

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: 263/2009

ECD: 536/2009

In the matter between:

E[....] K[....] M[....] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MBENENGE JP:

[1] On 29 March 2004, the plaintiff was involved in a motor vehicle accident whilst driving along the N2 road between East London and King Williams Town. She was injured and, resulting from the injuries, she seeks to recover damages from the defendant.

[2] In the plaintiff's particulars of claim, it is alleged that the driver of a bakkie with registration letters and number CFG [...] ¹ was negligent in, *inter alia*, encroaching on the plaintiff's lane of travel without giving lateral berth between the plaintiff's motor vehicle and the insured vehicle.

[3] In resisting the claim, the defendant denies negligence on the part of the insured driver and, in amplification of such denial, avers, *inter alia*, that the plaintiff drove negligently by overtaking the insured driver's vehicle on the left-hand side and entering the lane and path of travel of the insured driver when it was not safe to do so.

[4] The defendant has pleaded, in the alternative, that in the event of it being found that the insured driver was, for the reasons already mentioned, also negligent, the plaintiff's negligence contributed to the cause of the accident, with the result that the plaintiff's claim should be apportioned.

[5] The parties agreed to have the issues of liability and *quantum* separated, leaving the main issue for determination being whether the insured driver was negligent, alternatively whether any harm suffered by the plaintiff resulted from the combined negligence of both parties and, in such latter event, the degrees of negligence to be attributed to each party.²

[6] The plaintiff's testimony was brief. On the fateful day, she was driving a government-owned Nissan Twin Cab along the N2 road to East London. This is a freeway with double lanes on either side. She had been driving on the outer lane, at approximately 90 to 100 km per hour. The time was between 16:00 to 17:00. When she was about 20 km to Nahoon dam, she noticed, in the rear-view mirror, a bakkie carrying a ladder driven from behind. As the bakkie indicated an intention to overtake her vehicle, she observed yet another vehicle coming

¹ The insured vehicle.

² According to the relevant minutes, the defendant is of the view that 50% of negligence is attributable to the plaintiff.

from behind the bakkie. The bakkie overtook, but when it was parallel to her vehicle, it ventured into her path of travel and hit her vehicle on its right front fender. She said this happened when the bakkie was “*trying to give way to the vehicle behind it.*” She thereupon lost control of her vehicle and does not know what happened thereafter because she lost consciousness.

[7] The plaintiff eventually came around during hospitalisation. Five weeks after her discharge from hospital, she inspected the vehicle she had been driving and observed that it was damaged on its right side, “*the right fender and the rim.*” She disputed the correctness of a sketch plan shown to her and depicting the point of impact as having been on the inner lane. She was, at some point, visited by a policeman in connection with a criminal case of negligent driving that had been instituted against her. In the course of time, she was found not guilty of that offence.

[8] Under cross-examination, the plaintiff was shown an unsworn statement on which her signature is appended. In relevant part, the statement reads:

“This happened while I was approaching a gentle curve and I had notice[d] that there was another m/vehicle . . . following. I was driving at the far left.

The vehicle which was following did overtake me but it did not complete that. This vehicle hit me on the right front fender and m/vehicle overturned.”

[9] Upon a reading of the statement, more particularly the above-quoted excerpt, no mention of a third vehicle as having been part of the scene immediately prior to the accident is made. The plaintiff did not dissociate herself from the statement, but contended that the statement did not contain everything she had told the police.

[10] Reference was made to the sketch plan, which also makes no mention of the third vehicle. She responded that she had no complicity with the sketch plan because it was neither drawn by her nor at her instance.

[11] The plaintiff also disputed, as incorrect, the content of a statement made by Mr Wanele Booï wherein it is alleged that her motor vehicle drove in front of the insured vehicle and hooked to the tow bar until her vehicle lost control and overturned several times.

[12] Mr Wanele Booï is the only witness who was called to testify on behalf of the defendant. He is a policeman. He attended upon the scene and drew the sketch plan at the instance of the driver of the bakkie. However, he had no independent recollection of what he saw at the scene as the accident occurred some seventeen years ago. He said his focus was on the two vehicles that were allegedly involved in the accident, and not on any other vehicle, hence he could not testify as to the existence or otherwise of the third vehicle.

