IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6215/2016

In the matter between:

THELMA JULIUS **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

Coram: Cloete J

Heard: 25 February 2021, written argument delivered 15 March 2021

Delivered electronically: 28 April 2021

JUDGMENT

CLOETE J:

Introduction

[1] This is a delictual action for damages in which the plaintiff seeks to hold the defendant liable for payment of R5 million arising from injuries she claims to have sustained when hit by an unidentified motor vehicle on 5 October 2012.

The merits and quantum were previously separated during case management and the trial proceeded only on the merits.

[2] The plaintiff testified and called one witness, her husband Mr Godfrey Julius. The defendant called one witness, Dr Andre Müller, who is the Medical Services and Theatre Manager at Tygerberg Hospital ("Tygerberg"). At the commencement of the trial the parties agreed that the sole issue for determination at this stage (apart from costs) is whether the plaintiff has proven on a balance of probabilities that the injuries she sustained were as a result of a motor vehicle collision.

[3] In her particulars of claim the plaintiff alleged that on the date in question and while a pedestrian she was hit by a white bakkie of which both its registration number and driver are unknown to her. She further alleged that the collision occurred as a result of the sole negligence of the driver who drove at an excessive speed, on the pavement on which she was walking, and failed to obey the rules and signs of the road.

[4] She also alleged that as a result of the collision she sustained a closed fracture of her left humerus and deep scarring to her left hand. It is common cause that after sustaining her injuries she was initially examined at the Delft Day Hospital ("Day Hospital") and thereafter treated at Tygerberg. The plaintiff did not disclose in her particulars of claim where the incident is alleged to have occurred. The summons was issued on the plaintiff's behalf at the instance of her erstwhile attorney 3 ½ years later on 15 April 2016.

[5] In its plea the defendant denied that the collision occurred as alleged or at all. Although it pleaded in the alternative that the collision, if proven, was as a result of the plaintiff's sole negligence, alternatively her contributory negligence, these were abandoned at the commencement of the trial given that, if proven, the Court would find that the collision occurred on a pavement.

The evidence

[6] The plaintiff, who resides with her husband in Delft South, testified that at around 9pm on 5 October 2012 she and her husband were walking home after purchasing electricity at a nearby service station in Main Road. At a traffic circle close to a local high school, and while walking on the pavement, she was hit from behind by the bakkie, causing her to fall forward with her left arm outstretched.

[7] With reference to a set of photographs (Exhibit "B") she demonstrated that at the time of the alleged collision she was walking close to the edge of the pavement and her husband a metre or so in front of her and slightly to her right (Exhibit "B3"). According to her the bakkie had come around the circle in the wrong direction before mounting the pavement and colliding with her.

[8] Her evidence was further that her husband flagged down a passing motorist (whose identity is also unknown to her) and who drove her to the Day Hospital where she was attended to by a nurse. The nurse examined her arm and advised that it could not be treated there. An ambulance was arranged and she was transported later the same evening to Tygerberg, confirming with

reference to Tygerberg's clinical notes (Exhibit "A" page 16) that she arrived there at about 1.30am the following morning. She was admitted at Tygerberg to a unit which she described as busy with many doctors and other people.

[9] According to the plaintiff she did not know at the time that she could institute a claim against the defendant. This she discovered later after encountering a lawyer advertising his services in a vehicle marked "RAF Claims" parked at a library in the area when she was on her way to visit her mother one day. This lawyer was her erstwhile attorney who also assisted her in lodging the claim (Exhibit "A" pages 4 – 11 reflect that it was received by the defendant on 30 September 2014). The RAF claim form records that the time of the incident was 9.30pm and that it occurred at Main Road, Delft South (Exhibit "A" page 5).

[10] During cross-examination the plaintiff testified that she was not personally given a referral form or similar document by the Day Hospital to hand over upon her arrival at Tygerberg. She conceded that Tygerberg's clinical notes taken on her admission at its trauma unit (Exhibit "A" page 16) specifically record the mechanism of injury as slipping or stumbling from a fall; that the section headed "Road Accidents" is blank; and that the history under the heading "Final Diagnosis" reflects that she slipped and fell forward while running and landed on her left hand.

[11] The plaintiff accepted that all of this would have been recorded by the doctor who examined her on admission. She denied however that this was what she

conveyed to him, maintaining that she told him she was hit from behind by a bakkie. It is significant to note that there was no suggestion by the plaintiff (and nor does this appear in any of the clinical notes) that she sustained any injuries other than to her left arm and hand, despite her claim that she was hit "from behind" by a vehicle driving, on her version, at excessive speed.

