

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



16/11/16

Date of hearing: 11 November 2016

Case number: 74277/2014

(1) REPORTABLE: YES / (NO) ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES / (NO) ☒ NO
(3) REVISED.
14/11/2016
DATE SIGNATURE

In the matter between:

GODLEY GAUTA MABUNDA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRENNER AJ

1. The plaintiff, Godley Gauta Mabunda ("Mabunda") was involved in a motor vehicle accident on Sunday, 4 March 2012, at about 17h00, along the R101, (being the old Warmbaths Road), a tarred public road accommodating one lane of traffic in each direction. The road is used by commuters travelling from Hammanskraal to Pretoria and back. Mabunda was driving a 2006 Hyundai Getz ("the Getz") when a collision occurred with a red Golf driven by an unidentified driver. Mabunda's particulars of claim assert that the driver of the other vehicle was *"travelling in the opposite direction in the Plaintiff's lane of travel"*.
2. Mabunda sustained several injuries, namely, a compound right patella fracture, soft tissue injury to the left shoulder, a deep laceration over the right knee, a laceration of the left hand, and a minor traumatic brain injury.
3. The defendant, the Road Accident Fund, ("the RAF"), repudiated liability on the merits, and the case proceeded on the issue of merits only. The issue of quantum was reserved for determination by another Court in due course.
4. At inception of proceedings, a bundle of documents was handed up on the premise that the parties had concurred that the status of the documents was that they were proof of what they purported to be without any admission that they were proof of the veracity of their contents.
5. For the plaintiff, evidence was adduced by Mabunda, personally, whereafter, the plaintiff's case was closed. For the defendant, the RAF, evidence was advanced by a pedestrian who was standing on the side of the road at the time, namely, Azwidohwi Kwindu ("Kwindu"). The defendant elected not to call the evidence of the driver of the Golf, asserting that it was prepared to take the risk of closing its case without his testimony, after the driver had advised the RAF that he had taken ill.
6. Mabunda testified that his wife was travelling with him as a passenger, and they were proceeding in the left lane, in a southwards direction from

Hammanskraal, where he lived, to Pretoria. They were on their way to the Shoprite supermarket in Gezina, (where his wife worked), as his wife had received a phone call of an alarm being activated at the Shoprite and she had been unable to contact the security personnel who usually responded to activated alarms. The road went slightly uphill but then straightened to a flat road at the area where the collision occurred. It was a sunny day and had not yet become dark. He testified that he was travelling at a speed of about 80 km per hour.

7. As Mabunda arrived at the flat section of the road, he suddenly observed the Golf on his side of the road. His initial thought was that the driver intended to turn left into the same road and proceed towards Pretoria, but then he saw that it was turning to face him in his lane. When he saw it, it was about 100 metres away from him. It had apparently driven from a gravel side road to the left of the lane in which Mabunda was driving, where there was a Zionist Christian Church and some farms.
8. When Mabunda realised that the Golf was in his lane facing him, he swerved to the right, into the lane for oncoming traffic. He did not brake or hoot, or swerve to the left of the Golf. He did not swerve to the left because, after the left-hand yellow line, there was gravel and grass and what appeared to be a culvert on the left of this. He was concerned about the Getz turning over if he swerved left. He was sure there was no oncoming traffic at the time he swerved right. In cross-examination, however, he conceded that he had had no time to check whether there was oncoming traffic in the right lane. In the result, Mabunda said he collided with the Golf.
9. Mabunda could not state where the parts of each vehicle collided, as he was disorientated after the accident. He recalled that both vehicles landed on the side of the lane for traffic from south to north. He could recall nothing more about the accident and testified that he was admitted to hospital immediately after the accident. Mabunda's wife also sustained severe injuries and subsequently passed away on 2 November 2012.

10. In cross-examination, it was put to Mabunda that the collision occurred in a totally different way from that described by him. It was put to him that the RAF's witness would testify that Mabunda was driving behind another vehicle, proceeding in the same direction, when Mabunda tried to overtake the vehicle in front of him and collided with a red Golf which was travelling in the other lane for oncoming traffic proceeding from south to north.

11. Mabunda was referred to an affidavit prepared by his lawyer, signed a year later, on 5 March 2013. The operative part of this affidavit reads:

"I was travelling on the Old Warmbaths Road from Hammanskraal towards Pretoria. Near Pyramid an unidentified oncoming motor vehicle was travelling in my lane. I tried to avoid the collision by swerving to the right at the same time as the insured driver was returning to his lane and a collision occurred."