[13] The parties ended up locking horns in relation to whether the point of impact was on the outer lane, as alleged by the plaintiff, or the inner lane, as contended by the defendant.

[14] A determination of the point of impact, either way, which is what I turn to consider, will dispose of the issue of negligence and, thus, liability.

[15] It is trite that the plaintiff bears the onus to prove that the accident was attributable to the negligence of the defendant. The defendant bears an evidential burden, which may be discharged by pointing to inherent contradictions in the plaintiff's testimony and other cogent factors that belie the plaintiff's version.³

[16] I am also mindful of the fact that the evidence of the plaintiff, as a single witness, does not translate to the truth merely because it is not contradicted.⁴

[17] The plaintiff testified coherently and satisfactorily. Her demeanour as a witness was not in the least assailed. I was at no stage tempted to believe that

³ *Botha v Kirk Attorneys* (EL257/2016, ECD 757/2016) [2019] ZAECELLC 1 (22 January 2019), para 32.

⁴ *Siffman v Kriel* 1909 TS 1 538 at 543; *Botha, op cit* para 36.

her version of how the accident took place was a fabrication. She refuted the alleged version of the insured driver as to the point of impact as being an untruth.

[18] In my view, nothing turns on the sketch plan relied on by the defendant's camp during cross-examination. The sketch plan is what it purports to be, having not been admitted for the truth of its contents. It was merely received subject to its admissibility.⁵ The police official who compiled the same relied on information supplied by the insured driver, who was not called to testify. Due to passage of time, the police officer could not be of assistance concerning other objective facts observed at the scene.

[19] When a litigant fails to adduce evidence about a fact in issue, for example, by not calling a witness, he runs a risk of his opponent's version being believed.⁶ The failure on the part of the defendant to call the insured driver to testify is fatal to the defendant's case.

[20] Nor should the plaintiff be disbelieved purely because in the statement "*under warning*" she said nothing about the existence of the third vehicle. Her explanation that the statement does not contain everything he had informed the police is worth believing. No testimony was led to gainsay her version on this score.

[21] The proper test is not whether a witness is truthful or indeed reliable in all that it says, but whether on a balance of probabilities the essential features of the story, which he tells, are true.⁷

[22] I am satisfied that the plaintiff's version as to the point of impact is the truth. From her testimony, it is inferable that the insured vehicle encroached on

⁵ Cf *Bainton v Road Accident Fund* (4559/2016) [2018] ZAGPJHC 10 (31 January 2018)

⁶ *Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 at 840; also see *Brand v Minister of Justice* 1959 (4) SA 712 (A).

⁷ *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA), at para 10.

the plaintiff's path of travel without giving lateral berth between the plaintiff's vehicle and the insured vehicle.

[23] It is the duty of every driver overtaking a vehicle to leave a safe gap between her/his vehicle and the vehicle being overtaken, and not to return to her/his lane of traffic until she/he is far enough past the other vehicle to avoid a collision.⁸ The plaintiff's version establishes, by inference, with the requisite degree of proof, that these rudimentary rules were not observed and that, therefore, there was negligence on the part of the insured driver.

[24] On the plaintiff's version, the issue of contributory negligence does not arise, and none has been shown to have occurred.

[25] The insured driver is, therefore, wholly to blame for the accident. The liability of the defendant has thus been established.

[26] The plaintiff, being the successful party, is entitled to the party and party costs of the action incurred to date.

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

- 1. The issues of liability and quantum are separated, with the issue of quantum standing over for determination on a date to be arranged with the Registrar of this court.*
- 2. The defendant is held 100% liable for the plaintiff's proven or agreed damages in consequence of the motor vehicle collision, which took place along the N2 road on 29 March 2004.*
- 3. The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action incurred to date, together with interests thereon at the prescribed legal rate per annum from 14 days after taxation or agreement to date of payment.*

⁸ *Ndayiragije v Road Accident Fund* (16547/2009) [2013] ZAWCHC 10 (13 February 2013), paras 25 and 27

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

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Date matter heard : 09 June 2021

Date judgment delivered : 27 July 2021

[Also, by electronic mail transmitted to the parties' attorneys, in terms of paragraph 68 of the Eastern Cape National State of Disaster Management Directions]