff. He ought to have foreseen the risk of injury and taken steps to avoid it. It was argued that the provisions of the Apportionment Act were applicable. To that effect, section 1(1)(a) of provides as follows:

'1. Apportionment of liability in case of contributory negligence. – (1)(a)
Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.'

[14] The subject of contributory negligence within the context of motor vehicle accident claims has been addressed extensively in the case law. The question that arises is when a defendant can invoke the provisions of the Apportionment Act to mitigate against the extent of potential liability involved. In *AA Mutual Insurance Association Ltd v Nomeka*,⁴ the erstwhile Appellate Division considered whether the provisions of the Apportionment Act applied in the absence of the defendant's having pleaded contributory negligence. The plaintiff, in this regard, asserted that the defendant

⁴ 1976 (3) SA 45 (A).

was precluded from relying thereon and the court was prevented from applying the provisions thereof, notwithstanding its finding that the plaintiff was partly at fault. Viljoen AJA stated as follows:

‘The weight of the decisions is, therefore, that provided the plaintiff’s fault is put in issue, an apportionment need not be specifically pleaded or claimed. This is the correct view, in my opinion.

The Act has become part of our law of delict. It has supplanted the former all-or-nothing effect of the common law in this respect. I agree... that upon a determination of issues properly raised in the pleadings the Court must give judgment in accordance with the imperative direction of section 1 of the Act.’⁵

[15] The decision stands.⁶ Subsequently, in *Ndaba v Purchase*,⁷ Hugo J found that:

‘...no allegation is made that the collision was caused by any negligence on the part of the Plaintiff. That being so it seems to me that the case resolved itself into a so-called one percenter and that no question of contributing negligence or apportionment of damages could arise. The Magistrate in his judgment referred to the case of *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (AD) but I think that he misunderstood that case. In that case it was held that it was not necessary for a Defendant to plead an apportionment of damages provided (and this is important), *provided* that the negligence of the Plaintiff had been placed in issue. In that particular case the plea in this regard read as follows:

⁵ At 55 D-E.

⁶ See, for example, *Ndaba v Purchase* 1991 (3) SA 640 (N); *Gibson v Berkowitz and another* 1996 (4) SA 1029 (WLD); and *Harwood v Road Accident Fund* 2019 JDR 1768 (GP). See, too, the discussion in Klopper HB, *The Law of Collisions in South Africa* (LexisNexis, 8ed, 2012), at 92 and 148; and Harms LTC, *Amler’s Precedents of Pleadings* (LexisNexis, 9ed, 2018), at 274.

⁷ See n 6 above.

- “(a) Defendant denies that the said collision was due to any negligent driving of the insured vehicle by the said Mrs Holdsworth and denies that she was negligent in the respects alleged or at all.
- (b) Defendant pleads that the collision was due solely to the negligent driving of the plaintiff himself he being negligent and at fault in one or more of the following respects...”

On that basis and because of the form of this pleading the Court held that a formal plea in the apportionment of damages was not necessary. The crux of the finding is found in the following passage at page 55:

“The weight of the decision is therefore that provided that Plaintiff’s fault is put in issue an apportionment need not be specifically pleaded or claimed. That is the correct view in my opinion.”⁸

[16] The correct time and place for the defendant to place in issue the plaintiff’s fault is at the stage of pleading. In doing so, as the court found in *Roma v Road Accident Fund*,⁹ the defendant sets out the basis for his or her (or its) case and shapes the nature of the trial proceedings that follow. If the defendant has not placed in issue any fault on the part of the plaintiff, specifically his or her (or its) contributory negligence in relation to the event that gave rise to a delictual claim, then the defendant cannot claim, later, the apportionment of damages.

[17] In *Harwood v Road Accident Fund*,¹⁰ Van der Schyff AJ held as follows:

‘It is trite that in trial proceedings parties must formulate their cases and the issues on which evidence must be led, in their pleadings.¹¹ A defendant cannot,

⁸ At 641G- 642B.

⁹ 2023 JDR 2403 (ECMA), at paragraph [23].

