IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A156/2021

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

31.05.2022

SIGNATURE **DATE**

In the matter between:

VERONICA RAS **APPELLANT**

V

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

BASSON, J

[1] This is an appeal against the whole of the judgement and order handed down by Ranchod, J on 12 December 2019. There was no appearance on behalf of the respondent (the defendant in the *court a quo*). For convenience I will refer to the parties as they were in the court *a quo*.

Proceedings in the court *a quo*

[2] The plaintiff (the appellant in this application) claims damages for bodily injuries sustained on 29 July 2016 when her motor vehicle overturned on her way from Centurion to Krugersdorp in the early hours of the morning. The issue of quantum was separated from the liability and the trial proceeded on the latter issue only.

[3] Only the plaintiff gave evidence about the accident in the court *a quo.* The defendant called no witnesses. The plaintiff testified that she was travelling from Centurion, Pretoria in the direction of Krugersdorp. At round about 3H00, when she was approaching Diepsloot and whilst driving in the left lane, someone (a pedestrian) walked from her left-hand side towards the right-hand side. She then swerved into the right lane in order to avoid colliding with the pedestrian. She testified that she thereafter remained in the right-hand lane. When she looked there was a car without lights. In order to avoid a collision, she swerved and lost control of her vehicle. She could not recall what happened after that.

[4] The court concluded after having considered the evidence, that the plaintiff failed to prove her case on a balance of probabilities and concluded that the *cause causans* of the accident was when she swerved to avoid a pedestrian whereafter she lost control of the vehicle and it overturned. The claim on the merits was dismissed. It is against this order that the plaintiff appeals.

[5] The court *a quo* was critical of the manner in which the particulars of claim was formulated. It became apparent to the court that the pleadings paid scant attention to the plaintiff's basis of her claim. The plaintiff claims in the particulars of claim that a "*collusion*" took place which was caused entirely by the negligence of the insured driver. She pleads in what respects the insured driver was negligent. The unknown insured driver: (i) failed to keep a proper lookout for "*oncoming traffic*"; (ii) drove at a speed that was "*excessive in the circumstances*"; (iii) failed to apply brakes; (iv) failed

to keep a proper lookout for *"oncoming traffic"*; (v) failed to avoid the collision when, by taking reasonable care, including but not limited to travelling more slowly, he could and should have done so.

[6] The court *a quo* was further critical of the evidence presented by the plaintiff: Firstly, the plaintiff testified, but only *after* the presiding judge posed questions for clarification to the plaintiff, that in fact the insured driver drove *in front of her* in the *same direction* namely to Krugersdorp. She herself never testified that she and the insured driver were in fact travelling in the same direction. This, the court rightly points out, is contrary to what she claims in her particulars in claim. There the plaintiff claims that the insured driver failed to keep a proper lookout for "*ongoing traffic*".

[7] Secondly, the plaintiff claims in her particulars of claim that the insured driver failed to apply his brakes. If the two cars were in fact travelling in the same direction, how could she have known that by doing so, the *"collision"* would have been avoided?

[8] Thirdly, the plaintiff claims that the insured driver drove at an "*excessive*" speed, yet in her evidence she was adamant that she was driving within the speed limit. The court *a quo* rightly points out that, if the insured driver was driving at an excessive speed he would have been moving away from her, unless she was driving faster than the insured driver and caught up with him rapidly.

[9] Fourthly, the plaintiff expressly claims in her particulars of claim that the insured driver failed to avoid a "*collision*", yet no collision took place. In order to overcome this difficulty, the plaintiff testified that she swerved when she saw the insured driver in order to *avoid* a collision whereafter her vehicle overturned. The glaring problem with this version now tendered in evidence is the fact that her particulars of claim refer to a "*collision*". This version is also recorded in the minutes of the pre-trial meeting that was held a mere two days prior to the trial. The pre-trial minutes expressly states that two vehicles were involved in the *"collision"*. We now know that there has never been a *"collision"*. Lastly, the plaintiff testified that there was a pedestrian and that that had caused her to swerve into the right-hand lane. No mention of a pedestrian is made in the particulars of claim nor in the pre-trail minutes. This version only surfaced during her evidence at trial.

