



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

Case No.: 828/2023

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

01/09/2026

DATE

SIGNATURE

In the matter between:

NTIMANE DUMISANE HOWARD

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

VUKEYA ADJP

[1] The plaintiff lodged a claim for damages pursuant to injuries he sustained because of a motor vehicle collision he alleges happened on 3 January 2021. The plaintiff was a cyclist on Malekutu road, Kabokweni when the accident happened. He averred that while cycling, an unknown motor vehicle with unknown registration

numbers and letters driven by an unknown driver made a sudden turn into his lane and collided with him. He lodged a claim with the Road Accident Fund on 3 August 2021, in the amount of R3 400 000. 00 made up of several heads of quantum.

[2] The Road Accident Fund (“the defendant or RAF”), represented by the Office of the State Attorney, defended the action but presented no version of its own before the court.

[3] At the hearing of the trial, the parties agreed to approach the court with an application to separate the issue of merits from quantum in terms of Rule 33 of the Uniform Rules of Court which was granted by the court. The matter then proceeded only on merits and the issue of quantum was postponed *sine die* pending the determination of merits.

[4] The plaintiff’s evidence supported by his witness, Given Moriri, was, in a nutshell, that he was riding a bicycle on 3 January 2021 along Malekutu Road heading towards Kabokweni. The visibility was good, the weather was dry and the road surface was good. He stated that as he was cycling on the side of the road, he passed a taxi which was stationary on the road. A bakkie was approaching from the opposite direction of the road, moving at a high-speed. The bakkie collided with him as the driver made a sudden turn into the lane he was cycling in, when he swerved to the far left of his lane, the driver of the bakkie also went to the same direction and collided with him on the far edge of the road. He testified that there was nothing he could have done to avoid the collision.

[5] According to the plaintiff, the driver of the bakkie failed to stop after the accident. Mr Moriri, who was walking on the side of the road as the accident happened, took him to the hospital, where he received medical attention for the injuries sustained in the accident. He was admitted and discharged the following day with a head injury and a knee injury. Thereafter, he went to the police station to report the incident. At the police station, the police officer informed him that he could not complete the collision report because there were no documents before him confirming that he had been involved in an accident.

[6] Mr Given Moriri, confirmed that, as he was walking on the pavement, on 3 January 2021, he saw the plaintiff cycling. He immediately noticed a bakkie travelling on the opposite side of the road. The bakkie approached at a high speed and collided

with the plaintiff, as it turned into his lane. He testified that the bakkie collided with the plaintiff and then drove off after the accident. He then took the plaintiff to the hospital.

[7] Both the plaintiff and Moriri were confronted with a contradiction in their evidence regarding the date of the incident. It was indicated in the plaintiff's particulars of claim and section 19 (f) affidavit that the accident happened on 4 January 2021, however, in the plaintiff's supplementary papers and in their viva voce evidence in court, the accident happened on 3 January 2021. The plaintiff and Moriri explained that this was an error as the accident happened on 3 January 2021 after which the plaintiff was admitted to Themba Hospital in line with the hospital records. The plaintiff also explained that the fact that he spent the whole night between 3 and 4 January 2021 at the hospital contributed to the confusion.

[8] The real issues to be determined in this matter are very crisp, and they are, whether an accident involving a motor vehicle which collided with the plaintiff occurred at all and if it did, whether it was caused solely by the insured driver's negligence or by the combined negligence of the insured driver and the plaintiff and whether there is a legal *nexus* between the Plaintiff's injuries and the operation of a motor vehicle.

[9] The onus is on the plaintiff to prove on a balance of probabilities that his injuries were caused by or arose from the negligent driving of an unidentified motor vehicle. Although the defendant vehemently disputed the evidence of the plaintiff, it did not adduce any evidence to substantiate its allegation that the plaintiff was not involved in the accident. It only placed its reliance on the suggestion that the reliability, credibility, and admissibility of the plaintiff's testimony and his witness's late-amended evidence was questionable.

[10] It has been argued on behalf of the plaintiff that the plaintiff and the witness remained consistent in their testimony during cross-examination regarding how the motor vehicle accident occurred. They both testified that the accident occurred on 3 January 2021, and that the insured driver was operating a bakkie and left the scene of the accident thereafter. Furthermore, it was submitted that it is uncontroverted that the insured driver's motor vehicle left its lane and veered toward the plaintiff's lane of travel.

[11] Counsel for the plaintiff submitted that the question to answer in determining whether the plaintiff's conduct fell short of that of a reasonable person the test for

negligence ought to be applied. The court was referred to the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 where the test for negligence was set out as follows:

"For the purposes of liability, culpa arises if -(a) a *diligens paterfamilias* in the position of the defendant - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard such occurrence; and (b) the defendant failed to take such steps."

