IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable
Case No.: 4358/2018

In the matter between:

MOKONE MOLAOA Plaintiff

and

ROAD ACCIDENT FUND Defendant

Coram: **Van Rhyn J**

Heard: **11 September 2024 and 25 October 2024**

Delivered: **14 January 2025**

Summary: **Motor vehicle accidents - claim for compensation – collision on incorrect side of road – unknown insured driver overtaking – insured driver - sudden emergency – liability – no other version-available - principles restated – plaintiff not negligent.**

ORDER

1. The defendant is liable to pay 100% (One Hundred Percent) of the plaintiff's proven or agreed damages.

2. The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action, including the costs of counsel on Scale B, which costs shall include the costs attendant upon drafting the heads of argument.

JUDGMENT

[1] The plaintiff, Mokone Molaoa born, on 14 August 1995, issued summons against the defendant, the Road Accident Fund for payment of damages arising from a motor vehicle accident which occurred at approximately 15h00 on 27 March 2017 at Mzala Molise Street, Bothsabelo in the district of Bloemfontein. The collision occurred between motor vehicle bearing registration number DRY […], driven by F J Mohale, ('first insured driver'), involving a motor vehicle being a red Audi driven by an unknown driver (second insured driver) and a motor vehicle bearing registration number CNN […], driven by the plaintiff.

[2] The plaintiff alleges in paragraph 4 of the particulars of claim that the sole cause of the collision was due to the negligence of the first insured driver, alternatively the unknown second insured driver, alternatively the first and second insured drivers having been negligent in one or more of the following respects:

> "4.1 They travelled at a high speed under the circumstances;
> 4.2 They omitted to keep a proper lookout;
> 4.3 They omitted to keep their motor vehicles under proper control;
> 4.4 They failed to comply with the statutory traffic rules;
> 4.5 They failed to avoid an accident when by the exercising of reasonable care, they should and could have done so;
> 4.6 They failed to adequately apply the controls and other mechanisms of their motor vehicles in such a way that it does not pose a threat to other road users;
> 4.7 They failed to adequately consider the presence, movement and clearly visible movements of the other motor vehicle;
> 4.8 They failed to consider the rights of other road users.'

[3] The defendant deny that the insured driver was negligent and it is alleged that the accident was caused as a result of the sole negligence of the plaintiff in that he, inter alia, travelled at a high speed under the circumstances, omitted to keep his motor vehicle under proper control, failed to keep a proper lookout and failed to avoid an accident when by exercising reasonable care he could have done so. The defendant pleaded in the alternative that should it be found that the insured driver was casually negligent, then and in that event the accident was caused by the contributory negligence of the plaintiff and that any damages which the plaintiff may

have suffered fall to be reduced in accordance with the provisions of the Apportionment of Damages Act 34 of 1956. No mention is made of the second insured driver, being the unknown driver of the Audi motor vehicle in the defendant's plea.

[4] The matter proceeded in respect of the merits of the action only, the parties having agreed to separate the issues in terms of the provisions of Rule 33(4) of the uniform Rules of Court. The plaintiff testified that on 27 March 2017, at approximately 15h00, he was driving from Fairways Mall in a westerly direction in Mzala Molise Street, Botshabelo to his home, also situated at Botshabelo. The road was a tarred road with two single lanes, one in each direction. He approached a T-junction and slowed down with the view of turning to his right. A vehicle was approaching from the opposite direction. He described the vehicle as a red taxi or Iveco ('Iveco'). He explained that he was stationary and waiting for the Iveco to pass. He noticed an Audi A4 ('Audi') coming from behind the Iveco, overtaking the Iveco and entering his lane of travel. He decided to 'quickly' turn right into the adjoining gravel road to his right at the T-junction in an endeavour to avoid a collision with the oncoming Audi. He was waiting approximately ten meters away from the T-junction. The plaintiff testified that if he had not turned right, he would have collided with the oncoming Audi. He was unable to give an estimation of the speed at which the Audi was travelling. The Audi was behind the Iveco and he was unable to say how far away from the T-junction the Audi was when it appeared in his lane of travel. The Iveco was still approaching the T-junction, but not far away from the T-junction when the Audi overtook the Iveco. The Audi did not stop after the accident occurred but left the scene.

[5] During cross-examination the plaintiff explained that he was travelling at a speed of 65 km/h. He was alone in the vehicle. On his right-hand side there were houses next to the road and on the left side, gravel and a steep downward slope. He was waiting approximately ten meters away from the T-junction to turn to the right, while waiting for the Iveco to pass. The plaintiff, with reference to the sketch plan of the accident contained in the merits bundle, explained how the accident occurred. An objection was raised on the basis that the plaintiff was not the author of the same. The plaintiff proceeded to draw a rough sketch plan of the accident which was

admitted into evidence as exhibit ‘A’. According to the plaintiff the point of impact occurred in the opposite (oncoming) lane of traffic, approximately in the middle of the T-junction of the gravel road to which the plaintiff intended to turn into. The plaintiff testified that he collided with the Iveco on its left front side in a head-on fashion. The damage to his vehicle was also at the front thereof. He had not yet turned to the right but was travelling in the opposite lane when the accident occurred.

