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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 43220/2008

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE

SIGNATURE

In the matter between:

**ADVOCATE PHILINEOM BALOYI
(CURATOR AD LITEM)
OBO EMMANUEL MZIKAYISE MTSHALI**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MZUZU, AJ

Introduction

[1] The Plaintiff instituted an action against the defendant in a representative capacity as the curator ad litem on behalf of Emmanuel Mzikayise Mtshali. In

that on 12 August 2007 at about 21h00 at Roodepoort Road a collision occurred between an unknown motor vehicle having registration letters and numbers H[...] and Polo Classic motor vehicle bearing registration letters and numbers L[...] referred to as that of the plaintiff and there driven by the mother, Lydia Mtshali.

- [2] The defendant denies liability and defends the action and pleads that the plaintiff misrepresented himself and further that this was a single motor vehicle, that there was only one person in the vehicle and that person was seriously injured.
- [3] The issue of liability and causation have been separated from the issue of quantum. The trial proceeded only in respect of the merits.

Background

- [4] The plaintiff is alleging that on or about 12 August 2007 at about 21h00 at Roodepoort Road a collision occurred between an unknown motor vehicle bearing registration letters and numbers H[...] and Polo classic motor vehicle bearing registration letters and numbers L[...] referred to as that of the Plaintiff, then and there driven by the Plaintiff.
- [5] The collision was caused due to the sole negligence of the insured driver who was negligent in one or more or in all of the following respects, in that:
 - a. He failed to keep a proper lookout.
 - b. He failed to sufficiently respect the rights of other road users and in particular the rights of plaintiff.
 - c. He failed to avoid a collision, when by the exercise of reasonable caution, he could or should have been able to do so.
 - d. He failed to keep the insured motor vehicle that was during or under proper control.
 - e. He failed to apply the brakes of the insured motor vehicle timeously or at all alternatively he drove the insured motor vehicle of which the braking system was not in a proper working condition.

- [6] The plaintiff (EM Mtshali) sustained some serious injuries that caused him to experience pain and suffering, discomfort, loss of amenities of life etc, and is also disfigured and will in future experience such pain and suffering discomfort, loss of the amenities of life and disfigurement. As a result of the collision and the injuries sustained. The plaintiff has suffered the following damages: general damages, medical expenses and future medical expense.
- [7] The defendant denies the liability but rather pleads that the plaintiff has misrepresented himself in this case, the defendant further pleads that this was a single motor vehicle, that there was only one person in the vehicle who was seriously injured.

The issues to be determined

- [8] Whether or not the defendant is liable to compensate the claimant for alleged damages sustained as a result of the motor vehicle accident occurred on the 12 of August 2007.

Evidence / Facts

- [9] The plaintiff called three witnesses who testified in summary as follows: 1st Witness (Mrs Mtshali).
- [10] Mrs Mtshali testified that she was the driver of the Volkswagen Polo motor vehicle. She returned home between 8h00 and 9h00 from an errand to return her daughter home. On her arrival at home, she received a telephone call from her tenant who resided in her then deceased parents' home in Soweto.
- [11] Mrs Mtshali again left her home in Meerkat Street in Roodepoort and drove along the Elias Motsoaledi Road to Soweto. As she was driving along Elias Motsoaledi Road the mini-bus taxi with registration number H[...] appeared behind her and drove too close for her comfort. She changed lanes from the slow left hand lane (which she was driving on at 60 km per hour) over to the righthand lane to make way for the minibus. The minibus followed her and remained unacceptably close to her vehicle in the righthand lane. She changed

lanes again to the lefthand lane with the same result. She changed lanes again and the taxi bumped her from behind resulting therein that her vehicle capsized, finally landing on its wheels on the lefthand side of Elias Motsoaledi Road direction Roodepoort to Soweto. The front of her car faced the wall of the houses on the left of the road, and the back of the car faced Elias Motsoaledi Road. The car came to a standstill next to a tree which left about 50 cm between the tree and the motor vehicle that made it possible for Mrs Mtshali to get out of the vehicle on the righthand side thereof.

[12] Mrs Mtshali says that when she regained her composure, (as she stated “gained her mind back”) she was standing outside her vehicle. There were community members on the scene. She asked, “where is my child”. The people responded that they took him in a vehicle to hospital, she injured her left shoulder. She did not see her son taken to hospital; she was told after the fact. A community member took her to the hospital, being Baragwanath Hospital where she found her son, Muzi. She testified that she asked to move Muzi to a private hospital, she was told that such a move could be detrimental, and she then allowed Muzi to be treated in Baragwanath Hospital. She gave consent to the operation on Muzi at 03h50 on the morning of the 13 August 2007.

