IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE PROVINCIAL DIVISION, CAPE TOWN)

CASE NO: 7086/2018

DATE: 2020.08.19

In the matter between

MPUMELELO BLESSING MASEKO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

EX TEMPORE JUDGMENT

ROGERS J:

This is an action against the Road Accident Fund ('RAF') for damages arising out of an accident which occurred on 2 September 2016. The plaintiff was a pedestrian who was struck by a minibus taxi and injured.

The plaintiff appeared today through counsel. The RAF was for some time represented by a firm of attorneys, but in accordance with a blanket instruction given by the RAF to attorneys on its so-called 'panel', those attorneys filed a notice of withdrawal on 17 March 2020. The date of today's trial – 19 August 2020 – was set by way of a notice of set down issued in December last year, the matter having been certified trial-ready in November last year.

I must at the outset say something about the unfortunate state of affairs which prevails in the legal administration of cases against the RAF. Present this morning for the RAF as an observer was Mr Swart, a senior claims handler at the RAF's Cape Town office. He did not claim a right to represent the defendant in the litigation. He did not ask me to grant a postponement. He was, as I have said, here as an observer. If the RAF had sought a postponement, the circumstances are such that it is very unlikely to have been granted.

During the course of the evidence, I invited Mr Swart to raise with me any aspects he wished me to canvass with the plaintiff's witnesses; and upon the conclusion of the evidence I allowed him to make brief observations on the merits of the case. However, if the RAF is prejudiced in the present case by the absence of legal representation, it is prejudice flowing from the fact that I have not heard evidence from the driver of the minibus taxi, who would have been a natural witness for the RAF to have called had it been legally represented. While I cannot say that the evidence of the taxi driver would have led to a different result, that is at least a reasonable possibility, since the evidence of the plaintiff and his eye-witness was not so plainly unimpeachable that it might not have been called into question by countervailing evidence.

It seems to me that the conduct of the management of the RAF, in terminating the mandates of all its panel attorneys and then failing in appropriate circumstances to engage other attorneys to represent it in proceedings, is prejudicial to the public interest.

The RAF is, in terms of s 2(1) of the Road Accident Fund Act 56 of 1996, a juristic person. A juristic person, unlike a natural person, cannot appear in person in litigation; it has to be

represented. And authority establishes that save in exceptional circumstances, only duly qualified legal representatives may act as representatives of a corporate entity. The general restriction in this regard probably flows as a necessary implication from the fact that a number of statutory requirements are set in order for a person to be able to represent another in litigation, such requirements being those satisfied by advocates and attorneys with the right of audience in the High Court.

10 But whatever the source of the rule, it is as I have said well established. The most recent high authority on this question is the judgment of the Supreme Court of Appeal in *Manong & Associates (Pty) Ltd v Minister of Public Works & another* 2010(2) SA 167 (SCA), where the whole question is discussed by Ponnan JA in paragraphs 3 to 16. The learned Judge of Appeal confirmed the ordinary rule but added that in the exercise of its inherent jurisdiction the High Court may permit a corporate entity to be represented by a person who is not a lawyer with a right of appearance in the High Court. In
20 paragraph 10 he said:

> 'The circumstances in which the court would depart from the general rule and allow such representation were likely to be rare and their circumstances exceptional or at least unusual.'

From the discussion in that case, it appears that the most likely circumstances in which the court would permit a corporate entity to act through one of its officers are where the company is a small entity, either a one-person company or a small entity where a particular director may be supposed to have as much knowledge about the circumstances of the case
30 as would a similarly placed private individual. The larger and more complex a corporate entity, the less likely it is that a

court will permit it to appear through an official.

This is particularly so, it seems to me, in the case of the RAF, which is a large organisation with a complex hierarchy of officialdom. It has a budget for legal expenses. Indeed I understand from the judgments delivered in recent Gauteng litigation between panel attorneys and the RAF that the RAF's own position is that although it has dispensed with the services of its panel attorneys, it will nevertheless appoint attorneys *ad hoc* when this is needed. It does not appear to be the RAF's position that it should be entitled to be represented through its officials in court.

Whatever the RAF's intentions may be, the practical reality is that in many cases it is simply not being legally represented. The present is just one example. If the defendant had been legally represented, if it had called the evidence of the taxi driver, and if that evidence had ultimately been accepted or was sufficient to cause the plaintiff to fail in discharging the burden of proof resting on him, the RAF would have been spared the cost of meeting the plaintiff's claim for damages. The current circumstances simply do not seem to me to be in the best interests of the public of whose funds and affairs the RAF is custodian.

