IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: MTHATHA)

CASE NO: CC 3145 / 2022

In the matter between

LUYANDA MDA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

NGOQO AJ

[1] This is an action for damages arising out of a motor vehicle accident that occurred on the 19th February 2021 on the N2 road near Jojweni Location between Mthatha and Qumbu, Eastern Cape. A white Isuzu bakkie with registration number H[...] driven by the plaintiff collided with a grey Toyota bakkie with registration number N[...], driven by an insured driver who passed on immediately after the collision.

[2] At the beginning of the trial the parties agreed to separate the issues relating to merits from the issues relating to quantum in terms of Rule 33(4).[1] That then left the court with only one issue for determination; 'whether the insured driver was the sole cause of the accident or whether there was any contributory negligence from the plaintiff.'

[3] It is trite law that for the plaintiff to succeed with his claim against the defendant he must establish 1% negligence against the insured driver. Once the plaintiff proves the occurrence giving rise to an inference of negligence on the insured driver, the latter must produce evidence to the contrary or take a risk that judgment is given against him.

[4] The plaintiff testified that he instituted a claim against the Road Accident Fund (RAF). He testified that during the morning of the 19th February 2021 at around 05:00 to 06:00, he was driving on N2 from Tsolo to Mthatha, taking a child to school. He was with Nceba who was sitting in the front seat and a child who was sitting in the back seat. He was driving a white Isuzu bakkie with registration number H[...].

[5] It was misty and the road surface was wet. As he passed the first turn near Jojweni, going down approaching the second turn, a silver grey VVTI Toyota bakkie appeared approaching him from the front. However, due to the fact that it was misty, he was not able to see it while at a distance. This vehicle was encroaching on his lane, straddling the middle lane and the plaintiff's lane.

[6] The plaintiff testified further that on his left, there were rails. He therefore could not swerve to his left to avoid the collision between his vehicle and that of the insured driver. As the vehicle of the insured driver was already too close and partly on his lane when he spotted it, the only option he had was to brake. However, the vehicles still collided with each other.

[7] The vehicle of the plaintiff was hit on the front, on the driver's side. After the collision the plaintiff's vehicle turned, crossed the road in the middle of the road,

[1] Uniform Rules of Court (Updated to 20 September 2024)

which is the fast lane on the side of the on-coming traffic. The Toyota bakkie which had collided with his vehicle went around his vehicle and ended up on top of the rails which were on the plaintiff's left before the collision.

[8] During cross-examination by Mr. Thaver, the plaintiff stuck by his version and did not contradict himself. He testified during cross-examination that the incident happened fast and on his side of the road. He testified that his vehicle did not stop immediately after he stepped on the brakes and ended up colliding with the insured driver's vehicle on his side of the road. Subsequently, his vehicle's fender and door on the right-hand side were damaged.

[9] No further evidence was adduced by the plaintiff. At this stage the representative of the defendant applied for an absolution from the instance. Mr. Thaver cited the absence of documentary proof and absence of objective evidence as reasons for this application. This application was opposed by the legal representative of the plaintiff, Mr. Badli. He submitted that there was enough evidence to substantiate the claim of the plaintiff on record. It suffices to say that the application was dismissed by this court as having no merit.

[10] The defendant applied to open its case and to adduce the evidence of Mkhuseli Mcdonald Khuthu. Mr. Thaver in support of his application submitted that the plaintiff had provided the defendant with documents, during the discovery process, which the plaintiff was now not using, placing the defendant at a disadvantage. Mr. Badli raised an objection to that stating that he did not know the nature of the evidence to be called and whether calling the person will comply with rule 36 (9) and (10) of the uniform rules.[2]

[11] Rule 36 (10) (a) provides that:

> 'No person shall, save with the leave of the court or the consent of all the parties, be entitled to tender any plan, diagram, model, or photograph unless such person shall not more than 60 days after the close of the pleadings have

[2]. Supra

delivered a notice stating an intention to do so, offering inspection of such plan, diagram, model or photograph and requiring the party receiving notice to admit the same within 10 days after receipt of the notice.'