[12] The plaintiff was also taken to the Day Hospital referral letter (Exhibit "A" page 20) which records the presenting complaint as "fell while running today and sustained left arm injury". She similarly denied that the presenting complaint was accurately recorded, again maintaining that she told the nurse concerned "what I am telling the Court today".

[13] She conceded that both the nurse at the Day Hospital and the doctor who examined her upon admission at Tygerberg asked her to explain how she came to be injured, but was unable to provide an explanation why both had not only got it wrong, but also inaccurately recorded the very same reason for her injuries, i.e. running and falling. She resorted to the suggestion that the doctor might have misunderstood her because she was crying since her arm was sore.

[14] The plaintiff also conceded that the first mention made in Tygerberg's clinical notes of her being hit by a bakkie was almost 3 years later on 2 October 2015. This was after her erstwhile attorney assisted her in lodging a claim against the defendant. Her peculiar explanation for this was that before consulting her

erstwhile attorney she was unaware that she could lodge a claim for compensation as a result of being hit by a vehicle.

[15] The plaintiff's husband essentially confirmed her version of how the collision allegedly occurred. He testified that he accompanied her to the Day Hospital but returned home before she was examined there. He was concerned that their home had been left unlocked for their short trip to buy electricity, and had not anticipated that he would be away from home for so long. Mr Julius made no mention of the identity of the passing motorist who transported him and the plaintiff to the Day Hospital. He also confirmed how it came about that the plaintiff subsequently lodged a claim against the defendant.

[16] Dr Müller testified that in his capacity as Medical Services and Theatre Manager at Tygerberg he has overall responsibility to ensure that its staff perform an efficient and effective service, including to patients admitted to its trauma unit. He has held this position since 2007 and is familiar inter alia with standard admissions procedure. In addition he still practices in the trauma unit once per week and as such has considerable personal experience.

[17] His evidence was that Tygerberg falls under the auspices of the Western Cape Department of Health. There is a standard admissions procedure "across the board". The first thing a medical professional is required to do is take a thorough history from the patient as to the cause of the injury (or illness).

[18] As he explained it, this involves a comprehensive verbal interrogation before making an initial diagnosis, which is then confirmed upon physical examination and possible further specialised investigation. In other words, an accurate history is an integral component of an accurate diagnosis. Not only that, but an accurately recorded history is crucial since it is contained in what he described as a medico-legal document which medical staff are trained to know may ultimately feature in court proceedings.

[19] He also testified that none of the doctors who treated the plaintiff (in particular Dr Yu who attended to her admission) are still in Tygerberg's employ. Accordingly his evidence was based on his knowledge and experience of the trauma unit over a number of years, including its admissions procedure, with reference also to the plaintiff's Tygerberg clinical notes.

[20] His evidence was further that the document at Exhibit "A" page 16 was the standard form used in the trauma unit at the time of the plaintiff's admission. The doctor concerned would have recorded the mechanism of injury based on what the plaintiff had told him.

[21] He was also referred to the Triage Record (Exhibit "A" page 19) which he explained is the system used to determine the severity of the injuries with which the patient presents and the consequent degree of urgency in relation to treatment. The plaintiff was classified as falling into the green code, meaning that she could wait a few hours before treatment.

[22] Dr Müller also explained that the Triage Score is completed by the nursing staff upon the patient's arrival at the trauma unit before being assessed by a doctor. He confirmed that in this instance the document reflects that the main complaint was a left arm injury "as a result of a fall".

[23] He was also taken to the clinical notes of the orthopaedic surgeon who examined the plaintiff on 6 October 2012 (Exhibit "A" page 23) which reflect that her injury history was recorded as "fell on outstretched hand yesterday". He explained that it is incumbent on the specialist to whom a patient is referred for further investigation (in this instance, after the plaintiff had been x-rayed to determine whether there was a fracture which the admissions doctor appears to have suspected) to essentially repeat the diagnostic process afresh.

[24] In his words the specialists are "very pedantic" when it comes to thorough investigation, given that the ultimate responsibility lies with them. In his opinion it was highly unlikely that all of the medical professionals involved would have recorded the plaintiff's history inaccurately.

