

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No.: 3688/2015

15/12/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

S T K

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MNGQIBISA-THUSI, J

[1] The plaintiff, S T K, has instituted an action against the defendant, the Road Accident Fund ("RAF") for damages as a result of injuries sustained in a motor vehicle collision which occurred on 13 January 2014. At the time of the collision the plaintiff was a pedestrian. The motor vehicle which collided with them for registration number eight HGH was driven by Amelia Ndlovu, the insured driver. The collision occurred along the Mganduzweni Road, between Hazyview and White River, Mpumalanga.

[2] In its plea the RAF denied that the insured driver negligently caused the collision in which he plaintiff was injured. Further, the RAF pleads that when the collision happened, the insured driver was faced with a situation of sudden emergency and therefore cannot be held to have been negligent. Furthermore, the RAF pleaded that the plaintiff also contributed to the loss he has suffered in that he was also negligent.

[3] The following facts are common cause:

- 3.1 the collision occurred on 13 January 2014;
- 3.2 at the time of the collision the plaintiff was 21 years old and is currently 23 years old;
- 3.3 the point of impact occurred outside the road;
- 3.4 the road along which the collision occurred has two lanes, with one lane in each direction.
- 3.5 the road was dry and visibility was clear at the time the collision happened.

[4] As a result of the collision, the plaintiff sustained the following injuries:

- 4.1 fracture of the left tibia and fibula with an above knee amputation;
- 4.2 right tibia and fibula fracture;
- 4.3 scarring and disfigurement; and
- 4.4 psychological problems.

[5] The issue of loss of earning capacity is provisionally agreed upon at an amount of R1 519 880.05.

[6] The issues to be decided are:

- 6.1. whether the insured driver was negligent, if he was, whether the plaintiff contributed through his own negligence; and
- 6.2. general damages.

[7] The plaintiff has served and filed the medico-legal reports of the following experts:

- 7.1 Dr CW Goosen (Orthopaedic surgeon);
- 7.2 Dr L Hyson (Clinical psychologist);
- 7.3 Dr N J Mogoro (Independent medical assessor);
- 7.4 Ms L Mashishi (occupational therapist);
- 7.5 Dr M Mathabela (industrial psychologist);
- 7.6 GRS Actuarial Consulting (actuary).

[8] The RAF has served and filed the medico-legal reports of the following experts:

- 8.1 Dr TO Marley (independent medical practitioner);
- 8.2 Dr P Briets (industrial psychologist);
- 8.3 Alexander Forbes actuary; and
- 8.4 Dr J Masango (occupational therapist).

[9] The RAF's amended plea was allowed by agreement.

[10] The plaintiff's evidence is as follows. He is 22 years old currently registered for a bridging course in information technology and lives at Umgaduzweni, Nelspruit. On the afternoon of 13 January 2014, he together with his friend, Mr Thulani Gumbi ("Mr Gumbi"), were coming from Nkanini, facing oncoming traffic, from White River to Hazyview. As they were walking on the side of the road, they saw a car whose driver appeared to have lost its control coming along the road and travelling in the opposite direction to which they were facing. They tried to run away. In the process the car came towards them and ended up hitting them. As a result of the injuries he sustained, he was taken to the Themba hospital by ambulance where he was hospitalised for approximately two weeks. The plaintiff estimated the distance between the road and the point of impact is about 10 paces. He testified that there was no other car except the car which hit them.

[11] During cross-examination the plaintiff testified that on the day in question he did not drink any alcohol. He estimated the time at which they went to his friend's uncle's home was around 11h00 and that they could have left the uncle's home at around 15h00.

[12] The plaintiff was referred to a sketch plan of the area where the collision occurred which was discovered by the plaintiff and was drawn by the insured driver. The sketch plan is found on page 19 of the merits bundle. However, during cross-examination it was apparent that the plaintiff was not familiar with the sketch plan as drawn. As a result the plaintiff drew a new sketch plan of the area where the accident as he understood it.

[13] The sketch plan drawn by the plaintiff indicated the following points: the place where the plaintiff caught sight of insured driver, marked as 'A'; Nkanini, where the plaintiff and his friend were coming from, marked as 'B'; the area where the plaintiff and his friend were walking, marked as 'C'; the direction in which the plaintiff ran to as the insured driver's motor vehicle approached them, marked as 'D'; and the estimated point of impact marked as 'E'.