[12] According to the plaintiff, although the defendant pleaded in the alternative for contributory negligence there was no shred of evidence supporting the stance that the plaintiff was also to blame for the accident. The plaintiff submitted that Section 1(1)(a) of the Apportionment of Damages Act gives the court discretion to reduce the plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. The plaintiff argued that where apportionment is to be determined, the courts consider the evidence as a whole, in assessing the degrees of negligence of the parties, and there was no evidence to gainsay the plaintiff's version of the incident.

[13] The plaintiff submitted that it should be successful in the action, however, in the event that the Court determines that a just and equitable apportionment is to be made on the basis of the proven facts, the plaintiff submitted that such apportionment should be 80% in his favour, with the result that the defendant be held liable for 80% of the plaintiff's proven damages.

[14] The defendant argued for the dismissal of the plaintiff's claim basing its argument on the fact that the plaintiff failed to present to the court an Official Accident Report (OAR) or police statement from the date of the incident. It referred the court to the case of *Selamolela v Road Accident Fund* (2010), where the court held that where a version is uncorroborated by police records, the court must exercise extreme caution. The mere fact that a Plaintiff is injured does not, by itself, prove the involvement of a motor vehicle.

[15] According to the defendant the absence of an Official Accident Report (OAR) means there is no neutral, statutory record of the scene, the time, or the conditions of the alleged accident. Furthermore, the defendant submitted that a mention in a hospital file is insufficient to "bridge the gap" between the injury and a motor vehicle and without an accident report, it is equally probable that the plaintiff's head and knee

injuries resulted from a fall, an assault, or a non-motor vehicle collision. It argues that even if the court accepts the hospital records as proof of an "accident," they provide no evidence of negligence.

[16] The defendant further contended that the plaintiff's own conduct was the *causa causans* (proximate cause) of the collision. It relies on the case of *Shield Insurance Co Ltd v Theron NO 1973 (3) SA 515 (A)*, in which the court held that where there are no witnesses and the court is left to draw inferences, the plaintiff's failure to explain his own manoeuvres count against him. The defendant submitted that in the event that the court finds that the accident happened, that 90% negligence be apportionment against the plaintiff in terms of the Apportionment of Damages Act 34 of 1956.

[17] The first question to answer is whether an accident involving a motor vehicle and the plaintiff occurred at all. This depends on the evidence of the plaintiff and Moriri whose version is that the bakkie that collided with him disappeared from the scene. Moriri, the eyewitness to the accident, did not take the registration plates and numbers of this motor vehicle but could only describe it as a bakkie. The defendant has submitted that the failure of both the plaintiff and Moriri to place before court more information regarding the identity of the insured driver is indicative of the fact the accident did not occur.

[18] It must be borne in mind that the eyewitness was just a passer-by and may not have been aware that an accident was about to happen. To blame him and the plaintiff, who was injured, for not capturing the bakkie's registration numbers and plates would be far-fetched. One may also take into consideration that Moriri immediately gave attention to the injured cyclist and tried to find transport to take him to hospital. Furthermore, the evidence of the plaintiff was that when he went to the police station to report the accident on the next day, after being discharged from the hospital, the police refused to assist him, and this is the reason why there is no accident report regarding the accident.

[19] This all comes down to the question whether the plaintiff did sufficiently enough to get the identity of the insured driver of the bakkie. In *Ninteretse v RAF* (29586/13) [2018] ZAGPPHC 493 (2 February 2018), Raulinga J expressed himself as follows and I agree with his views

“...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.”

[20] Although there is evidence that there was a stationary taxi in the vicinity, there is no evidence whether the taxi had any passengers in it who may have witnessed the incident. There is also no evidence that there were bystanders who may have witnessed the accident. It may be said that the plaintiff did everything in his power to find Mr Moriri although he did not know him but failed to go back to the scene to try and find anyone who may have had information regarding the accident. This does not suggest that the accident did not happen. The evidence before court is that after he was discharged from the hospital, the plaintiff went to the police station to attempt to report the accident, but he was sent away and the police refused to help him. Although he did not go back to the scene to make inquiries, my view is that he could not have done anything else without police assistance.

[21] There may not be an accident report relating to the accident, however, there is credible corroborative evidence of Moriri who fully supported the evidence of the plaintiff regarding how the accident happened and that he indeed accompanied him to the hospital. The court also places reliance on the hospital records in which it was recorded that the plaintiff “was riding a bicycle and was involved in an accident”. This is the history that was provided to the hospital when the plaintiff was admitted. To a certain extent this information is also relevant in corroboration of the plaintiff’s evidence that he was involved in a car accident. I therefore find that the plaintiff has been able to show that an accident involving a motor vehicle occurred in which an unknown bakkie, driven by an unknown driver collided with him while he was cycling.