12. It was put to Mabunda that his affidavit omitted to mention that the other vehicle was facing him in the same lane. His answer was that his evidence before Court was the correct version. It was put to him that he was in a hurry that afternoon to reach Shoprite Gezina because of the alarm. He denied this, and reaffirmed that his speed was about 80km per hour. Mabunda repeated that there were only two cars in the accident and denied that he was trying to overtake the Golf when an accident occurred with another vehicle in the opposite lane. He conceded that his memory after the collision had been affected, owing to his head injury and a heart condition.

13. After the plaintiff closed its case, Kwindu testified for the RAF. He was a pedestrian standing on the left side of the R101 at about 17h30 on 4 March 2012. It was still light. He observed two cars following one another on the road proceeding from north to south. A blue/grey vehicle (which I may assume was the Getz) was driving behind another car which Kwindu could not describe. Kwindu saw the Getz trying to overtake the car in front of him when the Getz was about three to four metres away from the front car and,

in the process, the Getz collided with a car coming from the opposite direction and this was a red Citi Golf. Kwindu was unable to say whether the collision affected the car in front of the Getz or whether the car in front proceeded onwards, as he said he was observing the Getz.

14. He said he was facing northwards in the direction of Hammanskraal. He immediately went over to the right side of the road from Pretoria to Hammanskraal to attend to the occupants of the Golf. He recalls that the Getz and the Golf landed in the right side of the R101 itself, and not on the side.
15. Kwindu denied that a gravel road entered the left side of the R101 from the left near where the accident occurred. He drew a gravel lane which proceeded parallel with the R101 southwards, for cars coming from the church to use. He denied having seen a car entering the road from the left of the R101.
16. He conceded that, because he was facing northwards at the time of the accident, towards Hammanskraal, he could not have observed any vehicle to his left behind him.
17. On 4 March 2012 at 20h40, at the Pretoria North police station, it appears that Kwindu signed an affidavit testifying to what had occurred that day. The contents are entirely inconsistent with the version advanced by him in Court.
18. In Court, when the affidavit was shown to him, he denied emphatically that he had signed same or that he had gone to the Pretoria North police station that day. I will deal with these denials later. The contents of the statement are inciteful:

"1. I Azwindohwi Kwindu I am a black adult male age 28 years old born 1983-05-25 and residence Plot 16 Pyramid. Work at City of Tshwane Bon Accord quarry contact no none.

2. State under oath that on 2012-03-04 Sunday 17:15 I was standing next to the road on Warmbad Road next to Post Office and Pyramid restaurant.

3. There was a cream white motor vehicle registration unknown and model which went to pick up a person who was asking lift and it was standing in the road.

4. A blue car was traveling south and a red car was travelling south. A blue car try to avoid a car which was standing in the road by passing to its right.

5 And the red car was coming and it collided with the blue car which was trying to avoid the car in the road. It was a head on collision and the blue car roll and came to a standstill on its top."

19. I wish to make one observation concerning this affidavit. If there was a head-on collision between the blue car (the Getz) and the red car (the Golf), then the Golf must have been travelling from the south, and not the north. This much is consonant with Kwindas's version in Court, and Mabunda's version that he was travelling from the north. The accident report form supports this fact.

20. The only material difference is that, in his vive voce evidence, Kwindas disingenuously omitted to mention the white car obstructing Mabunda's lane before the accident occurred.

21. Kwindas admitted having told a policeman about what he had seen that day and that they had both spoken to one another in Kwindas's language, Sesotho. The policeman had written down Kwindas's statement but when Kwindas asked him to read it, (and Kwindas said he understood and could read English), according to Kwindas, the policeman refused. Kwindas said that the statement was also not interpreted to him in Sesotho.

22. Kwindas persisted in his evidence that there was no stationary car on the road, and that the accident occurred because Mabunda overtook the front

car when it was dangerous to do so, and collided with the Golf coming from the opposite direction.

23. The accident report form provides a brief description of the accident as follows:

“Motor vehicle A (the Getz) was travelling from north to south and motor vehicle B (the Golf) was travelling from south to north when motor vehicle A try to avoid a collision with a motor vehicle which was standing on the road and collided with motor vehicle B head on.”

24. The RAF thereupon closed its case, without leading the evidence of the driver of the vehicle which had collided with Mabunda's Getz.

25. I have afforded due consideration to the evidence, the admitted facts, and the circumstantial facts, as also the fact that no evidence was adduced by the driver of the Golf.

26. In my view, the collision occurred as follows. An unidentified cream vehicle picked up a pedestrian on the left side of the road, and drove into the road in which Mabunda was travelling but was stationary for a while. When Mabunda saw this car from 100 metres away, he thought that it was going to turn in the same direction in which he was travelling, that is, from north to south, but when it failed to do so, he took one evasive step, which was to swerve right into the face of oncoming traffic.

