IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, BHISHO)

Reportable: No
Case No. 78/09

Heard on: 18 & 19/05/2010 and 29/06/2010
Delivered on: 02 July 2010

In the matter between:

MXOLISI DESMOND KEBETHANA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

KEMP AJ:

[1] The Plaintiff sued the Defendant for damages he suffered, allegedly as a result of a motor vehicle collision which occurred when he was a pedestrian and the insured vehicle collided with him. The Plaintiff applied successfully shortly before the trial for the merits and quantum to be separated and the matter proceeded only in respect of the merits.

[2] The Defendant denied that the collision had taken place but pleaded in the alternative that if a collision was found to have taken place, that the collision occurred solely as a result of the negligence of the Plaintiff, and pleaded furthermore that the Defendant could not at that stage allege specific grounds of negligence. The Defendant then amended its plea after the plaintiff had testified, to include an allegation that the plaintiff had been drunk and that he

had intentionally entered into the line of travel of the insured vehicle, with the intention of claiming compensation from the Defendant, that he was therefore entirely to blame for the accident, alternatively, that an apportionment should apply.

[3] The Plaintiff called as his first witness Dr Olivier, an orthopaedic surgeon. Dr Olivier confirmed that the Plaintiff had suffered what he termed a typical "bumper knee" injury to his left knee. He explained that the bumper of a motor vehicle is approximately at the same height as the knee joint. The impact in a bumper knee injury is usually from the lateral aspect and the bichondylar fracture of the tibial plateau suffered by the Plaintiff was consistent with the sort of injury one could expect from such an injury.

[4] Dr Olivier testified that he had never seen a person with such an injury walk, and although he had heard anecdotal evidence of people for instance with cervical fractures mobilising, he was of the view that despite the pain, which would also have been a factor contra-indicating mobilisation in this sort of injury, that the bio-mechanics of the injury would simply not permit the body to support weight on that leg, either for walking or even for just standing. It appeared from his evidence that it was extremely unlikely, if not impossible, for the Plaintiff to have sustained the injury somewhere else and then to have walked down the road.

[5] Evidence was led by the Defendant's witnesses that the Plaintiff was being assisted down the road prior to the accident, that he was unsteady on his feet, that he smelt of liquor after the accident, and that there had been no contact with the insured vehicle, leading to the conclusion, argued by Mr Maseti, for the Defendant, that the Plaintiff had been injured elsewhere.

[6] Dr Olivier conceded that it was possible to sustain a similar injury without the involvement of an exterior force, but that such injuries would normally present

in patients suffering from osteo-porosis, and that such category of patient would usually be elderly women, people who had suffered from cancer, heavy smokers, or people who had been exposed to radiation. Dr Olivier was of the view that the Plaintiff did not belong to any of those groups and that the injury suffered was consistent with the bumper knee injury associated with an impact with a motor vehicle.

[7] The Plaintiff testified that he was walking on the gravel verge of the road in NU16 Mdantsane, facing oncoming traffic, when he heard a vehicle crossing the speed bump behind him. He appeared to think that it was a louder than normal sound, but thinking nothing further of it carried on his way. He took possibly three of four paces when he was hit by the insured vehicle.

[8] He testified that the insured driver had executed a u turn when he collided with him. He confirmed that he had had two beers after work but denied that he had been drunk. He also denied that he had been walking in the company of another person, or that the other person had been helping him to walk. He also denied that he had put his hands on the bonnet of the insured vehicle and demanded "bones money", as alleged by the insured driver.

[9] The Plaintiff's wife also testified. She confirmed that when he left home that morning that there had been nothing wrong with his legs and confirmed that although he smelt of liquor when she visited him at the hospital later that day, that he talked lucidly and did not appear to be drunk.

[10] The Defendant called the insured driver, who testified that he was going to visit his sister who lived in NU16, that he had seen the Plaintiff approaching on the right hand side of the road, some distance away, close to a shop which appeared on the photographs handed in. He denied that his car made a loud noise as he passed the speed bump and alleged that he passed his sisters house, as the road is too busy to execute a three point turn there, and

proceeded to a cross road, near to where the shop is where he had seen the Plaintiff.

[11]He then executed his u-turn, looking in both rear view mirrors to ensure that he was safe, and just as he finished the u-turn, was surprised to see the Plaintiff jumping in front of his vehicle, and putting both hands on his bonnet.