[6] The plaintiff testified that he noticed the Audi was speeding when it appeared from behind the Iveco. He indicated that if he had swerved to the left, given the gravel downward slope, the vehicle would have rolled over down the slope. A street light was positioned next to the road to his left. He used to travel on the same route regularly on Sundays for a period of two to three years prior to the accident. He did not flash the lights or hoot to warn the Audi since it appeared suddenly and caused him to be ‘frightened’. According to the plaintiff the indicator to the right was flashing. At the time of the accident he only possessed a learner’s driving license. It was put to the plaintiff that there was no unknown vehicle travelling in his lane prior to the accident. It was further put to the plaintiff that he was driving on the barrier line, travelling at a high speed and lost control of his vehicle and hence collided with the Iveco. According to the defendant the point of impact was not at the T-junction but actually before he had reached the T-junction on the incorrect side of the road. The plaintiff denied all the statements put to him during cross-examination but confirmed that the accident occurred on his incorrect side of the road. This concluded the evidence on behalf of the plaintiff and the plaintiff closed his case.

[7] The defendant called Sergeant M E Lekoro who is employed by the South African Police Services at the Community Service Centre at Botshabelo. At the time of the incident during 2017 she had the rank of constable. She attended the scene of the accident and compiled the Accident Report Form. Her name and signature appear on the last page of the Accident Report Form. With her arrival, she found two vehicles and an ambulance at the scene. She met with Mr Mohale, the first, insured driver, and requested his driver’s license. The plaintiff was attended to by the paramedics while in the ambulance. She obtained the plaintiff’s license and identity document from the paramedics. According to her observation the two vehicles, the Toyota Conquest, driven by the plaintiff, and the Iveco collided head on and were in

the same lane of traffic, the one facing west and the other facing in an easterly direction. According to her observation the plaintiff's vehicle was in the Iveco's lane of travel. She drew the sketch plan according to what she observed at the scene. The point of impact was not at the T-junction, it was further away from the T-junction. Sergeant Lekoro did not observe any skid marks on the scene. The version contained in the Accident Report Form was obtained from the first insured driver. She did not obtain any version of how the accident occurred from the plaintiff due to him being injured and attended to by the paramedics. On the right- hand side of the road there were no houses just an open veld. On the left side of the road there were houses and a street light. There is no steep slope next to the road.

[8] During cross examination it was established that the Sergeant Lekoro was unable to indicate whether the houses were situated on the north or south side of the road as she was unable to distinguish the 4 directions of a compass. It was put to Sergeant Lekoro that the plaintiff's version that the houses were situated on the right-hand side of the sketch was not disputed. It was furthermore not disputed that a steep downward slope was situated on the left side of the road as indicated by the plaintiff, whereas her testimony was in direct contrast to the version presented by the plaintiff. The version presented by the plaintiff that a street lamp is situated next to the road on the left- hand side was also not disputed. Sergeant Lekoro explained that Section A is situated on the left-hand side as indicated on the sketch plan contained in the Merits Bundle. She maintained that the street lamp was not situated on the side of the open veld but were on the side of the houses. Sergeant Lekoro conceded during cross-examination that the first insured driver informed her where the point of impact was. According to the sketch plan drafted by Sergeant Lekoro, the point of impact is in the lane of the first insured driver, but before the plaintiff arrived at the T-junction, in other words, to the east of the T-junction. This concluded the evidence on behalf of the defendant.

[9] It is trite that the onus rests on the plaintiff to prove negligence on a balance of probabilities on the part of the first insured driver or the unidentified second insured driver, or both for the defendant's liability to be established. I consequently have to determine whether the drivers of the insured vehicles were negligent in causing the accident. The first insured driver did not testify during the trial. He had

passed away prior to the hearing of the matter. His death is not related to the accident. The plaintiff relied upon the legal principles enunciated in *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA), in which judgment it was held as follows at paras [9] and [12]:

> "[9] It is clear from the evidence that the respondent was plunged by the insured driver's negligence into a situation of sudden emergency, that he had no more than a second within which to escape that emergency, and that he effectively was given a choice between facing the danger, or veering away from it and hoping that it would not follow him. He did the latter.
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> [12] When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances."

