REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

09/10/2017
DATE SIGNATURE

CASE NO: 2016/38213

In the matter between:

KORDOM, XANDER ULLRICH Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

FISHER J:

INTRODUCTION

[1] This is an action for damages against the Road Accident Fund ("RAF").The plaintiff alleges in his particulars of claim that a collision occurred on 23 August 2014 at approximately 1:30am along Netelton road, Elandsfontien, De Deur, between an unknown insured driver and a motor vehicle with registration numbers and letters MNY 065 GP being driven by the plaintiff.

[2] In terms of rule 33(4) the merits were separated from the quantum and this judgment deals only with such merits.

[3] The version of the plaintiff as to the collision essentially amounts to the classic "*hit and run*" scenario. The RAF was unable to advance any version and pleaded no knowledge in relation to the merits.

THE PLANTIFF'S CASE

[4] The plaintiff says he was travelling home along a dark road in the early hours of the morning in question after having been to a social gathering, at which he consumed alcohol but not to excess, when he was faced with two vehicles coming in the opposite direction. The drivers of these vehicles appeared to him to be driving erratically when he first noticed them. He said that he thought that they may be racing with each other. One of the drivers then veered into his path and to avoid a head-on collision he was forced to swerve onto the gravel verge – but was hit by this vehicle anyway. This impact caused his vehicle to roll. He was flung from the vehicle as he was not wearing his seatbelt. He lost consciousness and was assisted by a passing "*good Samaritan*" who contacted his family and the emergency services. He sustained injuries to his clavicle and shoulder blade. He was taken to Baragwanath Hospital where he was treated for his injuries.

[5] It was only 18 months after the accident that the plaintiff decided that he wanted to make a claim against the RAF. He testified that it was his mother who persuaded him to do so. He thus embarked on a process aimed at making the claim. To this end, he made an accident report to the police in relation to the accident. He states that he expected to find a record of the accident even though he did not report it at the time of the accident. His evidence is to the effect that he believed that the police would have opened a case of their own accord because they were called to the scene of the accident. The accident reports thus comprise statements made by the plaintiff for the purposes of instituting these proceedings. They are not the witness accounts of any person other than the plaintiff.

[6] The only independent evidence of the alleged collision is the hospital records that show that the plaintiff was admitted on 23 August 2014 and that he sustained injuries in a motor vehicle accident that reportedly involved his vehicle rolling and his being flung out.

[7] The rest of the picture relies on the testimony of the plaintiff and, to a limited extent that of his younger brother Mojle Kordom, who testified on his behalf. The picture however is, to say the least, incomplete and insubstantial. First, there is the missing identity of the person who stopped to assist the plaintiff. Nobody knew his name and nobody took his details. The police report ,which the plaintiff latterly signed as being true and correct however states that he woke up in hospital. Thus it appears to be a mystery as to how the family of the plaintiff were told to go to the accident scene. Contradicting his statement to the police, the plaintiff then explained that he must have given the Samaritan his girlfriend's telephone number at the scene – although he did not know how this had occurred

[8] Mojle's testimony takes up the story thereafter: he states that he was woken by his mother who had received a call on her cellphone to the effect that the plaintiff had been in an accident. When confronted in cross examination with the fact that the plaintiff's evidence was to the effect that the girlfriend was phoned he said he didn't know who was phoned – but that he

was woken by his mother and that the family – Mojle, the mother, the girlfriend, and an uncle who had taken the family to the scene in his vehicle attended on the scene. This notwithstanding, no one including the police, apparently took the details of the Samaritan. Mojle said that he did not meet this man. He believed, however, that his mother spoke to him at the scene. The plaintiff's mother is central to the version: she could explain to whom the call in the early hours of the morning came informing of the accident, she was the only person who could have given any evidence in relation to her dealings with the Samaritan, she was also on the version of the plaintiff the reason why he decided to make the claim when he did.

[9] The plaintiff testified that the vehicle was towed to the plaintiff's home and stored there for some time before the plaintiff decided to scrap it. There were no records of this towing as it was attended to by a person identified only as "*Pumba*" – who apparently worked for a towing company but did the towing job "*off the books*" i.e. for his own account. This version is again at odds with the police report which records the towing company as "*Sed's Towing*". This was then explained by the plaintiff on the basis that this was in fact the company for whom Pumba worked.

[10] Thus there is no concrete evidence of any collision save that of the plaintiff himself. Where one would expect easy corroboration, it is missing. There was no question that the plaintiff's mother – a key witness was available to be called to give some substance to the woefully insubstantial web of facts presented. That she was not called is indeed of concern.