[14] Further during cross-examination testified that they walked on the opposite side of the road opposite to Nkanini. Initially the plaintiff could not remember at what stage they had crossed the road to the other side of the road. However, the plaintiff testified that they had crossed the road to the other side way back along the road.

[15] The plaintiff called Mr Gumbi to testify. His evidence is that on 13 January 2014 at around 15h30, he together with the plaintiff were walking next to the main road, the R538, facing oncoming traffic. As he was busy chatting on his cell phone, he heard the plaintiff warning him to be on the look-out as there was a motor vehicle coming from the opposite direction which appeared to have lost control. He and the plaintiff tried to run away in order to avoid being hit by this vehicle, unfortunately vehicle hit them both and they were taken to the Themba hospital.

[16] After the evidence of Mr Gumbi, the plaintiff closed its case.

[17] The insured driver, Ms Ndlovu, testified in her evidence was as follows. On the day of the accident she was coming from work and going home and travelling at about 60 km/h, travelling from Hazyview in the direction of white River, when she saw two African males running across the road. At the same time there was another vehicle, a VW Golf, which was overtaking her at high speed. Further at the same time as the Golf was

overtaking her, another vehicle was coming from the opposite direction. As she tried to avoid the Golf, she swerved to the left and collided with a rock which flew into the air and hit her windscreen before rolling to the ground and hitting the plaintiffs left leg.

[18] Cross-examination Mr global considered that her evidence as to the area where the incident occurred differs from the sketch plan drawn by the plaintiff. In her evidence Mr global head testified to 3 cars having been in the area of the accident when the accident occurred. However the sketch plan only indicates one vehicle in the vehicle which was driven by the single. Furthermore during cross-examination Mr global was confronted with a statement she made to the police in which she did not mention either the golf or the car which came from the opposite direction no the which heat is used screen in the plaintiff's left leg. Furthermore Ms Ndlovu was confronted with the accident report which was admitted at an agreement during the pre-trial conference in which it is confirmed that a windscreen was not damaged.

[19] In argument it was submitted on behalf of the plaintiff that the plaintiff and Mr Gumbi's evidence was consistent and there were no contradictions and that the court should accept their evidence as credible and truthful. It was further submitted on behalf of the plaintiff that the plaintiffs version as to where the accident happened, that is, outside the road, was confirmed by the RAF's assessor, Kay Gee Investigations and Security. On the other hand it was argued on behalf of the RAF that the collision was solely through the negligence of the plaintiff and Mr Gumbi running across the road which put the insured driver in a sudden emergency situation. Further that the plaintiff's evidence was contradictory and inconsistent particularly with regard to where he claims they crossed the road. It was also submitted that Mr Gumbi's evidence should be rejected as he was not an independent witness. In the alternative it was argued that even if it is found that the insured driver was negligent, the court must also make a finding that the plaintiff was also negligent and therefore contributed 50% towards the negligence which caused the collision.

[20] It is not in dispute that the plaintiff bears the onus of proving on a balance of probabilities that the injuries he sustained are as a result of the negligence of the insured driver.

[21] In *National Employers' General Insurance Co Ltd v Jagers*¹ the court stated that:

"... that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rest on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the probabilities favour the plaintiff, the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[22] The plaintiff's version is that he and Mr Gumbi were walking on the side of the road in the direction of White River when the insured driver who was travelling in the opposite direction towards Hazyview and at high speed and who appeared to have lost control of her car hurtled towards them and hit them, resulting in the plaintiff's left leg being severed after he was hit by the insured vehicle. The plaintiff and Mr Gumbi denied that they were hit whilst crossing the road. Further, the plaintiff and Mr Gumbi denied the presence of any other vehicle other than that of the insured driver.

[23] The RAF's version, as testified to by Ms Ndlovu is that a City Golf had undertook he at high speed and at the time it overtook her another vehicle was coming from the opposite direction, and in an attempt to avoid the City Golf, her car left the road, hit a rock which hit his windscreen and rolled over to hit the plaintiff.

¹ 1984(4) SA 437 (E) at 4400 -G.

[24] The plaintiff and Mr Gumbi came across as credible witnesses when they testified about the events leading to the insured vehicle colliding with them and their evidence is accepted as being true. The plaintiff's evidence as to how the collision occurred was corroborated by the evidence of Mr Gumbi and no material contradictions could be found even under cross examination.