[13] She testified that the sketch of Mr Gumede is incorrect in that it shows a gate in the area where the vehicle came to a standstill. Her evidence is that it is a solid wall that separates the houses where the collision took place from the Elias Motsoaledi Road. She testified that she did not speak to Mr Gumede.

Under cross examination

[14] The plaintiff indicated that what she said in an affidavit which is annexed to the Road Accident Fund claim from paragraph 2 and 3 when she was lodging a claim must be disregarded as it is untrue and incorrect that on the 12 August 2007 approximately 18h35 she was the driver of a Volkswagen motor vehicle with registration number L[...]. her son M Mtshali was a passenger in her vehicle. They were travelling along Roodepoort Road. They were driving straight when all of a sudden, they felt a bump from behind. The next moment a motor vehicle with registration number H[...] was next to them and bumped their

vehicle again. The mentioned vehicle tried to highjack them. their vehicle started to spin and collided. The mentioned vehicle drove away and left the scene of the accident.

[15] She confirms that she woke up somewhere far from her vehicle and the scene of accident. The same people who tried to highjack them kidnapped her; she further confirms that she was just worried about her son who sustained severe injuries and had to phone all the hospitals to find or trace him.

[16] She advised that the commissioner did not read back the affidavit to her, nor did she read the consent of the affidavit and therefore asked us to disregard the affidavit and accept her version she presented in court only, albeit she concedes that she has many versions.

Second Witness of the Plaintiff

Mr Xaba testified in summary as follows:

[17] He is an emergency service personnel member and gave evidence on the procedures followed when emergency personnel are called out to an accident scene. They will not attend at an accident scene if not called out. When called out, they will arrive on the scene, assess the situation and in particular the condition of the person or persons involved in the accident. They have a system which identifies a seriously injured patient as P1 patient. A P2 patient is less serious but able to speak. A P3 person is for all intents and purposes not injured and a P4 person is deceased. Their protocol requires them to first attend to the most seriously injured patient. If it is not possible to obtain the personal information of the injured person from the person himself or herself, they would request the SAPS or Metro Police personnel on the scene to go through the motor vehicle to determine the identity of the person/persons in the car.

[18] They will then extract the person from the vehicle and take the person to hospital. At the hospital they hand over the patient to a doctor who must sign for taking control of the injured person. For this purpose, they complete a form that gives the particulars of the injury and the identity of the patient, and the

doctor must sign on the form for purposes of the handover. One of the forms stay with the hospital. He stated that there are at least three copies) two which are taken back with the emergency personnel for their administrative purposes.

Under cross examination

[19] He advised that it would be very dangerous for a person who is not trained to extract a victim with a spinal injury.

[20] It is likely that the spinal injury would be worse if extracted by a civilian.

[21] When they get to a scene and cannot identify a person, they request the JMPD or police services to search for a person, they do not search.

Mr Gaju's evidence in summary is as follows;

[22] Mr Gaju testified. He referred the honourable court to the Rule 35(3) and (6) notice issued by him against the defendant to obtain the necessary documentation that ought to be available on the defendant's version of the matter.

[23] No such documents were forthcoming from the defendant and Mr Gaju brought an application to compel. The result thereof was that the defendant conceded that it does not have such documents and will not rely on same.

[24] Mr Gaju also testified that on his own investigation there is no evidence of a person with the identity number and name of Mrs Mtshali's eldest son (now deceased) being transported from the accident scene to the Leratong Hospital.

[25] He also found that at Baragwanath Hospital there was also no evidence of documentation along the lines testified by Mr Xaba indicating that Muzi was taken to the Baragwanath Hospital.

Under Cross Examination

[26] Mr Gaju confirmed when he was asked if he was aware that evidence given by a party in court on behalf of a third-party was construed as hearsay evidence. He testified that when commissioning an affidavit, he has a duty to read the affidavit to the deponent and make sure he understands before a document is commissioned.

[27] He testified that he did not know when the commissioning process was not followed as per the act. He further said that the deponent is bound by the affidavit and the witnesses therein. He said he does not know what to make if deponent denies the contents of the affidavit.

[28] Mr Gaju stated that he consulted with the plaintiff's mother, Mrs Mtshali and gave further details of how the matter was investigated by Gaju Attorneys.

[29] After Mr Gaju's evidence, the plaintiff closed his case.