[25] During cross-examination Dr Müller accepted that it was possible the plaintiff's history was incorrectly reflected due to honest mistake. He also accepted that the Tygerberg trauma unit is a busy one. He disagreed that a Friday night/early Saturday (the plaintiff was injured on a Friday evening) is the busiest period in any given week, explaining that these are Sundays and

Mondays when there can easily be up to 100 patients in the unit with only 4 treating doctors (in addition to nursing staff) in attendance.

[26] He accepted that the note on the Triage Score should also have reflected how the plaintiff fell, but pointed out that both the notes of the medical professional at the Day Hospital and the admissions doctor at Tygerberg specifically recorded that the plaintiff was running when she fell.

Discussion

[27] It is against this evidence that in closing argument *Mr Benade* who appeared for the plaintiff unsurprisingly sought to exclude Dr Müller's evidence about what was contained in the clinical notes on the basis that these notes constitute hearsay. He submitted that had the defendant wished to have the notes admitted to prove the truth of their contents, it should have brought an application in terms of s 3(1)(c) of the Law of Evidence Amendment Act[1] ("the Act") prior to "the parties closing their cases".

[28] Section 3(1)(c) of the Act provides as follows:

> *'**3. Hearsay evidence.** –(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless--- …*
> *(c) the court, having regard to---*
>
> *(i) the nature of the proceedings;*
> *(ii) the nature of the evidence;*

[1] 45 of 1988.

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

[29] *Mr Benade* relied on *Visser v 1 Life Direct Insurance*[2] in contending that the defendant failed to discharge the onus of proving the truth and accuracy of the notes. In *Visser* the respondent relied on two sources of evidence to discharge the onus (which in that case rested upon it) that the deceased misrepresented her pre-existing medical condition such as to entitle it to repudiate the appellant's claim as beneficiary under a life policy. These sources were the transcript of a telephone conversation and, more pertinently for present purposes, hospital records of visits ostensibly paid by the deceased to its emergency unit. The transcript was not in issue.

[30] The Supreme Court of Appeal pointed out[3] that the admissibility of the hospital records had to be distinguished from the evidential status of their contents. The Court accepted that the records were admissible without further proof. The parties had agreed at a rule 37 conference that the records would serve as evidence of what they purported to be "without admission of the truth of the contents". In addition the respondent had admitted in response to a rule

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2 2015 (3) SA 69 (SCA).

3 At para [8].

35(9) notice that the notes were properly executed and were what they purported to be.

[31] The Court however found[4] that the doctor who conducted the interviews with the deceased should have been called to prove the truth of the contents of those records. This was not done; there was no explanation for the failure to do so; and no application had been made in terms of s 3 of the Act.

[32] It further found that the evidence revealed there was no clear understanding between the parties as to the evidential status of those records. Moreover the respective experts called by the parties expressed their views on the nature and seriousness of the deceased's medical condition based on the contents of those records, while at the same time their inadequacy and lack of clarity were repeatedly referred to in evidence. There was furthermore no agreement that the hospital records correctly reflected the deceased's medical condition.

[33] In my view the approach taken by the parties in the present matter is distinguishable for the following reasons. First, in the minute of a rule 37 conference dated 25 November 2019 it was expressly recorded[5] that "the plaintiff will provide defendant with a bundle of documents and the parties will agree which… will, <u>without further proof</u>, serve as evidence of what they purport to be, which extracts may be proved without proving the whole document <u>or any other agreement regarding the proof of the documents</u>" (my emphasis). This is the sole recordal concerning the evidentiary status of the

4 At para [9].
5 At para 9.8.

documents in the (trial) bundle and at the commencement of the trial a joint witness bundle including these notes was handed in without any further qualification or ado.

[34] Second, when *Mr Wynne* who appeared for the defendant was cross-examining the plaintiff on the notes, *Mr Benade* placed on record that while he did not formally object, the notes would constitute hearsay unless the authors themselves testified as to the truth of their contents. *Mr Wynne* responded that, given the agreement concerning the status of documents in the bundle, he would deal if necessary with this during closing argument. Nothing further was said about it.

[35] To my mind, if the plaintiff had any real difficulty with the evidential status of the notes, it was at that point that *Mr Benade* should have formally objected, or at least sought clarity on the defendant's stance, so that the latter could consider its position and if necessary bring a s 3(1)(c) application. To this it should be added that prior to the commencement of evidence *Mr Wynne* had also placed on record that the defendant's only witness would be Dr Müller who would testify inter alia about the clinical notes. This provided the plaintiff with another opportunity to place any formal objection on record. No such objection was raised.

