

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

NOT REPORTABLE
CASE NO. 1266/2021

In the matter between:

ROJEAN VINCENCIO JACKSON

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NONCEMBU J

[1] The plaintiff has instituted a claim for damages arising from a motor vehicle accident which occurred on 16 July 2016 at or near Milner Street, Queenstown. In his particulars of claim, he alleges that he was driving a red Toyota Conquest with registration letters and numbers B[...] 7[...] E[...], when a white van came towards his vehicle on the left-hand side of the road as he was approaching a T-junction. In trying to avoid colliding with the said vehicle, he swerved his vehicle to the right-hand side out of its lane of travel and in the process his vehicle collided with the fence of a Girls High School nearby.¹

¹ Para 5, 5.1 - 5.2; Index p 7.

[2] He lost consciousness and only regained it at Queenstown Private Hospital from where he was later transferred to Frontier Hospital. He was unable to establish the identity (or description) of the said vehicle as it had apparently fled the scene (as he was informed).²

[3] He alleges that the insured vehicle was the sole cause of the collision in that the insured driver was negligent in one or more or all of the following ways:

- (a) He failed to keep a proper lookout;
- (b) He drove at a speed that was too high under the prevailing circumstances;
- (c) He failed to apply his vehicle's brakes, alternatively to apply the breaks properly, further alternatively, to apply the brakes timeously;
- (d) He failed to drive on his correct side of the road in that he drove straight at the plaintiff, causing the plaintiff to veer off the road and into the boundary fence of the Girls High School.³

[4] As a result of the accident the plaintiff suffered various bodily injuries as listed at paragraphs 8 and 9 of his particulars of claim.

[5] The defendant denied any knowledge of the allegations. At paragraph 3 of its plea, which pertains to paragraphs 5, 6 and 7 of the plaintiff's particulars of claim,⁴ the following is pleaded:

'The defendant admits jurisdiction and has no knowledge of the rest of the allegations contained in these paragraphs, does not admit same and puts the plaintiff to the proof thereof.'

² Para 5.3 – 5.4; Index p 7.

³ Para 7; Index p 8.

⁴ Dealing with *inter alia*, the collision and the alleged negligence of the unknown insured driver.

Issues to be decided

[6] The matter proceeded on liability only as the parties applied for a separation of issues before the commencement of trial, which order was duly granted. The only issue for determination before this Court is the negligence of the insured driver (the unknown driver) at time of the accident and the liability of the defendant.

[7] If the Court finds that the insured driver was negligent and that the defendant is liable, it must also determine if such liability can be reduced by the extent to which the plaintiff may have contributed to the negligence causing the accident.

[8] The legal framework governing the claim is set out below.

[9] Section 17(1) of the Road Accident Fund Act 56 of 1996 ('RAF Act') stipulates that the defendant is obliged to compensate a person (third party) for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. The defendant's liability is conditional upon the injury having resulted from the negligence or wrongful act of the driver.⁵ An evidentiary onus rests on the plaintiff to prove such negligence on a balance of probabilities.

[10] Contributory negligence on the part of the plaintiff can reduce such loss or damage in accordance with the provisions of section 1 of the Apportionment of Damages Act 34 of 1956 ('the Apportionment Act'), which states as follows:

'(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.

⁵ MP Olivier, '*Social Security: Core Elements*', *LAWSA (LexisNexis, Vol 13(3), 2ed, July 2013)*, para 163.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.'

[11] The above principles constitute a basic framework for the determination of the issue that lies at the heart of the present matter. The following paragraphs deal with the synopsis of the evidence presented at the trial.

Evidence at the trial

[12] The plaintiff testified in support of his claim and called two witnesses, a security guard who witnessed the accident and a police officer who attended to the scene of accident and compiled an accident report (AR report). A sketch plan contained in the AR report compiled by the police officer also formed part of the evidence. The defendant did not tender any evidence.

[13] The plaintiff's evidence was that on the day in question, around 9 o'clock in the evening, he was driving his vehicle entering Milner Street in Queenstown. He drove into Milner Street and proceeded down the road. On approaching a 4-way stop, a bakkie came onto his lane of travel speeding from his right-hand side. It had bright lights on, which were shining onto his eyes.

[14] He swerved to the right and lost control of his vehicle. As he lost control, the vehicle swerved onto the pavement on the left and went into a ditch. The school fence was on top of the ditch. He lost consciousness after hitting the ditch.

[15] He regained consciousness after a few minutes when he got help from a police officer who came and took him out of the vehicle. He went to the police at the scene and gave a statement of what happened, after that, he collapsed and only regained consciousness in hospital. He told the police that he was approaching a stop street

when a bakkie came onto his lane, speeding and flashing bright lights into his eyes. He swerved his vehicle, and the vehicle went straight into a ditch. As a result of the accident, he sustained the injuries listed in his particulars of claim.

