IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A708/06

DATE: 19/8/2008

NOT REPORTABLE

IN THE APPEAL BETWEEN

GOGOZANE ABEL SOKO APPELLANT

AND

THE ROAD ACCIDENT FUND RESPONDENT

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JUDGMENT

MAKGOBA, J

[1] This is an appeal against the judgment and orders given by a magistrate in the Nelspruit magistrate court on 8 March 2005 in terms whereof the appellant's claim against the respondent was dismissed with costs. It is a claim for damages, being the actual amount spent by the appellant for funeral expenses relating to the burial of his son who passed away in a motor vehicle collision.

[2] At the trial it was common cause that a collision occurred between two motor vehicles on 28 September 2001 of which the one motor vehicle with registration

number BFT 721MP was driven by the appellant's son and the other vehicle with registration number CFT 120MP was driven by an unknown person. The accident happened on the road between KaNyamazane and Nelspruit. The appellant's son, one Bheki Steven Soko, died in the accident.

[3] It was agreed between the parties at the trial that the appellant suffered damages in that he had to pay the funeral costs to the amount of R4 900,00 relating to the burial of his son following the accident. The only aspect in dispute that the appellant needed to prove was negligence of whatever degree.

[4] It was further common cause that the vehicle of the deceased was travelling from east to west, that is from KaNyamazane to Nelspruit whilst the other motor vehicle was travelling in the opposite direction. The vehicle of the deceased suffered damage to the front right hand side of the vehicle.

[5] The only witness that testified at the trial was one Mr Joseph Bheki Teddy Shongwe who gave evidence for the appellant. He was a passenger in the motor vehicle driven by the deceased. While travelling from east to west he at some stage looked up and saw another motor vehicle approaching from the opposite direction. They were approaching a curve when he noticed that the said vehicle was moving directly towards their vehicle. The deceased could not do anything to avoid the collision because when it was seen that vehicle was very close. There were trees or shrubs on their left hand side and a mountain on the right hand side.

According to Mr Shongwe the motor vehicle that collided with the deceased's vehicle had veered onto their way and as such the two vehicles collided. The witness was injured, lost consciousness and only regained it in hospital after some hours.

[6] After closure of the appellant's case the respondent closed its case without leading any evidence. In dismissing the appellant's action the trial magistrate ruled that the evidence of Mr Shongwe in cross-examination is that he cannot recall what he told the police how the accident happened, the reason being that at the stage when the police came to take down the details of the accident he was in a state which he described as one filled with pains on an uncomfortable one.

[7] In support of his ruling the trial magistrate referred to the following piece of evidence on record:

> "Question: You informed the police that you did not see the accident?
>
> Answer: I cannot remember, my mind was not functioning properly. I explained how the accident happened.
>
> Question: You told the police officer that you did not see how the accident occurred?
>
> Answer: I cannot remember exactly what I explained to the police."

[8] In my view the magistrate misunderstood or misinterpreted the witness. The magistrate's understanding of this evidence is that the witness told the police that

he (the witness) could not remember how the accident took place. The correct position is that Mr Shongwe could not recall what he told the police but did explain to the court *a quo* what things he can remember.

In an effort to seek clarification from the witness the court posed the following question on page 120 of the record:

> "Question: So according to you what you explained to the police is how the accident happened?
>
> Answer: Yes. Yes. I explained to the police officer I was with whom, what happened and the car came and hit us."

[9] The court *a quo* erred in rejecting the evidence of Mr Shongwe on the unfounded statement made during cross-examination by the respondent to the effect that the witness told the police officer that he did not see how the accident took place. The court *a quo* based its findings on speculation or conjecture and not from positively proven facts. Inasmuch as the contents of Mr Shongwe's communication to the police officer was unknown to the court, the respondent did not even lay a formal basis for any contradicting evidence: see *De Wet and Another v President Versekeringsmaatskappy Bpk* 1978 3 SA 495 (C).

[10] The respondent was in possession of a statement apparently made by Mr Shongwe to the police and intended to confront him with such statement but the appellant objected to the usage thereof. The reason for objection was that the respondent

failed to make proper discovery and/or did not discover any statement to be used at the trial. The court *a quo* correctly ruled against the respondent with the result that the statement could not be used by the respondent.

[11] After disallowing the aforesaid statement the respondent was still not out of remedies at that stage and could have asked for a postponement to file a proper discovery and of course tender wasted costs. The other option was to simply call the police officer concerned to testify and substantiate the aforesaid unfounded statement. He, however, elected to his detriment not to call the police officer and to close his case. See: *Rawoot v Marine & Trade Insurance Co Ltd* 1980 1 SA 260 (C).