I turn now to the facts of the present case. At the commencement of proceedings I made an order in terms of rule 33(4) that the issues arising from paragraphs 1 to 4 of the particulars of claim as read with the plea thereto would be decided first, other issues to stand over for later determination. Essentially that means I must decide, first, whether the accident was caused by the taxi driver's negligence; and, second, if so whether the plaintiff himself was contributorily negligent.

The witnesses called by the plaintiff were himself and his friend Prize Mathebula. The prelude to the accident, which was at an intersection, is clear enough. The road running from west to east is Voortrekker Road, which before the relevant intersection is called Voortrekker Road but on the east side of the intersection becomes Strand Road. The road which intersects it at the relevant intersection is called Oos Road to the south of the intersection and Quarry Road to the north of the intersection. To avoid confusion I shall refer to these two roads simply as Voortrekker Road and Quarry Road, regardless of which side of the intersection they are on. The intersection is controlled by traffic lights which include traffic lights for vehicular traffic and traffic lights for pedestrians. Both roads carry two lanes of traffic in each direction, though Quarry Road south of the intersection has a third lane of traffic for vehicles turning right (eastwards) into Voortrekker Road.

The plaintiff and Mr Mathebula were both employed at the relevant time in Maitland. They met up after work in order to take a taxi home together because they both lived in the same residence in Parksig Villas in Bellville. They took the taxi to the Bellville taxi rank (near the station) and walked along the upper (north) side of Voortrekker Road in the direction of their residence. This route took them to the intersection that I have described.

When they got there, the pedestrian light was red, meaning that they could not cross Quarry Road to get to the other side of Voortrekker Road in order to walk further east along Voortrekker Road, and so they stopped. Mr Mathebula needed to relieve himself and chose to do so against the wall of the FNB building close by.

The plaintiff testified that when the pedestrian light turned

green, he checked to his right and to his left, concluded that it was safe to walk across the intersection in accordance with the green pedestrian light, and entered the intersection. He was just past the first lane when a hooter from his right attracted his attention. He looked to his right and there was a taxi approaching him at some speed in the fast lane in a south to north direction. His instinctive reaction was to jump backwards, ie from the fast lane back to the slow lane across which he had just walked, but it seems he could have made little progress in this direction when he was struck by the taxi, which had also chosen to swerve left in an attempt to avoid him.

He was flung some metres further north into Quarry Road where he lay in the fast lane of that road. His injuries, particularly to his right shoulder and arm, made it impossible for him to lift himself off the ground.

The evidence of Mr Mathebula was that after he had relieved himself, he turned around and was just at the curb of the intersection, about to step into the intersection, when he saw the plaintiff being struck by the taxi. He confirmed that the pedestrian light at this stage was green in favour of pedestrians crossing from west to east.

He also testified that the traffic light for vehicular traffic in Voortrekker Road was green, in other words that traffic was flowing from west to east (and presumably also from east to west). If Mr Mathebula's evidence is correct, it must follow that the traffic light for traffic wanting to cross the Quarry Road intersection in a northerly direction was red.

The plaintiff's evidence on this point is less clear. Initially he

testified that when he entered the intersection not only the pedestrian light but also the light for vehicular traffic in Voortrekker Road was green, and that the traffic lights for vehicular traffic in Quarry Road were red. He said that this was definitely the case. A little later, however, he said that he could not recall the colour of the lights for traffic in Quarry Road but that when he had looked to his right and left he had not observed any traffic flowing in a direction from south to north.

10 Other evidence from the plaintiff suggests that when he arrived at the intersection the pedestrian light was, as I have said, red for him but that the lights for traffic in Voortrekker Road were green. He said, when shown photograph 30 in Exhibit A, that this was how the traffic lights were when he arrived at the intersection – red for him but green for traffic in Voortrekker Road. This would also be consistent with the fact that later in his evidence, in response to my questions, he said that although on some occasions he would walk across a road when the pedestrian light showed red if it was safe to do so, on this
20 occasion he had stopped because there was traffic from Voortrekker Road turning north (left) into Quarry Road.

I think I may infer (or take judicial notice of the fact) that a green pedestrian light would either be displayed before or, at the latest, at the same time, as traffic lights turn green for any vehicles travelling in the same direction as, or turning left ro right across the path of, pedestrians. A green pedestrian light would not be displayed simultaneously with a green light for traffic travelling through an intersection at 90° to the pedestrian path.

30 So if, as the plaintiff said, the pedestrian light for him was red but the light for Voortrekker vehicular traffic was green, the

next change in the traffic lights would have been that the Voortrekker Road traffic lights for vehicular traffic would also have turned red; that there would have then been a green light for traffic in Quarry Road; and that thereafter the pedestrian light for the plaintiff would have turned green, either at the same time as, or shortly before, the lights for vehicular light in Voortrekker Road turned green. This would imply that when the plaintiff arrived at the pedestrian he first waited for the lights to turn green in Quarry Road and then, when they turned red, he entered the intersection and that the taxi jumped the red light, hence the collision.