[22] This brings me to the next issue for determination, which is whether the accident was caused solely by the insured driver’s negligence or by the combined negligence of the insured driver and the plaintiff. The law regarding the duty of a driver is trite, a driver should scan the road ahead continuously for obstructions or potential

obstructions. In *Nogude v Mniswa* 1975(3) SA 685 (A) at 688D a "proper look-out" was described as follows:

"More than looking straight ahead it includes awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side."

[23] It is every road user's duty to keep a proper look-out when using the road. The duty is not only that of a driver of a motor vehicle. The plaintiff testified that as he was riding the bicycle, a taxi was stationary in front of him, and it was parked wrongly. He swerved to pass the taxi and then went back to his lane, that is when a bakkie came onto his lane and came straight towards him and collided with him. He said the bakkie collided with him on the far edge of the road where he had swerved to.

[24] The plaintiff also had a duty to ensure that it was safe to pass the taxi while descending towards the bridge. He mentions four things that are of concern to this court and are indicative of the fact that the plaintiff was not as innocent as he would like the court to believe. These are, 1) that there was a stationary taxi which had parked wrongly, which he passed; 2) as he passed this taxi, he was descending towards the bridge; 3) there were cars coming from the opposite lane and 4) he swerved to pass the taxi and then went back to his lane. These four aspects point at a dangerous manoeuvre because, he would have had to increase speed to pass quickly, while there was oncoming traffic in the right lane.

[25] The insured driver drove on the wrong side of the road, facing oncoming traffic. There is no evidence that it was necessary for him to do so. And had he kept a proper lookout, he would have noticed the stationary taxi and the plaintiff who cycled on the same road. He did not act like a reasonable man as envisaged in *Kruger v Coetzee* (supra). However, the insured driver, in my view, was not the sole cause of the accident; the plaintiff also made his fair contribution towards the negligence. He overtook a wrongly parked taxi and while also avoiding the cars which were on the oncoming lane, he swerved to overtake the taxi, hence his evidence that he "swerved to pass the taxi, then went back to my lane".

[26] This must have been done at a high speed as there were oncoming cars on the opposite lane. The plaintiff should have stopped until all the cars in the opposite lane had passed before overtaking the taxi. However, he was busy focused on the

dangerous manoeuvre that he could not do anything else to try and avoid colliding with the bakkie and therefore failed to keep a proper lookout. The plaintiff's failure to observe the insured vehicle under the circumstances described above was negligent, and in my opinion, that negligence causally contributed to the collision.

[27] The question of the plaintiff's failure to remember the date on which the accident occurred does not tarnish the evidence in relation to the insured driver having negligently caused the collision. He provided the court with an explanation that he spent the whole night at the hospital between the 3rd and the 4th of January 2021 that he got mixed up with the dates. This explanation is acceptable to the court and therefore found to be immaterial. There is no evidence from the defendant or insured driver controverting with the plaintiff's testimony and his version appears to be credible despite having mixed up the dates of the incident.

[28] It is my view that both parties were responsible for the collision because either could have avoided it. The insured driver could have avoided the collision by simply not driving into the lane facing oncoming traffic on a busy road and the plaintiff should have kept a proper lookout instead of trying to pass a wrongly parked vehicle while there was oncoming traffic on the right lane thereby losing focus and failing to avoid the accident.

[29] The plaintiff was taken from the scene to the hospital immediately after the accident and the hospital recorded the injuries as alleged. It is therefore my finding that there is a connection between the accident and the injuries, sustained by the plaintiff.

[30] I am persuaded that the evidence of the plaintiff is sufficient to conclude that he has discharged the onus to prove that the defendant is liable to a certain extent in terms of the Road Accident Fund Act.

[31] Section 1 of the Apportionment of Damages Act 34 of 1956, reads as follows –

“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.

(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.

[32] In terms of the above legislation, contributory negligence on the part of the plaintiff can reduce his loss or damage claimed against the defendant. It gives the court discretion to reduce the plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. When making a determination on apportionment, the court must consider the evidence as a whole in assessing the degrees of negligence of each party. Given the above considerations, the plaintiff's conduct fell 30% short of what would have been expected of a reasonable person in his position. Accordingly, I am of the view that the defendant is liable to pay 70% of the plaintiff's proven damages.

[34] The Plaintiff, having been successful on the merits, is entitled to costs on the High Court party-and-party scale, Scale B.

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

1. The defendant shall pay the plaintiff 70% of his proven damages.
2. The trial in respect of quantum is postponed *sine die*.
3. The defendant is ordered to pay the costs of the merits trial on party and party scale (B).



VUKEYA LD
ACTING DEPUTY JUDGE PRESIDENT

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