[12]According to him it was obvious that the Plaintiff was drunk. The Plaintiff demanded "bones money" from him, but when the Plaintiff saw that he was getting angry, pretended to be drunker than what he actually was and sat down, pretending that he could not speak.

[13]The Defendant also called Mr Zola Siyatha ("Zola") as a witness. His testimony was to the effect that he came across the plaintiff who was sitting on the ground, trying to get up. He was obviously drunk but as he knew him he thought that he would assist him to cross the busy NU16 main road. He helped him to his feet and locking his arm into the plaintiff's arm, assisted him to walk some 25 metres to the intersection. The plaintiff never fell or appeared to be limping or to have any functional problems with either of his legs. He never complained of any pains, just appearing to be drunk and abusive. His version, that he and the plaintiff had been coming along the gravel road was never put to the plaintiff, whose evidence is that he had been walking along the tarred main road, in a direction opposite to that alleged by the insured driver.

It appears however that all of the eye witnesses were *ad idem* that the accident occurred in the vicinity of the shop which is at the intersection of the tarred road and the gravel road. However, the failure to put a totally different version of the events leading up to the accident to the plaintiff is either a dereliction of duty committed by Mr Maseti, or an indication that Zola's evidence is a fabrication. Zola is an independent witness and there appears to be no reason why he would have a motive to fabricate his evidence. I must therefore come to the conclusion that Mr Maseti simply neglected to put his

version to the Plaintiff. I do not think that it has affected the outcome of the case in any way but we have obviously lost an opportunity to test the Plaintiff's credibility, which is potentially detrimental to both sides.

[14]According to Zola, when they got close to the intersection he saw the insured car approaching, saw it executing a u turn, and then while it was still in motion, the plaintiff slipped from his grip and lunged forward, where he placed his hands on the bonnet of the car, and demanded "bones money" from the driver. Although he at first said that he was sure that there had been no collision between the plaintiff and the car, he was later only prepared to say that he never saw a collision and seemed to concede that if there had been one he might have missed it. When it was put to him by Mr Louw, for the Plaintiff, that he had mentioned in his statement to the police shortly after the incident that there had been a minor collision between the plaintiff and the insured vehicle he denied that he had told the police that and said that he had told them that the plaintiff had placed his hands on the bonnet of the car. I think that the version he gave to the police shortly after the incident is more likely to be accurate.

[15]The Defendant also called Constable Makena, who testified that he arrived on the scene to find the plaintiff seated on the road side, that he and his colleague helped the plaintiff to his feet, whereafter the plaintiff limped to the police van and got into the back. The police van was only about a mere and a half away. He noticed that the plaintiff was limping, as if he was in pain, but denied that he had helped him into the van, and insisted that he could remember that detail, even though the incident had taken place some two and a half years previously. He eventually conceded that his initial evidence that he had unusually accurate powers of recall was exaggerated. It appears also that there were many errors contained in the police accident report that he could not explain, hence it would appear, the concession about his powers of recall, and that his evidence, especially when related to his powers of recall, should be treated with some circumspection.

[16]The last witness the Plaintiff called was Dr Ting, who confirmed that he had been the admitting doctor at Cecelia Makiwane Hospital, and that he had made the annotations on the admissions folder that the plaintiff had fallen, which information he appears to think he got from a nurse, that the plaintiff had been too drunk to advise what his age was, although he conceded that many of his patients could not recall their ages, and that the plaintiff had walked with a staggered gait. Although Dr Ting alleged that he had an independent recollection of the plaintiff walking to his bed, on repeated questioning by both

Mr Louw and myself, I gained the impression that he seemed to be reconstructing his evidence in this regard. He testified that he saw between 100 to 150 patients a day on a weekend and up to 20 per day on a weekday, which would mean that he had seen in excess of twenty thousand patients between the time he saw the plaintiff and the day he testified. He repeatedly answered questions about his memory by referring to the form, and saying "because it's on the form". I gained the distinct impression that he was reconstructing his evidence in that regard. In any event, even if he had some independent recollection of the plaintiff staggering towards his bed, I do not believe that that evidence is destructive of the plaintiff's version.