In the absence of contradicting evidence from the taxi driver or any other eye witness, I cannot reject the evidence adduced on behalf of the plaintiff that the pedestrian light was green for him, from which I think one must infer that at that stage the vehicular traffic in Voortrekker Road also had a green light. There would never be a green light for a pedestrian in the position and direction that the plaintiff was facing and walking if there was also a green light for traffic in Quarry Road. It follows that the driver of the taxi entered the intersection at a time when the lights were red against him. It also appears from the photographs that the driver of the taxi would have had a fair view of the intersection. If he only saw the plaintiff and hooted at the point that the plaintiff marked on the exhibits, the driver of the taxi could not have been keeping a proper lookout.

The question then arises as to whether the plaintiff himself was negligent. We do not know at exactly what speed the taxi was travelling. The plaintiff estimated, though I would not attach too much significance to this, that it was more than 60 k/h and he mentioned a figure of 80 k/h. I would observe that at a speed of 60 to 80 k/h, a vehicle would cover between

17 and 22 metres per second. When the plaintiff looked right and left before entering the intersection, it would then have taken him perhaps four or five seconds to get to the point where he was eventually struck. So at the point that he looked right the taxi would have been perhaps 100 or so metres away from him.

The plaintiff testified that he did not see a taxi when he looked right. The configuration of the roads suggests that he could probably have seen a taxi if it was about 100 metres away, but perhaps he did not remember it because his natural assumption, given the phase of the traffic lights, was that any vehicles at that distance from the Quarry Road intersection would stop at the red light. I thus conclude that it was safe for the plaintiff to enter the intersection at the moment he did.

I do not think it is expected of a pedestrian that he should keep on looking all around him as he continues his walk across an intersection. It may have been prudent for him to have done so, but I do not think he was negligent not to have done that.

It was suggested by Mr Swart that when the plaintiff did become aware of the taxi, the evasive action which he took was unreasonable, and that he should have lunged forward rather than backwards in the direction the taxi itself swerved. However, given the speed at which the taxi was travelling (and I assume here that it might have been travelling as slow as 60 k/h), there would have been virtually no time for the plaintiff to move either forward or backwards. As I have said, at a speed of 60 k/h the taxi would have been covering 17 metres p/s, and my rough estimate from the markings made by the plaintiff on the exhibits is that the taxi was probably no more than four or five metres from him when he looked to his right upon hearing the hooter. Since he could not have mcovered

any significant distance forwards or backwards, it has not been shown that had the plaintiff's instinct been to take evasive action by darting forward rather than jumping backwards it would have made any difference.

Mr Mathebula's description of the accident seems to be correct, which is that the plaintiff was, practically speaking, struck at precisely the same position he was when he saw the taxi and was picked up by the front of the taxi and flung forward. It is noteworthy that both the plaintiff and Mr Mathebula marked the same spot as to where the plaintiff landed up afterwards. This spot was further up in the fast lane of Quarry Road to the north. If the plaintiff had made any significant movement back to the slow lane, he would have been flung in that direction or to the left instead of forward.

However, even if, causally, there might have been a different outcome if the plaintiff had lunged forwards rather than making some movement backwards, I do not think in the split second that the plaintiff's instinct can be regarded as negligent or even wrong. He was faced with a vehicle coming in the same lane in which he was. He seems to have been closer, at that moment, to the lane-divider than to the central traffic island, and it was natural that he should try to get out of that lane by taking the shortest route which would get him out of that lane. Although the taxi veered to his left to avoid the collision, I do not think, in the split second in which all of this must have happened, that the plaintiff would have observed the swerving and had any time to judge what to do thereafter. This was not a case where the plaintiff can be said to have knowingly and negligently gone into the path of the swerving taxi.

I thus conclude that the defendant has not discharged the burden of showing that the plaintiff was contributorily

negligent.

I thus make the following order.

(a) The defendant is liable in full for all such damages as the plaintiff may prove to have suffered in consequence of the collision alleged in the particulars of claim.

(b) The defendant is to pay the costs associated with the determination of liability, including the costs of today's appearance, subject to the proviso that if in due course the amount of damages, as proved or as agreed in a settlement, is within the jurisdiction of the Regional Court, such costs shall be taxed on the scale that would have been applicable in the Regional Court.

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ROGERS, J

JUDGE OF THE HIGH COURT

DATE: ……..