[16] Under cross examination, he stated that he was about 100 meters from the stop street when the bakkie came. When asked to clarify what he did when he saw the bakkie coming, he stated that he swerved to the right and applied brakes, but his brakes failed. His vehicle fell into the ditch. He was travelling at 60km per hour before the accident.

[17] The second witness for the plaintiff was Marius Lowe who was working for Red Guard Security as an Armed Response Officer at the time. The upshot of his evidence was that he was attending to an alarm that had gone off at a house on Milner Street when he witnessed the accident on the night in question. He was getting out of his vehicle at about 100 to 150 meters from the T-junction, when he saw a white bakkie entering the T-junction. He then heard a crash at the end of the T-junction. He called his control room to call an ambulance and the police. Thereafter, he went about his duties.

[18] When questioned on how it came about that he came to testify in the matter, he told the Court that he knew the plaintiff and his parents, who had told him about the accident,⁶ hence he came forward as a witness.

[19] The third and final witness for the plaintiff was Sonwabo Xinindlu, a Sergeant in the South African Police Service (SAPS) (Sgt Xinindlu) who had attended the scene on the day of the incident and compiled an Accident Report (AR report).

[20] He testified that he is a member of the SAPS with nineteen (19) years in the service, currently stationed at the Queenstown Flying Squad Unit. At the time of the accident, he had been working with collisions for a period of four (4) years.

⁶ That the plaintiff was the person involved in the accident he had witnessed.

[21] On the night of the incident, he was on duty when he received a complaint of an accident on Milner Road via radio control. He proceeded to the scene with a colleague who has since passed on. At the scene he saw a red Toyota Conquest which was on the field with one occupant inside. The ambulance was also at the scene.

[22] He rushed to the car where he established that the occupant was injured. He tried to ask the occupant what had happened. The occupant just told him that his car brakes failed, thereafter he collapsed. The paramedics took him to hospital.

[23] He completed the AR report and took it to the police station. Subsequently, he felt some discomfort, which was coupled with curiosity about how the accident had happened. He was of the view that something did not add up about what he was told regarding the accident. After two weeks, he went to visit the plaintiff, who informed him that he was trying to avoid colliding with a white bakkie that had veered onto his side of the road when the accident happened. He also went back to the scene where he observed skid marks on the road, which to him indicated the involvement of a second vehicle in the accident.

[24] The plaintiff's case was thereafter closed. By agreement, the parties filed written submissions for their closing arguments.

The legal principles applicable

[25] It is a trite principle of evidence that in civil matters a plaintiff bears the onus of proving his or her case on a balance of probabilities. In *Principles of Evidence*,⁷ this is formulated as follows:

‘In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a “balance of probabilities” but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the

⁷ PJ Schwikkard (et al), *Principles of Evidence* (Jutastat e-publications, 5th Ed, 2023), at ch32-p 666.

probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.'

[26] In *Miller v Minister of Pension (Miller)s*⁸ Lord Denning expressed the civil standard of proof as follows:

'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not.'

[27] *Miller* was referred to with approval by the Supreme Court of Appeal in *Ocean Accident and Guarantee Corporation Ltd v Koch*.⁹

[28] In *Ninteretse v Road Accident Fund*¹⁰, an unreported judgment of the Gauteng Division, Raulinga J stated the following:¹¹

'... the plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the defendant to prove anything. Even in the instance where the defendant has not tendered evidence to rebut the evidentiary burden of the prima facie case presented by the plaintiff in this case, the plaintiff may not succeed with his claim depending on the nature and weight of the evidence so tendered.'

[29] As can be discernible from the authorities referred to above, even in the absence of evidence from the defendant, the plaintiff in the present matter bears the onus of proving on a balance of probabilities; that there was an accident on the day in question,

⁸ [1947] 2 All E.R. 372 (25 July 1947) at 374.

⁹ 1963 (4) SA 147 (A) p 157

¹⁰ (29586/13) [2018] ZAGPPHC 493 (2 February 2018).

¹¹ At para 28.

which was caused by the sole negligence of the unknown insured driver, as a result of which he sustained bodily injuries.

[30] What remains to be answered therefore, is whether it can be said that the plaintiff's version in this regard, is more probable than not. Whether it can be said that such a state of affairs existed.

Evaluation of evidence

[31] The substratum of the plaintiff's evidence is that he was faced with a sudden emergency when an unknown white bakkie which was flashing bright lights, drove towards his vehicle onto his lane of travel. He swerved his vehicle to avoid a collision, applied breaks which unfortunately failed, resulting in him losing control of his vehicle and landing into a ditch and colliding with a school fence nearby.