[12] Having considered the provisions of this rule and having considered the argument by Mr. Thaver, this court decided that there is merit in Mr. Thaver's argument. This court also decided that in the interest of justice it would be unfair to deprive the defendant of the opportunity to adduce evidence in support of its case. This court decided to allow the defendant to call its witness as the plaintiff would not suffer any prejudice which cannot be addressed at a later stage.

[13] Mr. Khuthu testifying for the defendant told the court that he is an employee of RAF. At the time of his testimony he had been working for RAF for three years as a claims-investigator. Prior to joining RAF, he was employed by the Department of Transport for ten years as an investigator.

[14] He testified that he was given an instruction to investigate the merits of the plaintiff's claim. He could not remember who gave him the instruction. He testified that he was given documents in a form of a file which also contained a police docket with statements of police who attended the accident scene, plaintiff's statement, an accident report, hospital records and correspondence from the handler.

[15] Mr. Khuthu further testified that he verified the authenticity of the police docket and the police station from which it came. The docket was confirmed to be correct. He subsequently read the statement of the plaintiff which was a very short warning statement. The purpose was to establish whether an investigating officer had questioned the plaintiff and to find out where and when the statement was taken. He was able to establish that the plaintiff's statement was taken a couple of months after the accident.

[16] Mr. Khuthu further testified that he subsequently consulted with the plaintiff whom he asked to clarify his statement. According to Mr. Khuthu he was told by the plaintiff that his vehicle was on its lane. The other driver straddled the lanes and moved to the plaintiff's lane. The plaintiff further told him that he could not control his

vehicle as he was close to the barrier line. He further testified that the plaintiff told him that he bumped the deceased insured driver's vehicle on the fender and driver's door. Mr. Khuthu further referred to the police sketch plan which he later conceded was inaccurate.

[17] In his argument before judgment, Mr. Badli submitted that what the court had to ask itself is whether, on a balance of probabilities the plaintiff has succeeded in proving that the defendant is liable for all the damages that he has suffered as a result of the collision between his vehicle and that of the deceased insured driver. He further submitted that there was no evidence on record to suggest contributory negligence on the part of the plaintiff. He asked the court to find in favor of the plaintiff.

[18] Arguing for the dismissal of the plaintiff's claim or apportionment of damages, Mr. Thaver submitted that the plaintiff's claim was fraught with inconsistencies. He submitted that the plaintiff was unable to recall the lanes upon which each party was driving. He submitted that the plaintiff contradicted himself as to where the collision would have happened and gave different versions throughout his testimony. Mr. Thaver also relied on the sketch plan of the incident which, he submitted, proved that the plaintiff was an unreliable witness. He asked the court to consider an apportionment of damages in accordance with the Apportionment of Damages Act.[3] In this regard, Mr. Thaver submitted that the plaintiff had testified that he had seen the insured driver who had encroached on his lane. He tried to brake but could not stop his vehicle nor the collision from occurring. There was no indication whether the plaintiff had flashed his lights or hooted at the insured driver to get his attention.

[19] The plaintiff gave his evidence in a clear and chronological manner. As far as this Court is concerned, he gave his evidence in a such a way that it was easy for everyone to understand what had happened immediately before and after the collision. He was consistent about the fact that the collision occurred on his side of the road. At no point did he seem to be clutching at straws about what happened that day.

---

[3] Act 34 of 1956

[20] The same cannot be said about the evidence of the defence witness. Firstly, he could not tell the Court who instructed him to investigate how the accident occurred. Secondly, he was not at the scene of the accident when it occurred or immediately thereafter. Thirdly, he relied on a sketch-plan compiled by the police which he conceded was inaccurate. Fourthly, his whole evidence is based on hearsay, save for what he alleges he was told by the plaintiff. Lastly, the defence witness, more than anything, seems to have misunderstood the plaintiff with regard to the damages that were caused to the plaintiff's vehicle.