[12] The witness, Mr Shongwe testified that the deceased stayed on the left hand side of the white line and the insured vehicle came over the white line to their side of the road. He explained the point of impact as follows:

> "It happened on the middle of the white line coming towards our side."

There is no evidence from the respondent's side to gainsay this version. In any event the respondent admitted during argument that the accident occurred in the middle of the road.

[13] The authorities are clear with regard to negligence where the collision occurred in the middle of the road. In *Jadezweni v Santam Insurance Co Ltd and Another* 1980 4 SA 310 (C) the position regarding negligence is set out as follows:

> "Where a head on collision occurs more or less in the middle of the road the court is entitled to infer that both drivers were at fault. If either of the vehicles was across the centre line at the time of the collision the inference would be that the driver of that vehicle was negligent …"

The evidence of Mr Shongwe that the insured vehicle veered to their side and collided with the deceased's vehicle is in conformity with the above legal principle.

[14] Taking into consideration the facts which are common cause in this matter together with the admitted facts regarding the point of impact and damages caused to the deceased's vehicle one can safely draw an inference of negligence on the part of the insured driver. It is trite law that the *onus* rests with the plaintiff to prove negligence on the part of the defendant. There is no *onus* on the defendant to show that he had not been negligent, but, once the plaintiff has proved an occurrence giving rise to an inference of negligence on the part of the defendant, the latter has to give an explanation which is sufficient to dispel the *prima facie* proof of negligence, otherwise he runs the risk of judgment being given against him. See: *Ntsala and 0thers v Mutual & Federal Insurance Co Ltd* 1996 2 SA 184 (T).

[15] It is alleged and admitted that the deceased's vehicle collided with another vehicle driven by an unknown person. 0ne may assume in favour of the respondent that the driver of the insured vehicle could not have been available to dispel the *prima facie* proof of negligence. However, the respondent only needed to call the police official to whom Mr Shongwe would have made a statement as to how the accident occurred. The police official's evidence could have substantiated the unfounded allegation that Mr Shongwe did not know or could not remember how the accident happened. In the case of *Elgin Fireclays Ltd v Webb* 1947 4 SA 744 (A) it was held that an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.

[16] In my view the appellant did prove negligence on the part of the driver of the insured vehicle. It does not matter whether the deceased himself was negligent or not. The appellant need only to prove the proverbial one percent negligence on the side of the insured vehicle to be hundred percent successful with his claim of R4 900,00 as *quantum* has already been admitted by the respondent. No apportionment of damages is applicable on the claim of the appellant. See: *Kleynhans v African Guarantee and Indemnity Co Ltd* 1959 2 SA 619 (E).

[17] Counsel for the appellant prayed for a special order of costs against the respondent relating to the proceedings in the court *a quo*. It is clear from the record of proceedings in the magistrate's court that the attorney for appellant asked for costs on attorney and client scale, alternatively costs on a higher scale in terms of Rule 33(8) of the Rules of the Magistrate Court Act 32 of 1944. Whilst I am not persuaded that a good case has been made for a punitive cost order in the form of costs on attorney and client scale, I am however inclined to consider an award of costs on a higher scale in terms of Rule 33(8) as prayed.

[18] I hasten to say that the respondent conducted the trial in the court *a quo* in a frivolous and/or vexatious manner. What appeared to have been a simple case wherein an amount of R4 900,00 was claimed became a long drawn out case preceded by uncalled for postponements at the instance of the respondent. The respondent knew all along that the only version of how the accident occurred was that of the appellant. The driver of the insured vehicle was unknown, therefore the respondent did not have any version to put before court. The only witness in the case was labled a liar by respondent's attorney whereas no evidence was produced to gainsay the only version available. Unfounded statements were put to the witness to the effect that he does not know or remember how the accident occurred. The respondent was unable to substantiate such unfounded statements but simply closed its case in the face of a clear *prima facie* case. This is the matter which could and should have been settled instead of engaging in such

vigorous litigation which resulted in the appellant being out of pocket for a meager claim amount of R4 900,00.

[19] The appeal is upheld with costs.

[20] The judgment of the court *a quo* is altered to read as follows:

"Judgment is granted in favour of the plaintiff for-

(a) payment of the sum of R4 900,00;

(b) interest on the amount of R4 900,00 at the rate of 15,5% per annum from and including the 14th day after the judgment up to and including the date of payment thereof;

(c) costs on higher scale in terms of Rule 33(8), namely scale C.

E M MAKGOBA
JUDGE OF THE HIGH COURT

I agree

A M L PHATUDI
ACTING JUDGE OF THE HIGH COURT

A708-2006