27. He said he had no time to observe whether there was oncoming traffic, when indeed there was oncoming traffic in the form of the Golf. The red Golf was travelling on the opposite side of the road from south to north and Mabunda collided with it. And this is why the Getz and the Golf landed on the right hand side of the R101.

28. It appears that the white stationary car escaped the collision, and the scene. This is why the police plan identifies only two vehicles at the scene. The

accident report form identifies two vehicles involved in the collision, namely, the Getz and the Golf, and a brief description of the accident corroborates the versions of Kwindu in his affidavit and the version of Mabunda in his evidence that a third car obstructed Mabunda's path of travel and he swerved to avoid it.

29. In arriving at this conclusion, I have taken the following into account. Mabunda's recollection was sub-optimal and he appears to have been genuinely mistaken about what had happened. Kwindu's evidence was unimpressive, disingenuous and unreliable.
30. But their versions, in vive voce evidence before Court and in their affidavits, both contained probative value in the form of consistencies from which certain inferences may be drawn. Mabunda's affidavit that he tried to avoid a collision when he saw an unidentified oncoming vehicle in his lane is consistent with his observing a vehicle in his path which appeared to have turned to face him, and the particulars of claim support this.
31. This inference is consistent with Kwindu's affidavit, given on the date of the accident, which confirmed that a cream car which had fetched someone from the left side of the road was standing in Mabunda's path and Mabunda tried to avoid it by swerving to the right and thereby colliding with the Golf. This is why both the Getz and the Golf landed on the right hand side of the road, for traffic going from south to north. Kwindu's evidence in Court also placed the accident between the Getz and the Golf on the right-hand side on the road for oncoming traffic, and where they landed was further to the right of the accident.
32. By irresistible inference, Mabunda was mistaken in his belief that he had collided with the stationary vehicle in his path. He must have collided with the Golf travelling in the opposite lane from south to north. He conceded in cross-examination that he had not looked to see whether there were oncoming vehicles in the opposite lane.

33. In my view, I can take cognisance of the correctness of Kwindu's affidavit for the following reasons. His version that he did not sign it and that he did not go to the police station is patently false and inherently improbable. He confirmed in Court that the personal details at paragraph 1 of the affidavit and the details of his witnessing the accident at paragraph 2 were true. He confirmed having spoken in his own language, Sesotho, to the policeman who wrote notes of his statement.
34. It is incomprehensible and highly improbable that, this being the case, the policeman who wrote the affidavit could have conjured up the rest of Kwindu's version.
35. I turn to the question of contributory negligence under section 1 of the **Apportionment of Damages Act, 34 of 1956**. Under this section, the Court may reduce damages having regard to the degree of fault attributable to the driving of the claimant driver.
36. I refer to the case of **Burger v Santam Versekeringsmaatskappy Bpk 1991 (2) SA 703 A**. In this case, the Court found that when a reasonable driver approaches another vehicle over a considerable distance, which had been veering onto the wrong side of the road, the reasonable driver would take at least three steps. He would brake, move his vehicle to the left as far as possible and hoot continuously. In **Burger**, the driver failed to hoot and was held to be 25% at fault as a result.
37. Reverting to the facts in this case, Mabunda's conduct contributed to the collision because he did not take any reasonable steps to avoid it. His own version supports this fact. He did not brake. He did not hoot. He did not swerve to the left when the police plan indicates that there was an area on the side of the road, and any culvert, if there was one, would have been further away from this part of the road. He did not check for oncoming traffic in the opposite lane.

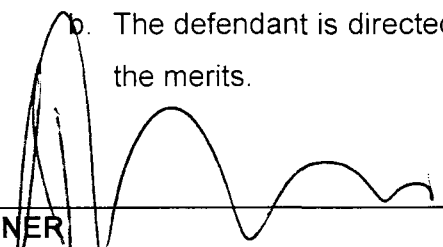
38. It has been noted that Mabunda had come from a rise in the road before the collision and this may have obstructed his vision before he saw the stationary car in his lane in front of him, apparently facing him. He was faced with a sudden emergency, on his version, but he failed to take reasonable precautionary measures to avoid the accident.

39. Taking all of the above into consideration, I find that Mabunda was at least 60% to blame for the accident.

40. The following order is made:

a. The defendant is found liable for 40% of the plaintiff's proven or agreed damages;

b. The defendant is directed to pay the costs of the action in respect of the merits.



T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
14 November 2016

Appearances

For the Plaintiff:

Advocate AA Lubbe

Instructed by:

N S Swan Inc Attorneys

Counsel for Defendant:

Adv AM Masombuka

Instructed by:

Diale Magoshoa Attorneys