


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28109/2015

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


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In the matter between:

KHAN, HASSAN SHAMSHEER obo

ESTATE LATE SHAMSHEER HABIB KHAN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MBONGWE, AJ:

INTRODUCTION.

- [1] The plaintiff in this action for damages seeks compensation against the defendant for bodily injuries sustained in a motor vehicle accident which occurred on the 24 August 2013 at approximately 06h15 along the old Alberton/Kliprivier Road. The plaintiff alleges that he was driving alone in his light delivery vehicle in a southerly direction when, as he was approaching bend to his left hand side, he noticed an unidentified motor vehicle travelling in the opposite direction driving on his lane of travel at a high speed as it was overtaking another vehicle. He alleges that he applied brakes and swerved to the left, off the tarred surface of the road and onto the gravel, to avoid a head on collision with that vehicle. In doing so his vehicle had a tyre burst resulting in him losing control of the vehicle and, as a result, the vehicle capsized and overturned. The plaintiff's claim is thus premised on the provisions of section 17(4)(b) of the Road Accident Fund Act, 56 of 1996, as amended.
- [2] It is necessary to state that the road concerned consists of two lanes; one for each direction of travel. From the plaintiff's perspective, the bend on the road would have been to his left, that is, towards the west.

[3] The defendant repudiated the plaintiff's claim and, in denying liability to compensate the plaintiff, alleged that the plaintiff had been travelling at a high speed, failed to negotiate the bend and proceeded across the lane for oncoming traffic and thus exited the tarred surface of the road on his extreme right hand side, that is, on the eastern side of the road. This point of exit alleged by the defendant is marked Point F on the sketch plan both parties used and referred to throughout the hearing. It is of importance to state that from this Point F the parties' evidence is similar and further details are common cause between them, with the exception that the hearsay evidence of the injured plaintiff makes no reference whatsoever to Point F and the rest of the common cause facts.

HEARSAY EVIDENCE

[4] The injured plaintiff (henceforth referred to as "the deceased") died three years after the accident having deposed to an affidavit setting out his version of the circumstances leading to the accident. The affidavit formed part of the claim documents lodged with the defendant. The deceased's said version became hearsay evidence due to his death. This evidence together with the hearsay evidence of the deceased's widow was ordered on 18 October

2017 by Mokose AJ, as she then was, admissible or to be admitted as evidence at the trial.

- [5] I pause to state that the pleadings had closed by the time the deceased passed on. He was substituted as the plaintiff by his eldest son who is also the executor of his estate. Equally important is to state that the hearsay evidence of the deceased's widow, Mrs Khan, who is referred to in Mokose's order as the deceased's lay witness, was said by the plaintiff's counsel to consist of what the deceased had allegedly narrated to her about the circumstances of the accident. The cause of the deceased's death has still not been established, according to the plaintiff's counsel.

OPENING ADDRESS

- [6] In addition to the hearsay evidence aforementioned, the plaintiff's counsel advised that the plaintiff will be calling two further witnesses; Ms Badenhorst, an accident reconstruction expert and the substitute plaintiff, Mr Khan. The latter took photographs of the scene of the accident on the same morning of the occurrence and while the deceased and his damaged vehicle was still at the scene. Mr Khan's evidence, the court was advised, would be on the depictions in the photographs.

- [7] The defendant's counsel advised the court that as the driver of the alleged unidentified motor vehicle is unknown, the defendant intends to bring an application to amend its plea at a later stage to align it with the evidence before the court.

OBJECTIONS RAISED

- [8] The defendant objected to the admission of the hearsay evidence of both the deceased and that of his widow. The plaintiff, on the other hand, indicated his intention to oppose the defendant's intended application for the amendment of its plea. In the end both the objection and opposition were dismissed for reasons given later in this judgement.

