REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

06 September 2021

DATE SIGNATURE

CASE NO: 20414/2016

In the matter between:

HASANE MICHAEL CHUMA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

EX TEMPORE JUDGMENT

CRUTCHFIELD AJ

[1] The Plaintiff, Hasane Michael Chuma, claims damages from the Defendant, the Road Accident Fund, a juristic entity established in terms of section 2 of the Road Accident Fund Act 56 of 1996 ('RAF'), in respect of injuries sustained pursuant to a motor-vehicle collision as defined in the Road Accident Fund Act

(the 'collision').

[2] The Plaintiff pleaded that the collision occurred on 14 July 2015 at approximately 02h:00 hours next to Wonderboom Junction Mall, Sinoville, Pretoria, when a motor vehicle of unknown registration driven by an unknown driver collided with the Plaintiff causing him various injuries.

[3] The Plaintiff was the sole witness to testify at the trial. Given that the collision was what is commonly referred to as a "hit and run", a collision in respect of which the driver did not stop after the collision, and that the insured driver was never identified or traced by the South African Police Service, the Defendant did not call any witnesses at the trial. Furthermore, there were no known bystanders or eye witnesses to the collision or the events leading up to the collision.

[3] The Plaintiff pleaded that the unknown insured driver was negligent and that the negligence of the insured driver was the sole cause of the collision and thus the sole cause of the injuries and the resultant sequelae for which he claimed damages.

[4] The RAF pleaded that in the event that the court found that an accident did occur, that it was caused solely by the negligence of the Plaintiff alternatively that the Plaintiff's negligence contributed to the cause of the collision in that the Plaintiff:

4.1. Failed to keep a proper lookout;

4.2. Failed to have due regard to the rules of the road;

4.3. Failed to have regard to other users of the road;

4.4. Entered and/or walked on the public road at an inopportune and unsafe moment;

4.5. Crossed the path of travel of the insured driver at an unsafe and inopportune moment;

4.6. Failed to take reasonable steps to avoid the collision when he was in a position to do so; and failed to avoid the collision when in the exercise of reasonable care and skill he could and should have done so

[5] Accordingly, the Defendant prayed that the claim be dismissed or be apportioned in terms of the Apportionment of Damages Act 34 of 1956. The parties' legal representatives informed me at the commencement of the trial that the parties intended dealing with the issues of the Defendant's liability for the collision, being the issues of negligence and causation, with the question of quantum being separated and postponed in terms of the Rule 33(4) of the Uniform Rules of court. Given that it is convenient to the court and to the parties that such a course be followed, I allowed the parties to proceed accordingly.

[6] The Defendant, at the commencement of the proceedings, admitted the occurrence of the accident, the date and location thereof and that the question of the apportionment was the only issue in dispute. The Defendant refused to concede the question of negligence on the part of the insured driver.

[7] The Plaintiff testified that he was walking on the pavement on the right side of the road towards Wonderboom Junction, approximately a kilometre away, when the accident occurred at approximately 02h:30 or 01h:00 in the morning on his way to work. The Plaintiff entered a curve in the road, over the bridge. The insured driver who approached from the opposite direction, failed to navigate the curve appropriately and knocked the Plaintiff. The incident was described as a 'side swipe' by the RAF's representative. The insured driver drove on without stopping.

[8] It is worthy of mention that on the Plaintiff's version, the insured vehicle would have to mount the pavement above the road surface, in order to collide with the Plaintiff.

[9] The Plaintiff testified that he saw the insured vehicle when it was very close to him and he was hit. The vehicle approached at speed and whilst it mounted the pavement and collided with him it did not impact the concrete barrier on the far side of the pavement.

[10] The Plaintiff stated in his evidence in chief that he was unable to take avoiding action. He was caught between the car and the concrete barrier that was preceded by a metal railing on the far side of the pavement.

[11] The Plaintiff submitted photographs of the scene where the accident occurred, taken prior to the trial date. The Defendant did not object to the introduction of the photographs into evidence.

[12] The photographs revealed a distance between the concrete barrier on the far side of the pavement on the Plaintiff's right side and the edge of the pavement alongside the road. No evidence was led as to the distance between the edge of the pavement alongside of the road and the concrete barrier and railing.

[13] The Plaintiff testified that the area where the collision occurred was well illuminated at the time of the collision and the streetlights were visible in the photographs.

[14] The photographs revealed that the height of the concrete barrier appeared to reach approximately the Plaintiff's elbow when the Plaintiff was standing up,

allowing the Plaintiff to see vehicles approaching the position of the collision prior to the approaching vehicles entering the curve on the opposite end of the curve.

[15] The Plaintiff's injuries were confined to his right knee, right leg and abrasions on his right arm and elbow. The Plaintiff testified in chief that he stopped walking when he realised that the car was about to hit him. The Plaintiff, when it was put to him in cross examination that his injuries on the right side of his body did not correlate with his evidence of how the collision occurred, stated that he turned when he realised that the insured vehicle was about to hit him.

[16] The resolution of civil dispute turns on the probabilities of the competing versions. In this matter, the RAF relied on the improbabilities in the Plaintiff's version and argued that whilst the RAF admitted that the accident occurred, the Plaintiff's version was sufficiently improbable to justify the dismissal of the case.