Defendant's case

[30] The defendant opened its case by calling one witness Mr Gumede, an erstwhile JMPD officer, who testified in summary as follows: He deposed to an affidavit on the 12 August 2007 in terms whereof he purports to have attended at the scene of the accident where Muzi was injured. He testified that Sakhile, Mrs Mtshali's other son who was in fact not involved in the accident, was the driver of the vehicle. He bases this on the fact that he says Mrs Mtshali told him (as per his affidavit) the identity of the (purported) driver of the Volkswagen Polo motor vehicle.

Under Cross Examination

[31] In cross-examination he conceded that he has absolutely no recollection of the collision.

[32] The defendant closed its case.

Legal Framework

[33] The burden of proving negligence and liability of defendant rests with the plaintiff convincing the court through credible evidence that the plaintiff's version is more probable than that of the defendant and most importantly that the plaintiff version is probable.¹

[34] In *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others*² the court held that:

1.1 To come to a conclusion on factual disputes a court must make findings on:

- a. The credibility of various factual witnesses.
- b. The reliability of their evidence.
- c. The probability of their evidence.

1.2 Credibility will turn on:

- a. The witness's candour and demeanour in the witness's box.
- b. Bias.
- c. Internal contradictions.
- d. External contradictions.
- e. The probability or improbability of particular aspects of his evidence.

1.3 The calibre and cogency of her performance compared to that of other witnesses in respect of reliability will be dependent upon the abovementioned factors and the opportunities the witness had to

¹ *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).

² *Stellenbosch Farmers' Winery Group Ltd And Another V Martell Et Cie And Others* 2003 (1) SA 11 (SCA).

experience or observe the event in question and the quality integrity and independence of his recall thereof.

1.4 Consideration of probabilities requires an analysis and evaluation of the disputed issues.

[35] Mrs Mtshali the witness on behalf of the plaintiff is the main witness in respect of the cause of action in this matter. Other witnesses testified about the after effect, that is the events occurred after the alleged accident occurred.

[36] In *Salamolele v Makhado*³, at para 374 the court stated the following in respect of the onus of proof:

“it is common cause that plaintiff bears the overall onus of proof...it may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on the plaintiff.”

[37] Mr Xaba’s evidence on the general working of the EMS team did not help the matter any further.

[38] Mr Gaju - plaintiff attorney about the investigation he conducted did not help the court any further as well.

[39] It is my view that the plaintiff failed to prove on balance of probability the accountability and the negligence of the defendant.

[40] The defendant as well did not assist the court with his evidence as he testified about the events that occurred after the collision, his evidence was based on the affidavit he completed when he attended the scene, though the evidence could have helped in drawing some inferences but it did not assist.

[41] In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities.

[42] The court should select a conclusion which it deems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.⁴

³ *Salamolele v Makhado* 1988 (2) SA 372 V.

[43] This process is achieved on qualitative assessment of truth and/or inherent probabilities of evidence of witnesses and, secondly, on ascertainment of which of the two versions are more probable.⁵

[44] The estimate of the credibility of a witness is inextricably bound up with a consideration of the probabilities, and the court is required to consider these concepts simultaneously.⁶

[45] In *National Employer's General Insurance Co Ltd v Jager*, the court, touching on the issues of determining probabilities in two mutually destructive versions, said:

'it seems to me, with respect, that in any civil case as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and fall to be rejected

In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and if the balance of the probabilities favours the plaintiff, then the court will accept his version as being proper and true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

⁴ *AA Onderlinge Assuransie Assosiasie Beperk v De Beer* supra.

⁵ *Selamolele v Makhado* supra.

⁶ *National Employer's General Insurance Co Ltd v Jager* 1984 (4) SA 437 (A) AT 440 E – 441A.

This view seems to me to be in general accordance with the view expressed by Coetzee J in Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens (supra) and African Eagle Assurance Co Ltd v Cainer (supra). I would merely stress however that when in such circumstance one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable.'

[46] Having heard all the evidence from both the plaintiff and defendant, it is therefore the conclusion of this court that on the balance of probabilities the plaintiff has failed to discharge its onus. As a result, the following order is that:

[47] Order

1. The plaintiff claim on merits is dismissed
2. No order to costs

MZUZU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicants	:	AJ Louw
Instructed	:	Gaju Attorneys
For the Defendent	:	Lutho Klaas
Instructed	:	State Attorney
Date of hearing	:	01-11 September 2025
Date of Judgement	:	02 March 2026