


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

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


SIGNATURE

18/11/2021

DATE

CASE NO: 230/2019

In the matter between:

THULANI ALEX KHUMALO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MASHILE J:

INTRODUCTION

- [1] On 1 July 2018, the Plaintiff, as a pedestrian, was allegedly involved in a motor vehicle collision with an unidentified vehicle driven by an unknown driver. In consequence of the collision, the Plaintiff claims to have suffered injury to his right hand shoulder and chin. He instituted this damages action against the Defendant believing that the collision has left the latter vulnerable to be sued for damages arising from the manner in which it occurred and the ensuing injuries. The claim comprises general damages and loss of earning capacity. The Defendant has not defended the claim and was not in Court on the date of hearing.
- [2] The particulars of claim describe his injuries as follows:
- 2.1 Head injury, with associated loss of consciousness and initial GCS of 13/15;
 - 2.2 Deep Laceration on the Chin;
 - 2.3 Dislocation of the Right Acromioclavicular Joint, with Crush Syndrome;
 - 2.4 Multiple soft tissue injuries; and
 - 2.5 Shock and psychological trauma.
- [3] The Plaintiff did not apply for separation of issues as intended in Rule 33(4) of the Uniform Rules of Court. Thus, the questions of liability and quantum were heard simultaneously. The Plaintiff was the only witness who testified on his own behalf on the issue of liability while various experts gave evidence on quantum. The evidentiary material before Court consisted of oral and documentary testimony. Depending on the outcome of liability, the Court may or may not proceed to assess

quantum. If this Court is not satisfied that on a balance of probabilities the Plaintiff has failed to demonstrate that the unknown driver of the unidentified vehicle was responsible for the collision, it will dismiss the claim and that will be the end of the road for the Plaintiff.

EVIDENCE ON LIABILITY

- [4] Here the evidence of the Plaintiff was key to deciding the case. He testified that he is a 43-year-old man who was then in the employ of Hitec Security in Mbombela. It was at approximately 17:30 on 1 July 2018 while on his way to work when he collided with an unidentified motor vehicle. The collision happened at a traffic lights controlled T-junction of Mashishing (R37) and Madiba (R40) Roads. Madiba Roads has two lanes flowing into a southerly direction and two into the opposite direction.
- [5] He testified that he was crossing Madiba Road from BP Filling Station towards Volvo, which he said is situated on the opposite side of the filling station. In other words, he was walking in Mashishing Road into an easterly direction crossing Madiba Road. He said that he successfully crossed the two lanes of motor vehicles travelling towards Riverside (into a northerly direction). He again crossed the first lane of motor vehicles travelling into a southerly direction but when he was a metre or so before completing crossing the second lane of motor vehicles travelling into a southerly direction, the unidentified motor vehicle collided with the left-hand side of his body specifically his lower limbs.
- [6] He confirmed that when he commenced crossing Madiba Road the traffic lights at the intersection were green for both motor vehicles and pedestrians travelling into an easterly direction. As a result of the impact on his left-hand side of the body, he fell to the ground on his right shoulder. The collision resulted in him sustaining injuries to his right-hand shoulder and abrasions on his chin. He stated further that he remembered waking up in hospital the following day.

- [7] The Court posed questions to him to establish precisely where and how the collision happened. The first question that the Court asked was why he crossed the road. His answer was that the traffic lights at the intersection were green for him. Asked whether or not he looked to his left-hand and right-hand sides prior to crossing the road, he said that he did. When asked whether or not he saw any cars, he stated that there were no vehicles approaching. The obvious question was, where then did the vehicle that collided with him come from? He confirmed that it had come from the Riverside direction. In other words, it was a vehicle that was travelling in Madiba Road into a southerly direction.
- [8] The Court asked why he did not see it. His answer was that he did not look at all because he noticed that the traffic lights were green for him. The next question for clarification was where precisely on his body was the impact with the vehicle. He stated that the impact was on his lower limbs more particularly, his left lower leg. He claimed that he had abrasions as proof of contact with the vehicle. The Court told him that it could not find any proof of such from the medical records. He then said that his trousers were even torn at the bottom. This concluded his evidence and it marked the end of the Plaintiff's case.

ISSUES

- [9] What stands for decision from the evidence levied before Court on liability is firstly, whether or not there was a pedestrian motor vehicle collision, the unknown driver of the unidentified vehicle drove negligently and that such negligent driving caused the collision. If he did, the Plaintiff must succeed with his claim. On the contrary, if he did not, the Plaintiff must fail.

LEGAL FRAMEWORK

[10] It is common cause that the Plaintiff bears the onus of establishing that the driver of the insured driver was not only negligent but that such negligent act caused the harm or loss. It was in that context that **Innes CJ** held as follows in *Van Wyk v Lewis* **1924 AD 438 at page 444**: “The general rule is that he who asserts must prove. A plaintiff therefore who relies on negligence must establish it.”

[11] In *Van Eden v Minister of Safety and Security (Woman’s Legal Centre Trust, as amicus curiae)* **2003 (1) SA 389 (SCA) ([2002] 4 All SA at 346)** paragraphs 9 and 10 the test for determining wrongfulness or otherwise of an omission or failure to act within the context of an action for delictual damages was set out as follows:

“[9] ... and omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of many factors which have to be considered...”