Appellants submissions

[10] Before us, counsel on behalf of the plaintiff submitted that the plaintiff, as a single witness, was a good witness who did not contradict herself in any material respects. It was further submitted that it does not appear from the judgement that the court *a quo* criticised the plaintiff's evidence nor was the finding made that she was an unsatisfactory or untruthful witness. It was also not found that the plaintiff's version was so improbable that it could not be accepted.

[11] This is not a correct assessment of the court *a quo's* judgment. The court *a quo* was highly critical of the evidence led by the plaintiff not only because on the probabilities, her version could not be accepted, but also because her version tendered at trial materially departed from what is pleaded in her particulars of claim. I can find no reason to interfere with the court's assessment of the plaintiff's evidence nor with the conclusion reached by the court *a quo* that the plaintiff has not proven her case on a balance of probabilities.

[12] It is so that the plaintiff was a single witness. Notwithstanding, it is trite that she carries the burden of proof of finally satisfying a court that she is entitled to succeed in her claim. It does not follow axiomatically that just because only one version was placed before the court, the defendant elected not to place contrary evidence before court, that a court will accept the evidence without considering the merits and demerits of the evidence tendered by such a single witness. This is what the court *a quo* in the present matter did in evaluating the plaintiff's evidence. The court in the well-known decision of *S v Sauls*,[1] explains:

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that*

[1] 1981 (3) SA 172 (A).

the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (Per SCHREINER JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[13] I have pointed out in which respects the evidence of the plaintiff depart from her claims in the particulars of claim. Most notably in pleading that there was a "*collision*" (when in fact no collision occurred); that the insured vehicle did not keep out a proper lookout for "*oncoming traffic*" (whereas the two vehicles were actually travelling in the same direction); and that the insured vehicle was driving at an "*excessive*" speed (which does not tally up with her claim that she was travelling at normal speed yet she was able to catch up with the insured vehicle).

[14] A party is bound by its pleadings. The Constitutional Court in *Molusi and others v Voges NO and others*[2] stated that *"[t]he purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone*." See in similar vein: *South African Police Service v Solidarity obo Barnard*[3] where the Constitutional Court highlighted the trite principles applicable to pleadings:

"[202] This is the context in which the question, whether Ms Barnard may be permitted to raise the new cause of action in this court, must be answered. It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by s 34 of the Constitution."

[2] 2016 (3) SA 370 (CC) ad para [28].
[3] 2014 (6) SA 123 (CC) ad para [202].

[15] A litigant is not permitted to plead one case in the pleadings and another in court. See *Minister of Safety and Security v Slabbert*:[4]

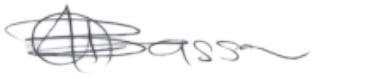
> *"[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."*

[16] It is a trite principle that a litigant must plead a particular case in the pleadings and plead the material facts on which it relies for her claim. It is not permissible to seek to establish a different case at trial (except where the pleadings have been amended).

[17] The plaintiff in her evidence departed from her pleaded case in material respects. This, coupled with the inherent probabilities of the plaintiff's evidence resulted in her claim being dismissed. I can find no reason to interfere with the order made by the court *a quo*.

[18] In the event the following order is made:

> "The appeal is dismissed with no order as to costs."



A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree,

[4] 2010] 2 All SA 474 (SCA).

M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree,

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the 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 for hand-down is deemed to be 31 May 2022.

Date of hearing

25 May 2022

Appearances

For the appellant

Adv JSM Guldenpfennig

Adv CG Jordaan

Instructed by

Nel Van der Merwe Smalman Inc

For the respondent

No appearance