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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10937/15

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

EPHRAIM NKWANYANA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] The plaintiff, an adult male has instituted a damages action against the defendant for certain bodily injuries he sustained in a motor vehicle collision on 15 September 2012. At the time of the collision, he was a driver of a motor vehicle bearing registration letters and numbers CA 4..... travelling on R101 Du Toits Kloof Pass, when an unknown motor vehicle travelling behind him, overtook him and came to a sudden halt in front of the Plaintiff's motor vehicle.

[2] In the particulars of claim at paragraphs 5 and 6 thereof, the plaintiff alleged as follows:

"5. The sole cause of the accident was solely caused by the driving of the driver of the unknown vehicle in that:

5.1 He applied brakes in front of a moving traffic for no reason;

5.2 He had no due regard to other road users;

5.3 He failed to adhere to traffic rules;

5.4 He failed to avoid the occurrence of the collision, where by the reasonable care and skill he ought to have done so.

6. As a result of the collision, the Plaintiff sustained bodily injuries as follows:

6.1 Bilateral tibia/ fibula fracture;

6.2 Right clavicle fracture;

6.3 Degloving injury right forearm;

6.4 Poly trauma."

[3] In its plea the defendant denied negligence on the part of the unidentified insured driver and in paragraph 4 thereof, specifically pleaded the following:

"4.1 The allegations contained herein are denied as if specifically denied as if specifically traversed and in particular the Defendant denies that the said unknown driver was negligent either as alleged or at all.

4.2 The Defendant avers that the collision was caused by the sole negligence of the Plaintiff who was negligent in one or more of the following respects:

4.2.1 He failed to keep a proper lookout;

4.2.2 He drove at an excessive speed in the circumstances;

4.2.3 He failed to keep his vehicle under control;

4.2.4 He failed to apply the brakes of his vehicle timeously or at all;

4.2.5 He failed to pay due regard to other road users and in particular the said insured motor vehicle;

4.2.6 He failed to so as to avoid the collision when by the exercise of reasonable care he could and should have done so.”

[4] During the pre-trial, which minutes were filed before court, the parties had agreed that the issue of merits and quantum will be decided separately in terms of Rule 33(4). At the commencement of the proceedings the parties applied for and the court granted such separation.

THE DISPUTE

[5] The matter comes before me for the determination of the *liability* and in the event of the plaintiff being successful on the merits, the trial on quantum is to be postponed *sine die*.

THE EVIDENCE

[6] The plaintiff, Mr Mandla Ephraim Nkwanyana testified that on 15 September 2012 he was driving a goods truck along the R101 Du Toits Kloof Pass, Cape Town. At the time of the collision he was employed as a driver by Zan Transport. The area that he was travelling in, he described as mountainous and the road that he was travelling on as a tarred road with two lanes. As he was driving on a downhill a vehicle then came at a high speed from behind, overtook him and immediately then applied its brakes in front of him almost coming to a complete stop. He testified that there were two occupants inside this vehicle and one of them then waved his hands and this vehicle then switched on its hazards. His first thought was that the occupants of the vehicle were trying to hijack him. He then realised that he would be involved in a collision and in an attempt to avoid the collision he swerved to the right. He then lost control of the truck and it overturned. He described the truck as consisting of a horse and trailer, with the horse approximately 5 metres long and the trailer approximately 12 metres long.

[7] During cross examination he further testified that as this motor vehicle came in front of him and applied its brakes, he also applied the brakes of his truck in order to avoid colliding with this motor vehicle. Furthermore, that as the truck lost control it overturned and landed on its side outside of the road surface. This then in essence was his evidence.

[8] The plaintiff then closed his case.

[9] The defendant closed its case without tendering any *viva voce* evidence.

ON MERITS

[10] The plaintiff's evidence was that the collision occurred as he was in the process of avoiding colliding with a vehicle which had overtaken him and came to a standstill in front of him. This portion of his evidence is uncontradicted as no evidence in rebuttal was presented by the defendant.

[11] In his Heads of Argument, counsel acting on behalf of the defendant submitted that the plaintiff contradicted himself by testifying that the collision occurred on a straight stretch of the road whereas the accident report depicts that the collision occurred where the road was making a curve. This description of the road depicting the scene of the collision (was given to the author of the report by the plaintiff) and is more probable with the contention by the defendant, that the plaintiff lost control of his truck where the road was curving and he was descending and that no other vehicle was present at the scene. The plaintiff however when confronted with this proposition, was adamant that the collision occurred before the road was making a curve. Furthermore, that the failure by the plaintiff to mention in evidence in chief that he also applied his brakes in addition to swerving to his right in order to avoid the collision, ought to be construed by the court that the plaintiff made an untruthful statement for which the court should draw an adverse inference against him. Similarly, when the plaintiff was confronted with this aspect of his evidence being omitted, he testified that he was not specifically asked as to whether he had applied his brakes and that it follows that he would have applied his brakes under the circumstances. In addition to the above, the plaintiff's inability to estimate the time it took when he first noticed the other vehicle overtaking him, to the time that he lost control, is indicative of the fact that there was no other vehicle present on the day.

[12] The plaintiff conceded under cross-examination that he gave the police a statement which was recorded in the accident report. Counsel representing the defendant however failed to confront the plaintiff with any other contradictions contained in the accident report. Although, the accident report under the heading 'Description of the accident' makes no mention of another vehicle overtaking the plaintiff and braking in front of him resulting in the plaintiff taking evasive action in order to avoid a collision. In the absence thereof, this court cannot merely reject the plaintiff's evidence in the absence of any rebuttal evidence.

[13] In the result I find as regards the liability, that the defendant is held liable to compensate the plaintiff 100% of such damages as the plaintiff is able to prove as a result of the collision which occurred on 15 September 2012.

ORDER

[14] As a consequence, the following order is made:

14.1 The defendant shall pay the plaintiff 100% of the plaintiff's agreed or proven damages;

14.2. The trial on quantum is postponed *sine die*;

14.3 The defendant shall pay the plaintiff's costs for the trial on the merits on a high court scale.

C.J COLLIS

ACTING JUDGE GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

Counsel for the Plaintiff : ADV. B.L. NGUBANE

Instructed by : MKHABELA INCORPORATED
Counsel for the Defendant : ADV. M.H.MOKALE
Instructed by : MOLEFE DLEPU
Date of Hearing : 29 JULY 2016 & 4 AUGUST 2016
Date of Judgment : 9 SEPTEMBER 2016