[25] I was not impressed with Ms Ndlovu's evidence which I found not to be plausible as to how the collision happened. On the one hand Ms Ndlovu alleges that the plaintiff and Mr Gumbi were crossing the road at a place they were not supposed to cross and without looking if it was safe to do so when she hit them. It is common cause that the point of impact was outside the road. This is inconsistent with her evidence of a City Golf overtaking her at high speed and her veering to the left and hitting a rock. If the plaintiff and Mr Gumbi were in her line of travel, she would have hit them on the road and the alleged City Golf which was travelling at high speed, including the other alleged vehicle which was coming from the opposite direction would have hit the plaintiff and Mr Gumbi if they were crossing the road at the time Ms Ndlovu was travelling at the same place. Her version of how the collision happened is not probable.

[26] I am of the view that the insured driver must have seen the plaintiff and his friend from a distance as it is common cause that on the relevant the weather was clear and visibility was good. Even if there was another vehicle overtaking the insured driver from the right, the insured driver should not veered to the left of the road onto the shoulder of the road particularly as she was aware of pedestrian walking along the side of the road.

[27] The fact that the point of impact was not on the road but outside, establishes prima facie inference of negligence. I am satisfied that the plaintiff has proven that the insured driver was solely negligent in causing the accident.

[28] With regard to the RAF's defence of sudden emergency I am not convinced that the RAF has laid any basis to its defence of sudden emergency. In Neethling and Potgieter's **Law of Delict**², the following requirements have to be met in order to prove

² 7 edition (2014).

sudden emergency:

- 28.1. "The wrongdoer must have faced a situation of imminent peril;
- 28.2. The wrongdoer must not have caused the perilous situation by his own negligence or imprudence; and
- 28.3. The wrongdoer must not have acted in a grossly unreasonable manner.

[29] I am of the view that the insured driver has presented any credible evidence that she was faced with imminent peril. In fact, taking into account all the facts in this case, the insured driver caused the dangerous situation in that she must have been driving at a speed in excess of her alleged 60 km per hour speed, thereby losing control of her vehicle and veering to the shoulder of the road.

[30] I am satisfied that the plaintiff's version as to the events leading to the insured vehicle colliding with them is more probable and I accept it and reject the defendant's version as highly improbable. Further, I am satisfied that the plaintiff has discharged the burden of proving his claim against the defendant on a balance of probabilities.

[31] I am not convinced that the plaintiff was also negligent when one takes into account the evidence of the plaintiff and his witness that they saw the insured driver travelling at high speed and appearing to have lost control of her vehicle, and that they had tried to run away in order to get out of the path of the insured driver's path.

[32] With regard to the amount to be awarded for general damages, the plaintiff is seeking an amount of R2 200 000.00 whereas it was submitted on behalf of the RAF that an amount of R900 000.00 would be an appropriate award as general damages.

[33] Both parties made reference to unreported judgments which were not made available to this court. However, the decisions referred to in the parties' heads of argument have been considered.

[34] The plaintiff is 23 years old. As a result of the collision, the plaintiff's left foot was amputated just above the knee and has lost his ambulatory capacity in that for the rest of his life he is going to have a prosthesis inserted in order to assist him in walking.

According to the reports of the plaintiff's clinical psychologist and independent medical assessor, the plaintiff feels ashamed of his amputated leg and has low self-esteem. He is sometimes angry and unhappy, has become socially isolated and appears to be suffering from symptoms of depressive mood. According to the clinical psychologist, the loss of a limb has affected the plaintiff psychologically and has negatively impacted on his quality of life, particularly when one takes into account his age.

[35] I am therefore satisfied that as a result of the injuries the plaintiff sustained and his permanent disability as a result of the collision, he has suffered loss of amenities of life and should be accordingly compensated.

[36] Accordingly the following order is made:

1. The defendant is found to have negligently caused the collision which occurred on 13 January 2014.
2. The defendant to pay the plaintiff the amount of R1 519 880.05 for loss of earnings.
3. The defendant to pay the plaintiff the amount of R1 200 000.00 as general damages.
4. The defendant is liable to pay interest on the amount mentioned of R2 719 880.00 at the rate of 15.5% per annum calculated from 11 March 2011.
5. The defendant is directed to furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
6. The defendant is ordered to pay the costs of suit, such costs to include the costs of all experts as well as qualifying experts, if any.

NP MNGQIBISA-THUSI
Judge of the High Court

Appearances

For Plaintiff: Adv F Matika

Instructed by: TMN Kgomo & Associates

For Respondent: Adv ZF Kriel

Instructed by: Mkhonto & Ngwenya Inc