[32] As a point of departure, it must be recorded that the plaintiff did not present as a very impressive witness in court. As will become apparent below, following his evidence, including the chronology thereof, was a bit of a challenge. It also does not help matters that his version is fraught with challenges, some of which cannot be said to be of an insignificant nature. I deal with these below.

[33] A first hurdle which I find to be insurmountable, is that his particulars of claim pertaining to how the accident happened differ materially to his testimony in court. At paragraphs 5.1 and 5.2¹² of the particulars of claim the following is stated:

'5.1 The Plaintiff was driving on his side of the road and approaching a T-junction stop sign, he observed a motor vehicle driven by the insured driver coming towards his motor vehicle at speed *from the left-hand side*. (own emphasis)

¹² Index p7.

5.2. As a result, the Plaintiff, in order to avoid a collision therewith, swerved his motor vehicle to the right-hand side *out of the line of travel of the white bakkie* and collided with the fence of the Girl's High School nearby.' (emphasis intended)

[34] In his testimony in court his version was that the insured vehicle was approaching from his *right-hand side*, and he swerved to the right to avoid the collision. (emphasis intended) He even illustrated the direction of the insured vehicle (from his right-hand side) on the sketch plan that was shown to court. Under cross examination he was taken to task on how he could swerve to the right, towards the danger, in trying to avoid a collision, if he was not himself negligent. He could not give a satisfactory answer.

[35] A second challenge is that the plaintiff testified that he told the police at the scene about how the accident happened; that he was approaching a stop street when a bakkie came onto his lane speeding and flashing bright lights into his eyes. He swerved and went straight into a ditch. He then collapsed afterwards and regained consciousness in hospital. Interestingly, this is not what is reflected on the AR report under the description of how the accident happened, which report according to Sgt Xinindlu's evidence, was completed at the scene based on what he was told by the plaintiff before he collapsed.

[36] In the AR report under the heading 'BRIEF DESCRIPTION OF THE ACCIDENT' the following is recorded: 'It is alleged that mv/A was travelling straight when it loose brake systems and bump the pavement and fence of Queens.'

[37] This is significant because earlier on during the plaintiff's examination in chief, an impression was created that he had actually gone to the police station to report the accident. It was only when he was asked to clarify this, that it became clear that he had told the police who were at the scene what had happened.

[38] This aspect also raises another dynamic to the plaintiff's version, in that according to Sgt Xinindlu, he got two reports from the plaintiff (on how the accident

happened), the first one being the one he completed on the AR report at the scene of the accident, and the second one being the one he got when he interviewed the plaintiff again after two weeks. A factor which the plaintiff makes no mention of in his evidence. I now turn to deal with the evidence of Sgt Xinindlu's.

[39] His evidence is even more of a conundrum than that of the plaintiff. Firstly, his evidence in court on what he was told by the plaintiff at the scene regarding how the accident happened differs to what he recorded on the AR report. Contrary to the full statement recorded in the AR report (see para 36 above), his evidence in court was that the plaintiff only told him that the vehicle's brakes failed, after which he collapsed.

[40] His explanation for these two different statements was that he felt discomfort after submitting the report at the police station as he had an inkling that something did not add up. This, coupled with an element of curiosity, led to him visiting the complainant and the scene again after two weeks, when he got the second statement and observed skid marks on the road. He could not alter the AR report as it had been taken by the traffic department.

[41] This explanation, however, does not resolve the problems in his evidence. If anything, it leaves one with even more questions than answers.

[42] By way of an example, it is not in dispute that the accident happened on 16 July 2016 around 9 pm, the same day that he attended the scene. His testimony in court was that he completed the AR report at the scene, from information he received from the plaintiff, who collapsed without giving him full details of the accident. However, the AR report is dated 17 July 2016 and reflects that it was signed on the same day (17 July) at 22h00 by Sgt Xinindlu. This then begs the question of when the aforementioned discomfort and curiosity arose, because evidently, on the document itself a whole day lapsed before he could complete/sign and submit the report. Which shows that if he wasn't happy with the information he had received he could have held it back until the information was verified.

[43] Furthermore, the AR report contains other information which in my view, could have only been obtained from the plaintiff. No evidence or clarification was tendered by Sgt Xinindlu, the compiler of the report, in this regard, notwithstanding that according to his evidence, the plaintiff collapsed without providing full details of the incident.

[44] As to how the personal details of the plaintiff (recorded as driver A) which include his names, ID number, home and work addresses ended up being on the report he compiled remains a mystery. The AR report also indicate that only one (1) vehicle was involved in the accident¹³. As to why he would record such information when he never received same from the plaintiff, or from anyone else at the scene is another mystery.

