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

CASE NUMBER: 26612/2011

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
Date: 29 March 2021

In the matter between:

GRAU FRANCOIS **PLAINTIFF**

And

LEVIN VAN ZYL **DEFENDANT**

Coram: Molahlehi J.
Heard: The trial was conducted as a videoconference on the *Microsoft Teams* digital platform.
Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives *via* email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date of the delivery of thejudgment is deemed to be on 29 March 2021.
Summary: Claim for damages - motor vehicle collision- 1% negligence of the

insured driver is deemed to sufficient to establish liability. Collision not in dispute. Plaintiff establishing a *prima facie* case of negligence. The plaintiffs failure to call the insured drive. The principle governing failure to call an available and willing witness restated.

Judgment

Introduction

[1] The question to answer in this case is whether the injuries for which Mrs Grau, the Swiss national, (the plaintiff) is claiming compensation for, is causally related to the negligent or otherwise unlawful act and further to the driving of the vehicle by the driverinsured by the Road Accident Fund on 19 December 2007.

[1] The collision between the motor vehicle driven by the insured driver, Mr p Naidoo under registration number, [....] and that driven by Mr Grau, the plaintiffs husband under registration number [....] is common cause.

[2] The plaintiff instituted these proceedings against the defendant, Levin Van Zyl Inc, for negligently causing her claim against the Road Accident Fund to prescribe.

[3] After protracted litigation, the parties have now agreed that the defendant can be held liable if she was able to show that the insured driver contributed 1% negligence to the collision. Thus, the issue before the court is whether the plaintiffs injuries were due to the negligent driving of the insured driver.

[4] The only witness who testified in support of the case of the plaintiff was MrsVenter, who testified virtually through the MS Teams digital platform.

[5] Mrs. Venter's testified that on the day of the accident they were travelling from an evening event with the Grau family when their car was hit from the rear-end by the car insured by the Road Accident Fund.

[6] The Grau family was visiting their daughter, who was staying with Mrs. Venter whilst studying in South Africa.

[7] Mrs. Venter testified that the accident occurred on 19 December 2007 on the N2 Freeway, made of four lanes, in Kwazulu Natal and was a passenger in the vehicle driven by Mr Grau. They were travelling on the second lane from the right. She suddenly heard a car passing them at high speed. Just as they were discussing the speeding car, their car was suddenly hit from the rear-end by another vehicle. The violent impact of the collision catapulted their car into the air.

[8] She further testified that at the time of the accident, they were travelling at between 100 and 110 km/h.

[9] The plaintiff closed her case at the end of the testimony of Mrs Venter.

[10] The defendant elected not to cross-examine Mrs Venter and close its casewithout calling any witnesses.

Submissions by the parties

[11] The plaintiff's Counsel submitted that his only witness's evidence was sufficient to establish a *prima facie* case against the defendant, showing that the accident's cause was the insured driver whose negligent driving contributed at least 1% to the collision.

[12] The defendant's Counsel contended that the plaintiff's case stands to fail because there is no evidence as to how the accident occurred. In this respect, heargued that the insured driver ought to have been summoned to testify.

Legal principles

[13] It is trite that in civil matters, such as the present, the onus of proof is on the party alleging that the event's occurrence is causally connected to the injuries he or she suffered. The onus rests on the plaintiff to prove negligence on the balance of probabilities.

[14] It is equally trite that the defendant can avoid liability by adducing evidence showing no negligence on his or her part. Failure to adduce such evidence presents the risk that the defendant may be held liable for damages suffered by the plaintiff.

[15] It has not been disputed in this particular case that the collision occurred at the rear-end of the car in which the plaintiff was travelling in. Although, as a matter of law, there is no onus on the defendant to show that he was not negligent, there is a duty on him or her to adduce evidence to show that he was not negligent. The evidence must be sufficient to dispel the *prima facie* proof of negligence.[1]

[16] In *Ex parte Minister of Justice: In re V v Jacobson and Levy,*[2] the court held that:

> "Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the

[1] See Ntsala v Mutual and Federal insurance 1996 (2) SA 184 (T) at page 191 G - H.

absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus."

[17] In the context of motor vehicle collisions, it is trite that the plaintiff, as a passenger claimant, has to prove only 1% negligence on the part of the insured driver in order to succeed his or her with her claim against the defendant. It is equally trite that where a vehicle collides with another motor vehicle from behind, the presumption is that the driver of the vehicle which rear-ended the other vehicle was negligent in failing to keep a proper look out, failed to scan the road ahead and failed to avoid the collision in not applying his brakes timeously or at all.[3]

[18] The other issue that arose during the submission by the defendant's Counsel concerned the failure by the plaintiff to call the insured driver to testify. The principle governing this issue received attention in *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd,*[4] where the court held that:

"... Where a party fails to call as his witness one who is available and able to elucidate the facts, whether the inference that the party failed to call such a person as a witness because he feared that such evidence would expose facts unfavourable to him should be drawn could depend upon the facts peculiar to the case where the question arises".

[19] In *Tshishonga v Minister of Justice and Constitutional Development and Another,*[5] the court held that failure to call a witness is reasonable in certain circumstances, such as when the opposition fails to make out a *prima facie* case. In thatcase, the court held that:

"The failure of a party to call a witness is excusable in certain

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[2] 1931 AD 466 at 478.
[3] Groenewald v Road Accident Fund (74920/2014) [2017] ZAGPPHC 879 (5 October 2017).
[4] 1979(1) SA 621 AD.
[5] (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC) (26 December 2006).

> circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to ... place 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."

[20] As alluded to earlier, the defendant did not lead evidence to rebut the plaintiffs version that the insured driver caused the accident.

[21] The defendant's Counsel contended that the plaintiff has failed to prove her case because it failed to call the insured driver to testify as to how the accident occurred.

[22] It is trite that the court may draw an adverse inference against a party that fails tocall a witness who is available and able to testify.

Evaluation

[23] The onus to prove that the insured driver was negligent rested on plaintiff. It was contended that the plaintiff failed to discharge her onus in that she did not call the insured driver to explain how the accident occurred.

[24] In my view, the plaintiff succeeded in producing sufficient evidence to establish a *prima facie* case of negligence on the part of the insured driver, which was not challenged nor contradicted by any other witness. Thus the issue of failure to call theinsured driver to testify is unsustainable.

[25] In conclusion, I find that the collision of the insured driver's vehicle with that of the plaintiff constitutes *prima facie* evidence of proof that at least 1% of

negligence is attributable to the insured driver.

Order

[26] In the premises the following order is made:

1. It is declared that the defendant is liable to compensate the plaintiff for her proven or agreed damages resulting from the collision which occurred on 19 December 2007 on the N2 South just before the Inanda off-ramp in Kwazula-Natal.
2. Costs are reserved.

E Molahlehi
Judge of the High Court,
Gauteng Local Division,
Johannesburg

APPEARANCES

For the Applicant: Adv. Piet Uys
Instructed by: A Wolmarans Inc.
For the Defendants:
Instructed by: Maluleke Msimang and Associates
Date of the hearing: 11 February 2021
Judgement delivered: 29 March 2021.