[36] Third, Dr Müller did provide an explanation why the authors of the Tygerberg notes (all of whom he was able to identify) were not called to testify on behalf of the defendant. He also explained that since it is a teaching hospital, in the

nature of things doctors "moving on" is not unusual. While he was challenged on why he had not taken further steps to try to locate the individuals concerned, his explanation that he only checked to see whether they were still employees was not unreasonable and, after all, it was the plaintiff who bore the onus on the merits (unlike the case in *Visser*).

[37] Fourth, it was submitted by *Mr Benade* that the stage at which an application to admit hearsay evidence should be made, and a ruling given, always depends on the particular circumstances. He relied on *Giesecke & Devrient SA v Minister of Safety and Security*[6] where it was stated that:

> *'[23] Under this heading the first question arising results from the appellant's objection against the timing of the court a quo's ruling on admissibility. According to this objection, the court should have considered this ruling only at the end of the case, after hearing all the evidence and not as it did at the end of the appellant's case. I do not think the answer to the question thus raised would make any difference to the outcome of the appeal. Yet, as a matter of principle, it is not entirely insignificant. I shall therefore venture an answer. But in the circumstances, I propose to do so without unnecessary elaboration. In criminal proceedings the issue raised by the appellant's objection had been answered. That answer appears from the following statement by Cameron JA in* S v Ndhlovu *2002 (2) SACR 325 (SCA) para 18:*
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> *". . . [A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of [s 3 of the Law of Evidence Amendment Act 45 of 1988], and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."*

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6 2012 (2) SA 137 (SCA) at paras [23] and [24].

(See also S v Molimi *[2008] ZACC 2; 2008 (2) SACR 76 (CC) para 17.)*

[24] The court a quo held that the position should be no different in civil proceedings. The appellant's contention was, however, that the court had erred. The difference between the two, so the appellant's argument went, is that in criminal proceedings effect must be given to the constitutional right of an accused person to a fair trial, in particular, the presumption of innocence and the right to challenge evidence (in s 35(3)(h) and 35(3)(i) of the Constitution of the Republic of South Africa, 1996). But as I see it, the argument loses sight of s 34 of the Constitution which also entitles both parties to civil proceedings to a fair public hearing. That right is given effect to, inter alia, by the Uniform Rules of Court. In terms of rule 39 the defendant is afforded the right, where the plaintiff bears the onus, to apply for absolution from the instance at the end of the plaintiff's case or to close its own case without leading any evidence if the plaintiff has failed to establish a case which requires an answer. As I see it, it is essential for a proper exercise of these rights that the defendant should know whether the court considers the hearsay evidence relied upon by the plaintiff, admissible or not. Stated somewhat differently, in order to decide whether the plaintiff has made out a case to answer, a defendant is entitled to know the constituent elements of that case. It follows that rulings on the admissibility of hearsay evidence in civil proceedings should also be made at the end of the plaintiff's case.'

[38] In the present matter the plaintiff was cross-examined on the contents of the clinical notes before she closed her case in circumstances where the evidentiary status of those notes had, at least ostensibly, been agreed in the minute of the rule 37 conference, namely that they would serve as evidence of what they purport to be in the absence of any other agreement regarding their proof.

[39] As previously stated no formal objection was raised on the plaintiff's behalf before she closed her case, nor during the case of the defendant. But it went

further, since the defendant's own witness was cross-examined on those notes as well, which went directly to the heart of the issue before me, namely whether or not the plaintiff's injuries (the nature of which are common cause for present purposes) were caused by a motor vehicle collision or some other event.

[40] However in argument *Mr Wynne* took the position that the defendant accepts that portions of Dr Müller's evidence amount to hearsay (which would be not only the Tygerberg clinical notes but also the Day Hospital referral letter). He submitted that such evidence should nonetheless be accepted in this instance in terms of s 3(1)(c) of the Act. This change in tack raises the question whether the defendant is precluded from requesting its admission at this late stage.

[41] *Giesecke* made clear that the overarching principle as far as timing is concerned is s 34 of the Constitution, namely the right of both parties to a fair hearing. The Supreme Court of Appeal also reiterated that s 3 *'introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require'.*[7]

[42] Given the recordal in the pre-trial minute, and the change in tack by the defendant after the conclusion of testimony as to the evidential status of the notes, it falls to be criticised for failing to request the admission of this evidence in terms of s 3(1)(c) at an earlier stage. However in the particular

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[7] At para [31].

circumstances of this matter it is my view that the interests of justice call out for a high degree of flexibility and that the evidence should nonetheless be admitted in the interests of justice. The reasons are briefly as follows.