THE EVIDENCE

- [9] The deceased's hearsay evidence is contained in paragraphs 2, 3 and 4 of his affidavit and reads thus:

(2)

"On or about the 24th August 2013 at approximately 06h15, I was travelling along old Alberton/Kliprivier Road. I was involved in a motor vehicle accident, while I was the driver of motor vehicle bearing registration numbers and letters BJ 65 XC GP"

(3)

"As I was approaching a bend, I noticed the driver of an unidentified motor vehicle overtaking another motor vehicle travelling from the opposite direction. This vehicle was approaching me at a high speed and was travelling in my lane of travel".

(4)

"This motor vehicle was about to collide with me head on, and in an attempt to avoid the collision, I braked and swerved to the left. As I swerved, onto the gravel, my vehicle had a tyre burst and it capsized and rolled.'

[10] It important firstly to state that contrary to the deceased's version, it is common cause that his vehicle exited and re- entered the tarred road surface more than once. According to the evidence of the deceased's son, which was mainly, albeit partially, supported by photographs he took at the scene as well as that of the deceased's widow, in avoiding a head on collision, the deceased had swerved to the left and exited the road on its western side at Point X on the sketch plan. He then swerved to the right, re-enter the road, but drove across it entirely and exited it again at Point F on the eastern side. Point F, which is at the eastern shoulder of the

road, is the point where the defence alleges the deceased had first veered off the road after failing to negotiate the bend to his left. It is from this point onwards that the factual evidence of both sides, saves for that of the deceased, is in agreement and, consequently, became common cause facts.

COMMON EVIDENCE

[11] Having exited the road at Point F, the deceased had carried on driving for some lengthy distance, arguably 171 metres, on the gravel almost parallel to the road, before re-entering the road again only to drive across it again and exiting it on the western side where the vehicle hit a ditch and overturned.

[12] The defendant denied the existence of the plaintiff witnesses' alleged Point X as well as the deceased's allegation on the existence of negligent unidentified vehicle.

COTRADICTIONS IN PLAINTIFF'S CASE

[13] It is to be noted that from the above quoted version of the deceased, Point F and the entire common cause facts that followed are not mentioned and purportedly non-existent. Point X, which was alleged by the widow and the deceased's son as the

first point of exit from the road by the deceased, is untenable in that (a) if it existed then the accident would have commenced and ended there, regard being had to the deceased's version; (b) the evidence of the widow and Mr Khan and agreement with the defendant's version from Point F becomes nonsensical and constitutes an extended version to the written version of the deceased, and, (c) if Point X existed, the stretch of the accident scene becomes even far more than the 171 metres mentioned in paragraph 8, supra, thus bolstering even more the suggestion that the deceased had been travelling at a high speed and lost control of the vehicle as a result; a version the plaintiff wants to deny, hence the objection to the amendment of the defendant's plea. Reality is that Point F and the common cause facts that followed did exist. The deceased's failure to include the common cause facts alone casts serious doubt on the probative value of his evidence and automatically the hearsay evidence of his widow.

TRAVERSING THE SOURCE OF POINT X

- [14] The plaintiff's accident reconstruction expert, Ms Badenhorst, testified that she could not establish Point X, neither could her counterpart for the defence with whom she signed the joint minute. She stated in her report that Point X was narrated to her by the

plaintiff's attorney as "a clarified version of the deceased's version". While giving evidence in chief, plaintiff's counsel put the version regarding Point X to Ms Badenhorst and solicited her comment thereto. He was, however, interrupted by the court wanting to know the source of this version. His response was that it was the plaintiff's attorney, who was present in court. Asked if the attorney will be called as a witness, counsel's response was that he will consider it, but nonetheless abandoned his pursuit of Ms Badenhorst's comment nor did he, at any later stage call the attorney as a witness. It should be noted later in this judgement how the mysterious Point X becomes differently introduced.