¹⁰ See n 6 above.

at the trial, rely on a defence, *in casu* sudden emergency, which is not pleaded. Neither can a plea of apportionment of damages be considered in the absence of specific allegations concerning the plaintiff's negligence.'¹²

[18] In the present matter, the defendant never pleaded contributory negligence on the part of the plaintiff. No allegation was made to the effect that the plaintiff failed to keep a proper lookout for passing motorists or similar. His fault was never placed in issue. The relevant portion of the defendant's plea merely stated that:

'The Defendant has no knowledge of the allegations made in these paragraphs, cannot admit or deny same and puts Plaintiff to the proof thereof.'¹³

[19] Counsel for the defendant conceded in argument that contributory negligence was never pleaded. Reference was made, nevertheless, to the decision in *Lekgothoane v Road Accident Fund*,¹⁴ where the court dealt with a claim for damages arising from an accident at a controlled intersection. The parties in that matter presented mutually destructive versions of what occurred, leading to Seima AJ's finding that they were equally liable based on contributory negligence, resulting in a 50% apportionment and an order to that effect.¹⁵ The case is, however, distinguishable. The defendant in *Lekgothoane* pleaded contributory negligence and presented evidence to that effect. That is not the position in the present matter.

[20] Consequently, in the absence of the defendant's having pleaded contributory negligence, the question of apportionment under section 1(1)(a) of the Apportionment Act does not arise. The defendant cannot rely thereon.

¹¹ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A), at 107C-H.

¹² *Harwood*, n 6 above, at paragraph [6].

¹³ The remainder of the plea was similar in character. It amounted to what counsel for the plaintiff termed a 'non-admission'. The distinction between a denial, as envisaged under rule 22(2) of the Uniform Rules of Court, and a non-admission is not uncontroversial. See *South African Railways and Harbours* 1981 (3) SA 1016 (C), at 1018E-F; *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C), at 417I- 418B; and *N Goodwin Design (Pty) Ltd v Moscak* 1992 (1) SA 154 (C), at 162F- 163I.

¹⁴ 2017 JDR 1843 (GP).

¹⁵ At paragraphs [19] and [20].

Relief and order

[21] Having considered the probabilities in relation to the evidence presented, the court is satisfied that the plaintiff and the person admitted to the Midlands Hospital on 10 September 2020 are one and the same. There is no dispute regarding his identity. The court is satisfied, moreover, that there was no evidence of contributory negligence on the plaintiff's part and that there was no basis upon which the defendant could have invoked the provisions of the Apportionment Act. The plaintiff has demonstrated on a balance of probabilities that his injuries were caused by the negligence of the driver involved. He has proved the essential elements of a delictual claim. Consequently, the provisions of section 17(1) of the RAF Act apply.

[22] Nothing turns on the legality or otherwise of the plaintiff's residence in South Africa as a Malawian citizen. In the recent decision of *Mudawo and others v Minister of Transport and another*,¹⁶ a full bench held that there was nothing in the text or purpose of the RAF Act and the context of the Road Accident Fund to conclude that the reference to 'any person' under section 17(1) should be restrictively interpreted to exclude illegal foreigners.¹⁷ This was never an issue in the present matter.

[23] The only remaining issue is that of costs. There is no reason why the general rule should not apply; the plaintiff, as the successful party, is entitled to his costs.

[24] The following order is made:

1. The defendant is liable for 100% of the plaintiff's proven damages regarding the motor vehicle accident that occurred on 10 September 2020 in the district of Graaff-Reinet.

¹⁶ 2024 JDR 1394 (GP).

¹⁷ At paragraph [46].

2. The remainder of the plaintiff's claim is postponed *sine die*.
3. The defendant is ordered to pay the plaintiff's party-and-party costs on the High Court scale, as taxed or agreed by the parties, such costs to include the costs of trial on 18 and 19 June 2024.
4. The defendant is ordered to pay interest on the above costs at the prevailing legal rate, calculated from the date of *allocatur* or agreement until the date of payment.

JGA LAING
JUDGE OF THE HIGH COURT

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Dates of hearing: 19 June 2024
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