[21] During cross-examination the plaintiff testified that his vehicle was damaged in the front. Its fender and door on the driver's side were damaged. This issue was not in any way challenged by Mr. Thaver during cross-examination of the plaintiff. It is, therefore, unfathomable that the plaintiff would have told Mr. Khuthu anything in the contrary. The less I say about Mr. Khuthu's evidence, the better it is for everyone, particularly the defendant's case.

[22] The argument by Mr. Thaver that the plaintiff's evidence is fraught with inconsistencies has no factual basis. This Court holds a different view as it can be seen herein above. The argument that the plaintiff ought to have hooted, flickered his lights and stopped in time is also not plausible. It has to be remembered that the weather was bad on the day and misty. In his uncontested evidence, the plaintiff did testify that he could only see the oncoming vehicle when it was already too close to him, leaving him less or no room to react timeously and to take precautionary measures to avoid the collision. It would be an absurdity for this court to expect of any driver to handle his vehicle perfectly while driving under imperfect conditions. What is expected, however, is that the driver handles his vehicle with caution, mindful that any negligence or recklessness on his part might affect other road users or even result in death.

[23] Section 16 of the Civil Proceedings Act[4] provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible

[4] Act 25 of 1965

witness. The Court in the case of **Bravemen Madlala v RAF**[5] dealing with the issue of a credible evidence said it is evidence that is likely to be believed. The court further went on to say that a credible witness is a witness who is believed to be truthful. However, it is still up to this Court to assess the evidence of the plaintiff in order to weigh the probabilities.

[24] In the case of **Neuyebauer & Co LTD v Bodiker & Co (SA)**[6] Solomon JA dealing with the duty of a defendant in a civil matter said the following in his dictum;

> 'The duty of the defendant then is to set forth his defence with sufficient precision to enable the plaintiff to ascertain what the defence is.'

[25] There can be no doubt in anybody's mind at this stage that before this court, the only credible and reliable version of events that unfolded on the 19th February 2021 is that told by the plaintiff and this court accepts it. Subsequently, the court finds the following to be proven facts:

a) That on the 19 February 2021, while taking a child to school at about 05:00-06:00, the plaintiff's vehicle collided with an insured driver's vehicle on the plaintiff's side of the road.
b) Owing to misty weather, the plaintiff could not see the insured driver's vehicle approaching in time.
c) The insured driver's vehicle was straddling the lanes and encroaching on the plaintiff's lane.
d) At the time when the plaintiff saw the insured driver's vehicle it was already too late and the only thing that he could do was to brake.
e) Owing to weather conditions, his vehicle did not stop immediately and ended up colliding with the insured driver's vehicle on the plaintiff's side of the road.

[26] I am satisfied, therefore, that the plaintiff has discharged the onus that rested on him. I am satisfied that the insured driver was the sole cause of the accident.

---

[5] [2025] ZAGPPHC 153
[6] 1925 AD 316 @ 321

[27] In terms of section 17 (1) (a) and (b) of the Road Accident Fund Act[7] (the Act) and regulations promulgated thereunder, the defendant is liable to compensate victims of motor vehicle accidents arising from the driving of a motor vehicle where the identity of the owner or the driver has been established and or subject to any regulation made under section 26 of the Act where the identity of neither the owner nor the driver thereof can be established.

[28] Consequently, I make the following orders:

a) The defendant is held liable for all damages suffered by the plaintiff as a result of a motor vehicle accident that occurred on the 19th February 2021 on N2 road near Jojweni Location between Mthatha and Qumbu, Eastern Cape.

b) The defendant to pay costs of trial on Scale B.

NGOQO AJ

JUDGE OF THE HIGH COURT

Heard on: 19 MAY 2025

Judgment handed down on: 28 MAY 2025

Plaintiff's Counsel: Z BADLI
MADALA CHAMBERS
MTHATHA

Defendant's Counsel: MR THAVER

Instructed by: STATE ATTORNEY
94 SISSON STREET

[7] Act 56 of 1996

FORT GALE

MTHATHA