[10] On behalf of the plaintiff it is argued that he was in a situation of sudden emergency caused by the oncoming Audi. He found himself in a situation of imminent danger, not of his own doing, when called upon to react thereto. It therefore cannot be said that he, by possibly taking the wrong option, acted negligently. On behalf of the defendant, it is contended that the hearsay evidence as contained in the Accident Report Form be admitted in terms of the provisions of s 3 (1)(c) of the Law of Evidence Amendment Act 42 of 1988 ('Law of Evidence Act'), alternatively s 34 of the Civil Proceedings Evidence Act 25 of 1965 ('Civil Proceedings Evidence Act') on the basis that it is in the interest of justice. During the testimony of Sergeant Lekoro, when evidence regarding the version of the first insured driver was presented, the plaintiff objected to the presentation of such evidence. It is therefore contended that the version pertaining to how the accident occurred, as contained in the Accident Report Form, obtained from the insured driver, be admitted as evidence. The first insured driver's version is that a head on collision occurred when the plaintiff crossed over to the incorrect side of the road. There is no mention of an unknown driver or Audi overtaking the Iveco. It is argued

on behalf of the defendant that that the first insured driver would have informed Sergeant Lekoro if any such vehicle existed and contributed to the causing of the accident.

[11] Hearsay evidence is only admissible in very limited circumstances and is presumed to be inadmissible unless proved otherwise. The Law of Evidence Act 4 defines hearsay evidence as: evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.[1] The contents of the police report regarding the description of the accident therefore amounts to hearsay evidence. The sketch plan drawn by Sergeant Lekoro is similar to the sketch plan drawn by the plaintiff apart from for the point of impact. In this regard Sergeant Lekoro was informed by the first insured driver where the point of impact occurred. This amounts to hearsay evidence.

[12] During argument and as contained in her heads of argument, Ms Banda, appearing on behalf of the defendant, applied for the hearsay evidence to be admitted. The defendant relies upon the principles applied in V*an Willing A and another v The State* (109/2014) [2015] ZASCA 52 (27 March 2015) and *S v Shaik and Others* 2007 (1) SACR 247 (SCA) at paras 170 -178 for support that the hearsay evidence be admitted on the basis that the interest of justice demands its reception. However, the plaintiff having objected against the leading of hearsay evidence, was not cross-examined on the version as contained in the Accident Report Form. Ms Banda did not apply for the hearsay evidence to be admitted during the trial in accordance with the provisions of s 3(1) of the Law of Evidence Act and/or s34 of the Civil Proceedings Evidence Act. I have duly considered her arguments. However, when I have regard to the factors set out in s 3(1)(c) of the Law of Evidence Act, there is in my opinion no basis upon which it is in the interest of justice to admit the said contested evidence. The case law relied upon by the defendant, that the hearsay evidence should be allowed by the court, is distinguishable from the facts in the matter at hand and cannot avail the defendant. Even if the description of the accident and the sketch plan in the Accident Report Form were to be admitted into evidence, it will carry absolutely no probative value in the circumstances. It will be

[1] The Law of Evidence Amendment Act 45 of 1988 s 3(4).

severely prejudicial to the plaintiff to admit it into evidence and expect him to have an explanation for the said version, in circumstances where the defendant relied upon the version presented by the first insured driver to compile the said report. The said version, apart from the point of impact, in any event, is not in contrast with the version presented by the plaintiff. It is the existence of the Audi that is not mentioned in the said report. I consequently find that the description of the accident and the accident-sketch contained and depicted in the Accident Report Form, constitute inadmissible hearsay evidence and is to be excluded from the evidence to be considered for the adjudication of this matter.

[13] The plaintiff's evidence pertaining to the steep downward slope to his left and the street light situated next to the road to his left- hand side were not disputed during cross examination. His version regarding the houses to his right was also not disputed. After much confusion caused by the inability of Sergeant Lekoro the explain to the court on which side of the particular road the street light and houses are situated, it was however established that the plaintiff and Sergeant Lekoro are in agreement that the houses are indeed situated to the northern side of Mzala Molise Street, being the right- hand side of the plaintiff. However, the site of the street light and the presence of a downward slope to the left remain in dispute. It is not difficult to appreciate the clear prejudice that the plaintiff stands to suffer if the testimony regarding the level surface on both sides of the road and the location of the street light, presented by the defendant, are accepted when the defendant's version in this regard was not put to the plaintiff during cross-examination. It is apposite to quote from the *locus classicus* on cross-examination, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC):

> '[61] The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule, it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the

party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealings with witnesses. It is still current in England and has been adopted and followed in substantially the same form in the commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.' [2]

[14] The plaintiff was unable to provide an estimation of the travelling speed of the oncoming Iveco or the Audi. He was unable to give an estimation of the distance between his vehicle and that of the oncoming Iveco or the Audi when he first noticed the Audi. It is therefore not possible to calculate how much time the plaintiff had to react and to take evasive action. It is generally accepted that reaction time of the average driver is between three quarters of a second and one second. On the other hand, the plaintiff did not contradict himself when he testified and explained that he is unable to give an estimation of the distances and the travelling speed of the other vehicles. He was stationary at the time when he noticed the oncoming Audi. According to his observation the Iveco was still some distance away. He was truthful when he explained that he was not in possession of a driver's license at the time of the accident. I further take note of the fact that he was a young man of 22 years when the accident occurred. Bearing in mind the absence of evidence to contradict his version, it is not possible to reject his version regarding the unidentified second insured driver in the Audi which overtook the Iveco and caused the plaintiff to find himself in a situation of imminent danger.