[17] The Plaintiff argued that there was nothing that the Plaintiff could do to avoid the collision. The RAF argued the opposite, stating that the Plaintiff could have moved to the Plaintiff's right side towards the concrete barrier in order to avoid the collision.

[18] On the assessment of the probabilities, logic dictates that if the insured vehicle approached the Plaintiff at speed sufficient to mount the pavement but drive off without impacting the concrete barrier and without coming to a halt, then the Plaintiff had adequate opportunity to move out of the path of the insured vehicle.

[19] Whilst I accept that the collision occurred, the position of the injuries on the Plaintiff's body constitutes objective evidence that the accident did not happen in accordance with the Plaintiff's version. Logic dictates that the injuries, on the

Plaintiff's version of the events, would be on the left side of his body or on both sides of the body. It is highly improbable on the Plaintiff's version that the injuries would occur on the right side of the Plaintiff's body as they did occur. As to the Plaintiff's evidence that he turned when he realised he was about to be hit given under cross-examination, for the injuries to occur on the right side of the Plaintiff's body the Plaintiff would have had to turn towards the road to the Plaintiff's right, into the path of the approaching vehicle, thus making the Plaintiff's version even more improbable.

[20] Furthermore, on the Plaintiff's version that the area was well illuminated, the Plaintiff, if he had been keeping a proper lookout, would and should have been aware of the approaching vehicle more especially if the vehicle was travelling at speed as the Plaintiff testified.

[21] Given the Plaintiff's evidence that he saw the vehicle just before it hit him, I must find as I do that the Plaintiff failed to keep a proper lookout and that he failed to take steps available to him to avoid the collision when he could and ought to have done so.

[22] In the circumstances, the RAF argued that the Plaintiff's evidence was insufficient for the Plaintiff to be found to have discharged the onus and that his evidence pointed to a degree of negligence on his part. The RAF relied on the unreported judgment of *The South African Bank of Athens v 24 Hour Cash CC.*[1] The Plaintiff argued that judgment ought to be given in favour of the Plaintiff with a minimal apportionment against the Plaintiff in that it was not possible to determine where the insured vehicle was damaged as a result of the collision.

[23] In order to find contributory negligence based on the RAF's pleading, the RAF would have had to adduce evidence to establish negligence on the part of the

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1 *The South African Bank of Athens v 24 Hour Cash CC*[1] A3027/2016 dated 11 August 2016 (*'South African Bank of Athens'*).

Plaintiff on a balance of probabilities. See in this regard the case of *Llewellyn Fox vs Road Accident Fund*[2] *A548/16* dated 26 April 2018. In the *Llewellyn Fox* case at paragraphs [12] and [13] thereof, the court reiterated that;

"[12] *... the onus ... rests on the plaintiff to prove the defendant's negligence which caused the damages suffered on a balance of probabilities. In order to avoid liability the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff.*

[13] *Where the defendant had in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities, Johnson, Daniel James vs Road Accident Fund Case Number 13020/2014 GHC paragraph 17, confirming Solomon and Another vs Musset and Bright Ltd 1926 AD 427 and 435."*

[24] There is no evidence before me on which to find a causal connection between the collision and the conduct of the Plaintiff. Given the circumstances of this matter, it was not possible for the RAF to call a witness as there was none available.

[25] The question is to whether the plaintiff, who bears the overall onus, discharged the onus on a balance of probabilities. This depends firstly on a quantitative assessment of the truth and/or the inherent probabilities of the evidence and secondly on which version is more probable. See in this regard the case referred to previously of *The South African Bank of Athens v 24 Hour Cash CC* where the court stated:[3]

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2 *Llewellyn Fox vs Road Accident Fund* A548/16 dated 26 April 2018 (*'Llewellyn Fox'*).

3 Van der Spuy AJ in *Selamolele v Makhado* 1988 (2) SA 372 (V) at 374 (*'Selamolele'*).

[9], " ... Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. See Maitland and Kensington Bus Co (Pty) Ltd v Jennings 1940 CPD 489 at 492 where Davis J stated:

> *'For judgement to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.'*

[26] I have already referred to the improbabilities of the plaintiff's version. These improbabilities allude regrettably to a degree of fabrication on the plaintiff's part.

[27] In the circumstances I am not able to find that sufficient reliance can be placed on the plaintiff's version of the events that caused the collision. I am not persuaded that the evidence before me reaches the reduced standard of reliability referred to in the judgement of *South African Bank of Athens*, quoting from the judgement of *Selamolele; "that in order to give judgment for plaintiff I must be satisfied on adequate grounds that sufficient reliance can be placed on the story of the plaintiff and his witnesses."*

[28] There are not adequate grounds to satisfy me that sufficient reliance can be placed on the Plaintiff's version.

[29] By virtue of the aforementioned, the Plaintiff's claim in this matter stands to be dismissed.

[30] The is no basis on which to find that the costs of the action should not follow the merits.

[31] Accordingly, the Plaintiff's claim is dismissed with costs.

I hand down the Judgement

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 6 September 2021.

Appearances

For the Plaintiff	: Adv. K Mhlanga
Instructed by	: JM Modiba Attorneys
For the Defendant	: Mr T Mukasi
Instructed by	: The State Attorney, Pretoria

Date of Hearing : **07 and 08 September 2021**

Date of Judgment : **06 September 2021**