[45] Mr Rusi for the plaintiff, sought to argue in his submissions, that the 'incomplete' AR report does contain an indication of the presence of a second vehicle in the form of skid marks which are shown on the sketch the witness was caused to narrate to the Court.

[46] There are two problems with this argument. Firstly, as I have aptly demonstrated above, *prima facie* the document itself, the AR report is quite complete with far more information than the witness testified about in court (as having obtained from the scene). Secondly, the evidence of this witness was that he only saw the skid marks on his second time of visiting the accident scene, which was more than two weeks after the accident.

[47] Therefore, without more nothing links the skid marks to the accident *in casu*. For all we know, they could have happened at any other time after the accident had long happened. Furthermore, he visited the scene on the night of the accident, and yet he gave no evidence that he saw skid marks on the day.

¹³ Page 1 of the AR report.

[48] Lastly on this witness, one other aspect which raises one's eyebrows regarding his version is the peculiar interest he seemed to have developed over this particular accident. On his own version, this was a single vehicle accident with no fatalities, which meant that no docket was opened and by extension no investigation was to follow.

[49] He also confirmed that the AR report was generally completed for the vehicle owner's insurance purposes. And yet, his curiosity¹⁴ and interest in the matter drove him to the extent of going to interview the plaintiff and visiting the scene a second time weeks after the incident, all for information he did not know what he was going to do with, because he could not correct the AR report, and he had no docket to put it in.

[50] His duties at the time of the accident entailed attending to minor complaints and accidents. Which meant that even if there were investigations to follow in the matter, that would not have been his function but that of an investigating officer.

[51] But for having attended the scene of the accident on the day in question, the totality of the evidence of Sgt Xinindlu is somewhat of an enigma. It seems to have been carefully crafted and altered for the purpose of fitting in with the current proceedings. Overall and considered in the totality of the evidence in this matter, his evidence seems highly improbable and demonstrates all the hallmarks of a recently fabricated story. I reject it as false.

[52] In conclusion, I now deal with the evidence of the second witness for the plaintiff, Marios Lowe. In my view this witness's evidence did not add much value to the plaintiff's case. Other than seeing a white bakkie entering the T-junction, he did not see how the accident happened except for hearing a crash at the end of the T-junction. Therefore, the inference that his evidence was merely crafted to corroborate the plaintiff's version of the existence of a second vehicle at the accident scene becomes irresistible. This Court is also not lost to his inherent bias in the matter, given his knowledge of the plaintiff's family and how he came to be involved in this trial.

¹⁴ He was quite emphatic about his curiosity driving him to follow up on the matter.

[53] Nevertheless, given the nature and the poor quality of the plaintiff's evidence in this matter as demonstrated above, the evidence of this witness does nothing to assist the Court otherwise.

[54] Under these circumstances, even absent any evidence from the defendant in the matter, I cannot find that the plaintiff's version is more probable than not. Currently there are three versions of how the accident happened before this Court. All these being from the plaintiff. On the particulars of claim the insured vehicle approached from his left-hand side, and to avoid a collision he veered to the right and out of its way, and in the process lost control of the vehicle as his brakes failed.

[55] In his evidence in court the insured vehicle approached from his right-hand side. He veered his vehicle to the right (towards the danger), lost control of his vehicle as his brakes failed and landed in a ditch.

[56] According to the AR report he was proceeding straight (towards the T-junction) when his brakes failed, he bumped the pavement and the fence of Queens (a school nearby).

[57] These contradictions are very material and go to the very core of his case. The situation is compounded by the two witnesses he called to corroborate his version, especially Sgt Xinindlu with his thwarted half-attempt at resiling from what he recorded in the AR report at the scene.

[58] Considered in totality, the plaintiff's different versions and the evidence presented on how the accident happened, render it highly unlikely that the state of affairs sought to be proved existed.

[59] Under these circumstances, I cannot find that the plaintiff has discharged the onus resting upon him of establishing on a balance of probabilities, that there was an

accident which was caused by the sole negligence of the insured driver. He has failed to prove his claim on a balance of probabilities; accordingly, his action cannot succeed.

Order

[60] In the result, the following order is made:

The plaintiff's claim is dismissed with costs.

**V P NONCEMBU
JUDGE OF THE HIGH COURT**

Appearances:

Counsel For the plaintiff:

L Rusi

Instructed by:

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For the defendant:

Ms V Futshane

Instructed by:

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Gqeberha

Dates of hearing:

18 April 2024 and 13 May 2024

Date of judgment:

15 October 2024