[11] Even aside from the deficiencies in corroboration, the version itself, as presented by the plaintiff, is inconsistent and unsatisfactory in even its most fundamental components. The plaintiff states that he was on his way back from a social gathering. He went to see a friend. The friend was not to be found however – so he socialized with friends of the friend – all unnamed. He testified that this social gathering took place in Vereeniging which was 45 minutes to an hour away from his home in Enerdale; that he travelled home from Vereeniging; and was travelling Southbound on the road where the

accident occurred. He testified that he does not know the name of the road but that he knew it only by a nickname "*Majala*" road. His reports to the police however indicate that he stated that he was travelling north. The police reports which are all signed by him have him travelling home variously from Eden Park and from Vereeniging and in a northerly and southerly direction. He also gave differing statements as to the position on his motor vehicle where the insured driver hit his vehicle. He could not explain these discrepancies save to state that those compiling the reports had committed errors. He did not however dispute that he had signed the reports in apparent acceptance of the truth of what was stated therein. The plaintiff took the constable investigating the accident to the place where he said the collision had occurred. His report states the plaintiff took him to the scene *"... and found out that it was a Netelton Rd; Elandsfontein; (open veld)".*

[12] The plaintiff was a poor witness. Apart from the inconsistencies – one gained the impression that the version given was deliberately lacking in form and substance – so that he could escape detailed questioning on the salient features. He even sought to "*withdraw*" the detailed version of the two oncoming vehicles racing with each other and behaving recklessly when it was tested in cross examination. Even his driver's licence had, according to him, been lost and never renewed.

[13] The plaintiff's brother was also careful to give only so much detail as could establish that an accident had occurred. It, too, was unsatisfactory in its central details such as how he was alerted to the accident and his failure to engage with any person to save his brother at the scene. His version is that he spoke to the plaintiff and that all that was said was that he should "*get the vehicle home*". This is at odds with the plaintiff's version to the police to the effect that he woke up in hospital. In any event the evidence of Mojle was such that it could not lend any credence to the version of the collision itself.

THE DEFENDANT'S CASE

[14] The RAF closed its case on the merits without leading evidence. As stated above it pleaded that it had no knowledge of what occurred and simply put the plaintiff to the proof of his case.

DISCUSSION

[15] The court may base its finding on the single evidence of a competent and credible witness.(see: s16 of Civil Proceedings Evidence Act 25 of 1965)

[16] In ***Denissora v Heyns Helicopters*** 2003 (4) All SA 74 (C) the court (per Yekiso J) held:

"It does not, however, follow that because evidence is uncontested, therefore, it is true. The evidence may be so impossible in the light of all other evidence that it cannot be accepted". (see in this regard Meyer v Kirner 1974 4 SA 90 (W) at 930-H). The fact that evidence stands uncontradicted does not relieve the party from the obligation to discharge the onus resting on him. (See Minister of Justice v Saernetso 1963 3 SA 530 (A) at 534 H)

I am in respectful agreement with these prescripts.

CONCLUSION

[17] In light of the concerns above in relation to the evidence, I cannot find that the plaintiff has discharged the onus of establishing his case on the merits in a manner which can be described as competent or credible.

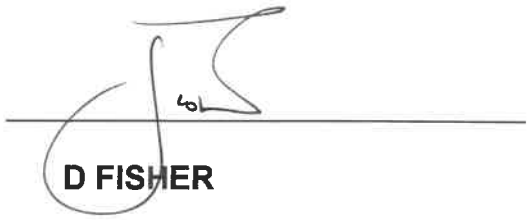
[18] The failure to adduce evidence is usually looked upon as a strong indication that such evidence would be to the detriment of the party

concerned. (see: *Sampson v Pim* 1918 AD 657 662; *Elgin Fireclays Ltd v Webb* 1947 4 All SA 389 (A); 1947 4 SA 744 (A) 750; *Gleneagles Farm Dairy v Schoombee* 1949 1 SA 830 (A) 840; *Durban City Council v SA Board Mills Ltd* 1961 3 All SA 344 A).

[19] I considered in all the circumstances whether this was a matter where the evidence is such that the case had not been established because of the lack of the sufficiency of the evidence or whether the case presented was such that the evidence falls to be rejected. Given the profound deficiencies in the case, it is my view that the failings are such that the evidence of the plaintiff falls to be rejected and the case should be dismissed.

I thus make the following order:

The plaintiff's case is dismissed with costs.



D FISHER

HIGH COURT JUDGE

Date of Hearing: 4 September 2017

Judgment Delivered: 9 October 2017

APPEARANCES:

For the Applicant: Adv Sempe Instructed by TW Mathebula Inc.

For the Respondent: Adv Gorge Instructed by Mayat, Nurick Langa Inc.