- [15] The hearsay evidence of the deceased's widow was ordered admissible on the basis that it will consist of what the deceased had allegedly told her about the circumstances leading the accident. This fact was reiterated by the plaintiff's counsel in his opening address. Mrs Khan testified that the circumstances of the accident were narrated to her by the deceased two days after his discharge from hospital and at home. She had been present during all consultations the deceased had with his attorneys and with counsel. This included the day, approximately six months after the accident, when the deceased made his aforementioned affidavit to

his attorney. Despite the “omissions” of some aspects of what the deceased had allegedly told her and which finally constituted her hearsay evidence, she did not remind or draw the deceased’s attention to the omissions in the affidavit he was making or convey them to the attorney. It was due to Mrs Khan’s purported failure in this regard that it emerged during her cross examination that she had herself studied law.

[16] Further, Mrs Khan testified that she was present and driving the vehicle in which she and the deceased were travelling during a re-visitation of the scene of the accident for the purpose of the deceased relating and pointing out relevant points on the scene to his attorneys who, together with counsel, the plaintiff’s accident reconstruction expert as well as Sgt Noge, the defence witness, were present. There was no evidence that the alleged Point X was pointed out by the deceased. Had he done so Mrs Khan would have heard him and so would, more importantly, the plaintiff’s expert. The two would have given evidence to that effect in court. Instead, the expert testified that Point X could not be determined by her nor by her counterpart for the defendant with whom she had signed the joint minutes. She further testified that she could neither confirm nor deny the existence of Point X.

[17] For her part and during her evidence in chief, Mrs. Khan testified that she got to know about Point X during a consultation, in which she was present, the deceased had with counsel after the latter had allegedly asked the deceased to draw a sketch indicating how the accident had occurred. This evidence, considered in the light of counsel's earlier response with regard to the origin of evidence with regard to Point X, Ms Badenhorst's testimony in that regard and the denial of the existence of this point by Sgt Noge clearly demonstrate that this purported point was a product of fabrication. The determination to make Point X appears later and again in a dubious manner in the evidence of Mr Khan, who becomes the third source to have establish Point X. Considering the various avenues/opportunities she had been present and with the deceased when the accident had been discussed, Mrs Khan could have gained direct knowledge of Point X and all facts concerning it from the deceased himself. Mrs Khan appeared stunned when counsel for the plaintiff read out the deceased's version to her and invited her comment thereon. Mrs Khan proffered none.

[18] With regard to Mr Khan, as pointed out earlier, he was called to give evidence based on the depictions in the photographs he had taken of the scene of the accident. He, however, went beyond the

perimeters of the evidence he was called to give when he not only alleged to have seen clearly visible tyre marks of the deceased's vehicle at Point X, both on the gravel after the vehicle had exited the road and on the tarred surface of the road where the vehicle re-entered the road before proceeding to exit it again at Point F. Mr Khan had curiously omitted to take photographs of this important spot. Questioned on his purported omission, Mr Khan testified that he had not thought of taking photographs when at the alleged Point X. Asked what his reasons for taking photos were, he testified that he had intended to show one of his brothers who was out of Gauteng what had happened. Mr Khan testified that he runs a truck logistics business. He was unlikely, in my view, not to have focused and take photographs of this important point or even walk back to do so, had it existed.

- [19] In no particular order, the photographs Mr Khan took depicted the tyre markings of the deceased's vehicle from Point F, down the gravel until the vehicle re-entered the road and exiting it again before overturning. As in Mrs Khan's instance, he failed to comment, when asked to do so, to the version of the deceased that was read to him; In fact he was visibly surprised and simply shook his head when the invitation was repeated.

EVIDENCE OF SGT NOGE

[20] The evidence of sergeant Noge, the only witness for the defence, which, as stated in paragraphs 8 and 9, supra, will, for its similarity to the plaintiff's witnesses from Point F, not be repeated, save to state that Sgt Noge denied the existence of Point X stating that him and his colleague had followed the tyre marks trail of the deceased's vehicle and could not have missed the alleged Point X, especially when it was as clearly visible as Mr Khan alleged it was. Sgt Noge testified that he had deposed to an affidavit and that his conclusion after the completion of his preliminary investigations with his colleague was that the deceased's accident was a single vehicle accident. This was also the view expressed by Ms Badenhorst and her counterpart for the defendant in their report. Similarly, his conclusion that the deceased could have been speeding, lost control of the vehicle at the bend as a result and ultimately overturned was also shared by both experts.