[2] President of the Republic of South Africa v South African Football Union at paras 61-65.

[15] In *Ntsala v Mutual and Federal Insurance Co Ltd* 1996 (2) SA 184 (T) the court held as follows:

> 'Where the driver of a vehicle suddenly finds himself in a situation of eminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger the driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision. Van der Heever J (as he then was) in *Cooper v Armstrong* 1939 OPD 140 at 148 said the following:
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> > "Where a plaintiff is put in jeopardy by the unexpected and patently wrongful conduct of the defendant, it seems to me irrational meticulously to examine his reactions in the placid atmosphere of the Court in the light of after-acquired knowledge; to hold that, had he but taken such and such a step, the accident would have been avoided, and that consequently he also was negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others." In this instance I am of the opinion that, if the driver of the insured vehicle was in fact acting in a sudden emergency, he took the proper and obvious course by swerving to the left. If he then loses control of his vehicle or if in panic he swerves back onto the tarmac and a collision follows, he cannot be faulted and held to be negligent. There is therefore no merit in this submission by counsel for the plaintiffs."[3]

[16] Given the evidence presented by the plaintiff as to the hazards to his left-hand side and the fear of the vehicle rolling down the steep downward slope, it cannot be gainsaid that no reasonable man would have acted as the plaintiff had under the prevailing circumstances. Sergeant Lekoro seemed unsure of her version regarding the location of the street light and the houses. Notwithstanding her inability to explain where north and south are in relation to the scene of the accident, she nevertheless indicated in the description of the accident in which direction each of the drivers

[3] *Ntsala v Mutual and Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 192G – 193A

travelled prior to the incident, being that the plaintiff travelled in a westerly direction and the first insured driver in an easterly direction. This actually confirms her version that she obtained the description of how the accident occurred from the insured driver as she is undoubtedly unable to provide such information from her own observations at the scene. Sergeant Lekoro was not present when the accident occurred and did not obtain a version form the plaintiff at the time of the incident. The version presented by Sergeant Lekoro should therefore be rejected.

[17] Ms Banda contends that it is highly improbable for the plaintiff to collide head on with the insured vehicle if he was executing a turn to his right. I do not agree with the contention on behalf of the defendant that the plaintiff was in the process of executing a turn to his right. The plaintiff testified that he swerved to the right in an attempt to avoid a collision with the oncoming Audi. He then continued to drive on the incorrect side of the road, straight ahead to the T-junction. He was not in the process of turning to the right when the collision occurred. The damage to the vehicles confirms his version of the events. He attempted to reach the T-junction ahead of the oncoming Iveco and obviously misjudged the speed of the Iveco and the distance to the turn-off to the right having been plunged into a situation of a sudden emergency. Had the Audi no appeared from behind the Iveco, there would have been no logical reason for the plaintiff to have crossed over into the lane of oncoming traffic. On the plaintiff's version he was aware of the oncoming Iveco. I therefore accept the plaintiff's version that he endeavoured to avoid a collision with the Audi, travelling on the incorrect side of the road and approaching the plaintiff at a high speed, by swerving to his right. In my view, the circumstances were such that the plaintiff's decision to swerve to the right did not amount to negligence but at the most to an error of judgment. Since the evidence of the unknown insured driver of the Audi could not have been presented and the first insured driver of the Iveco had passed away since the accident, there is no explanation before court why the driver of the Audi veered into the lane of the plaintiff. I consequently find that the unknown second insured driver of the Audi was negligent by having veered into the lane of travel of the plaintiff, which negligence caused the accident. In the circumstances the defendant failed to prove any contributory negligence on the side of the plaintiff in causing the accident.

[18] I consequently make the following order:

1. The defendant is liable to pay 100% (One Hundred Percent) of the plaintiff's proven or agreed damages.

2. The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action, including the costs of counsel on Scale B, which costs shall include the costs attendant upon drafting the heads of argument.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

Appearances

On behalf of the Plaintiff:	Adv. A Sander
Instructed by:	Du Plooy Attorneys Bloemfontein
On behalf of the Defendant:	Ms P Banda
Instructed by:	State Attorneys, Bloemfontein