[43] First, any amount for which the defendant might ultimately be found liable if the evidence is excluded would be paid from the public coffers. Second, the purpose for which the evidence was tendered was to rebut the plaintiff's version in the absence of the defendant having any witness to the alleged incident itself. The defendant was constrained to rely on circumstantial evidence in the form of the notes and referral letter, in addition to the direct evidence of Dr Müller about standard admissions procedure. This evidence sought to be excluded by the plaintiff is highly relevant to determine whether the defendant should be held liable.

[44] Third, the defendant gave the reason (through the testimony of Dr Müller) why the authors of the notes (upon whose credibility the probative value of such evidence depends) did not testify and its explanation was reasonable. Fourth, the only prejudice the plaintiff could possibly suffer if the evidence is admitted is a diametrically opposed version to her own about the cause of her injuries, which is an issue of credibility. Indeed, as *Mr Benade* himself submitted, the defendant has no version pertaining to the alleged collision itself, and it can hardly be said that the plaintiff has been taken by surprise.

[45] Given that there are two mutually destructive versions the plaintiff can only succeed if she discharges the onus resting upon her to persuade the Court

that her version is true when weighed against the probabilities. The plaintiff did not strike me as a person of limited intellect. Although not a poor witness per se, her credibility is called into serious question when regard is had to the testimony of Dr Müller (who had no personal interest in the matter, was clearly an honest and credible witness, and whose testimony was not materially challenged) as well as the objective evidence in the form of the clinical notes and the events leading to the plaintiff instituting action against the defendant.

[46] As far as the testimony of Mr Julius is concerned, it did not escape my notice that he was present during the plaintiff's testimony, and gave evidence immediately thereafter when what she conveyed to the court was fresh in his mind. This places a question mark over the weight to be attached to his evidence, which amounted to a simple repetition of the plaintiff's version as to the alleged incident itself. Although his evidence stands uncontested since he was not cross-examined, on the crucial aspect of what the plaintiff conveyed to the treating professionals soon after the incident he was unable to confirm her version since he was not present.

[47] The plaintiff sustained no injuries other than to her left humerus and left hand despite allegedly being hit from the rear by a motor vehicle travelling at high speed. It is not necessary to be an expert to consider the improbability of her having no other injuries at all in the circumstances. Rather, her injuries are more likely consistent with what the objective evidence revealed, namely her reporting to no less than four medical professionals within the 24-hour period after the incident that she had fallen, and to two of them, while running. Logic

dictates that, were her version true, she would instead have told these professionals that she was knocked over.

[48] The plaintiff took no steps for almost 2 years after the incident to report to the police what she must surely have realised was a criminal act on the part of the alleged driver, particularly given her testimony that he drove recklessly in the wrong direction around the circle before mounting the pavement and colliding with her. This is a separate issue from any potential claim she might have to compensation from the defendant. Moreover, if the vehicle was travelling as she alleged, the question arises why Mr Julius, about a metre in front of her and slightly to her right, was entirely unscathed.

[49] In addition, there can be any number of reasons for a fall, but in this particular case the two professionals who recorded the reason both noted down the very same one, i.e. running. Given Dr Müller's unchallenged testimony about the necessity to record an accurate history (part of medical training) I agree with him that it is highly improbable that all four of these individuals not only ignored the plaintiff's report of how she was injured, but negligently selected their own reason, and co-incidentally the very same one to varying degrees in each instance.

[50] One would also reasonably have expected the plaintiff or her husband to obtain the contact details of the passing motorist who drove them to the Day Hospital immediately after the alleged collision, at least for purposes for

reporting the matter to the police or to later thank him or her for the assistance.

[51] To my mind, upon a conspectus of the evidence as a whole, the probabilities rather point to an opportunistic attempt by the plaintiff to obtain compensation from the defendant upon being told by her erstwhile attorney that, if injured in a motor vehicle collision, she could pursue such a claim. I do not suggest that this was at the instance of her erstwhile attorney but rather that the plaintiff seized upon the opportunity for financial gain, possibly after having also received advice that it was not required of her to provide information about the identity of the insured driver or vehicle for this purpose. I thus conclude that the plaintiff has failed to discharge the onus and that her claim falls to be dismissed. There is no reason why costs should not follow the result.

[52] **The following order is made:**

1. **The plaintiff's claim is dismissed with costs, including any reserved costs orders.**

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J I CLOETE