[21] I now revert to the dismissal of the defendant's objection to the admission of the deceased's as well as his widow's hearsay evidence. The admission of this evidence was ordered by the court after hearing argument from both sides. Secondly, the mere admission of such evidence does not equate to an acceptance of

its veracity which the trial court is enjoined to make a determination on taking into consideration all the evidence before it. Further, no prejudice, save for the deprivation of the opportunity to cross examine the deceased, his hearsay evidence was expected to be repeated by his widow and could be tested.

[22] As stated in its opening address, the defendant, at the end of its sole witness's testimony, but before closing its case, moved an application for the amendment of its plea to align it with the evidence before the court. There were two amendments sought, namely, one to include a plea that the accident was occasioned solely by the negligent high speed driving of the deceased (which resulted in) his failure to negotiate a bend and zig zagging at least more than once across and off the road until his vehicle overturned.

[23] The gravamen of the plaintiff's opposition to the amendment was that the defendant had failed to include these specific pleas in the plea and that it was opportunistic of it to bring the application at this late stage of the proceedings. The amendment was granted and the opposition dismissed on two grounds; rule 28 provides for the amendment of pleadings at any stage of the proceedings and, secondly, it would have been impossible for the defendant to plead

specifics in circumstances where it did not have the advantage of accessing and obtaining the version of the driver of the unidentified motor vehicle. Further, there was clearly no prejudice to the plaintiff or to the conduct of the plaintiff's case occasioned by the amendment sought.

ANALYSIS OF THE EVIDENCE AND FINDINGS

- [24] The hearsay evidence of the deceased appears profoundly to have been wilfully crafted to exclude any facts incriminating him such as the veering of his vehicle at least twice off and back on the tarred surface of the road and the curiously long stretch of the accident scene which suggests that the deceased had been driving at a high speed, inter alia. This was also the view of the parties' experts expressed in their joint minutes as well as the unbiased, in my view and finding, evidence of Sgt Noge. The exclusion of these obviously self-incriminating facts by the deceased adversely impact on the probative value of his version of the circumstances leading to the accident. His credibility with regard to the contested existence of the alleged negligent unidentified motor vehicle is tarnished. His deliberate exclusion of what became the common cause facts necessarily points to the unreliability of his hearsay evidence. For these reasons the hearsay evidence of the

deceased and all evidence founded therefrom ought to be rejected as false.

[25] The hearsay evidence of the deceased's widow of what she had allegedly been told by the deceased, consequently, stands to be dismissed. Similarly, her evidence with regard to Point X is dismissed for the reasons given earlier in this judgement.

[26] Mr Khan's testimony, to the extent that it was supported by photographs, was of great assistance to the court and unassailable. However, his evidence regarding Point X or the existence of Point X did not only fall outside the perimeters of the evidence the court was advised he would give, namely, based on the photos, but was also awash with the rejected version given by Mrs Khan. For these reasons Mr Khan's evidence regarding the alleged Point X is rejected as false.

[27] The evidence of both the plaintiff's expert and that of Sgt Noge for the defence appeared to be very objective and with no trait of bias for or against either party. The evidence of Sgt Noge and his findings after conducting preliminary investigations in the morning of the occurrence, I find, provided the most probable narration of the circumstances leading to the occurrence of the accident.

[28] Based on the findings in this judgement I make the following order:

1. The plaintiff's claim is dismissed.



M. MBONGWE AJ

ACTING JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR THE PLAINTIFF Mr N. Motala

FOR THE DEFENDANT Mr S. Meyer

Dates of hearing 13 -16 August 2019

Judgement delivered September 2019