[12] Insofar as negligence is concerned, it is instructive to refer to the case of *Kruger v Coetzee* **1966 (2) SA 428** which is a locus classicus in matters involving negligence:

“For the purposes of liability culpa arises if –

“(a) *diligens paterfamilias* in the position of the defendant –:

(i) *would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.”

- [13] The mere fact that an incident occurred should not of necessity attract liability. The pronouncement of the Supreme Court of Appeal in *Minister of Safety and Security and another v Carmichele* **2004 (3) SA 305 (SCA) ([2004] (2) BCLR at 133; [2003] 4 All SA at 565)** in this regard is noteworthy:

“The insidious subconscious influence of ex post facto knowledge... Negligence is not established by showing merely that the occurrence happened... or by showing after it happened how it could have been prevented. The diligent pater familias does not have prophetic foresight [and] (a) after the event, even a fool is wise.”

ANALYSIS

- [14] The Plaintiff was the only witness who testified on his own behalf notwithstanding that the collision took place during the day, when it was peak hour and therefore both motor vehicle and pedestrian traffic was high. Given the fact that the insured driver is said not to have stopped after the collision, one would have expected the police to have tried their best to find out whether or not there were any people who might have witnessed the collision. Furthermore, the ambulance records would normally indicate who was at the scene of the collision when they fetched the injured person. In this case, there are no such documents.
- [15] Am I saying that the Plaintiff is responsible for all these omissions? Of course not, but it remains aberrant and striking that his attorneys failed to collate even the most basic documentary evidence that would enable them to prove their case. Dr Dlamini whose name appears on the medical records was not called to shed information where he received the information that the Plaintiff was involved in a pedestrian motor vehicle collision.

- [16] According to the medical records, the Plaintiff was brought into hospital by EMS yet not even a single witness from EMS was called to enlighten this Court on where they fetched the Plaintiff, under what condition he was when they found him and who called them to the scene of the collision, if there was such. This Court would have thought that any attorney who has lodged a claim where the motor vehicle and the driver are both unknown would have ascertained that these questions are adequately addressed at the hearing. The Plaintiff is even silent on what steps he took to establish the identity of the unidentified vehicle after his release from hospital
- [17] Apart from the above, the evidence of the Plaintiff is not satisfactory in several respects. Firstly, he admitted that he crossed the street because the traffic lights were green for him and not that it was safe to do so. Accepting that the traffic lights were green for him, it is noteworthy to state that he would still have been negligent to cross without confirmation that it was opportune to do so. That said, I am mindful that in this situation the duty on the insured driver to avoid the collision would have been greater as the traffic lights would have been against him or her.
- [18] However, the Plaintiff was not a reliable witness as he vacillated on the question. He said that he looked to his right-hand side and then to his left-hand side before crossing Madiba Road, yet later he confessed that he only looked at the green traffic light and not whether or not vehicles were approaching from either side. His answers clearly took a toll on his credibility.
- [19] Most disquieting is that he was adamant that the insured vehicle collided with his left side more specifically, his left lower limb. It must be extraordinary that there is no evidence of any sign of his left leg having been involved in some kind of a blunt trauma. That would certainly have been consistent with the theory of his leg coming into contact with a solid fast moving object such as a vehicle.
- [20] He had no comment when told that it was strange that the medical records have particularised all the injuries save for those abrasions that he claimed he had.

Caught off-guard by the question, he said that he nonetheless had torn pair of trousers as evidence. But proof of collision would have required more than torn pair of trousers such as a heavy noticeable impact or even a fracture of one or both his lower limbs.

- [21] How the Plaintiff sustained the injuries that he claims were the result of the collision remains enigmatic. That said, it is not the duty of the Court to investigate what their cause is but it should suffice to state that his injuries are not consistent with his description of the collision. As such, he has failed to show that on a balance of probabilities his injuries are the direct result of an impact between him and a motor vehicle.
- [22] The testimony of the Plaintiff on why he proceeded to cross Madiba Road suggests that the traffic lights may have been red for him. The fact that he started by stating that there was no vehicle approaching, he did not see any vehicle and ultimately that he only looked at the traffic lights that were green for him is characteristic of a witness trying to avoid giving what actually transpired. Everyone else who is a witness in this matter assumes that what the Plaintiff told them about the cause of his injuries is correct. That is to say that there is no independent corroborating evidence at all. The police and the ambulance personnel came after the collision and would have recorded what he told them. No independent witness from the scene of the collision gave evidence.

CONCLUSION

- [23] Finally, it ought to be emphasised that the burden of proving that a collision happened as a result of the negligent driving of another in consequence of which a claimant sustained injuries remains the duty of a plaintiff. It is of no moment that a claim is defended or not the rule stands. Against that background, I am constrained to find that the Plaintiff has failed to establish on a balance of

probabilities that he was involved in a motor vehicle accident as a result of which he sustained injuries. I make the following order:

1. The Plaintiff's claim is dismissed with costs.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 November 2021 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:
Instructed by:

Adv I Mabaso
Ndlovu Attorneys

Counsel for the Defendant:
Instructed by:

No appearance

Date of Judgment:

18 November 2021