[17]Although Dr Olivier testified that it would be highly unlikely for a person with the Plaintiff's injuries to walk or even to stand, if the Plaintiff was drunk, then it may well be possible that his pain was to some extent masked by his state of intoxication and that he managed to move a pace or two. It seems that he may well have been helped into the police van and if he staggered to his hospital bed, whether drunk or not, it is not the same as walking 25 metres or more, as testified to by Zola.

[18]It seems to me that the overwhelming probabilities support the version that the plaintiff could not have been injured before he met the insured vehicle. Zola's evidence is that he saw the plaintiff who was struggling to walk due to his state of drunkenness, that he assisted him, but not to the extent that he was lead to conclude that there was anything wrong with the plaintiff's legs,

and it seems, bearing Dr Olivier's testimony in mind, that it would have been impossible for the plaintiff to have moved that distance without Zola forming an impression that there was something wrong with the plaintiff's legs.

[19] It appears that the plaintiff and Zola then entered the main road or were in the vicinity of the intersection at precisely the time when the insured driver executed his u turn. It is a common thread between all of the witnesses that a u turn was executed and that the plaintiff was in close proximity to the insured vehicle at the end of the u turn. Zola concedes that there may have been an impact. Dr Olivier is of the view that a slight impact would have sufficed. It is a little far fetched to think that the Plaintiff planned on the spur of the moment to fling himself into the path of the insured vehicle in order to claim compensation from the Defendant. Far more likely in my view is that the insured driver failed to keep the Pliantiff under observation and likewise that the Plaintiff failed to keep the insured driver under observation, that the insured driver then found the plaintiff in front of him, and that he applied brakes too late, bumping the Plaintiff with enough force to cause the bumper knee injury described by Dr Olivier. It is not strange that the Plaintiff then, after having been injured by the insured vehicle, placed his hands on the bonnet of the car and demanded "bones money".

[20] The Plaintiff's version is to the effect that he was walking along the tarred road. I find that this is probably incorrect. I find that Zola's version is more probable. He is an independent witness and his version sounds more probable than any of the others. I find that the insured driver, by his own admission executed the u turn and that he was completely unaware of the presence of the plaintiff until he saw him in front of his car. He appears to have been more concerned with what was going on in his rear view mirrors than with possible pedestrians. It was a busy road and it is not unreasonable for him to have been concerned about oncoming traffic in either direction, hence his insistence that he looked in both mirrors prior to turning.

[21]As the Plaintiff was waiting to cross the road he might well have turned one way or the other prior to doing so, explaining why the injury was to the left knee and not to the right. People do not stand still when waiting to cross a road, especially if they are drunk.

[22]I must now consider whether the plaintiff contributed to the accident in any way. If I accept Zola's version then I must find that the plaintiff did in fact lunge into the road as described by him. He must however have been placed in such close proximity to the vehicle that he was able to do so as a result of the insured vehicle executing the u turn and coming to within a short distance of him. If the plaintiff was indeed drunk and stumbling then the insured driver should have seen him had he been keeping a proper lookout. It seems as if the insured driver saw him at the very last moment and quite clearly failed to keep him under proper observation. The insured driver was executing a manoeuvre which was inherently dangerous and unexpected by pedestrians in the vicinity of the intersection and had a duty to keep them under observation.

[23]I am driven to the inevitable conclusion that if the insured driver had kept the plaintiff under observation that he would have been able to avoid the collision. It is also probably true that if the plaintiff had kept the insured vehicle under observation that he would also have been able to avoid the collision. I am satisfied however that it was the insured driver who carried the greater portion of responsibility for the collision and that an appropriate finding would be that the Defendant should be liable for 80% of the damages proven by the Plaintiff. Mr Maseti conceded that in the event of my finding that the Plaintiff should succeed, that he would be entitled to the costs of an inspection in loco with counsel, the cost of the photographs produced in court, and the qualifying expenses, if any, of Dr Olivier.

[24]In the event the following orders are made:

(a) The Defendant is ordered to compensate the Plaintiff for 80% of the damages proven by the Plaintiff to have been suffered by him as a result of the collision with the insured vehicle on the 29th September 2007;

(b)The Defendant is ordered to pay the Plaintiff's costs of suit, together with interest thereon as prescribed by law from 14 days after date of taxation, which costs will include:

(i) the costs of an inspection in loco with Plaintiff's counsel; the costs of the photographs; the qualifying expenses, if any, of Dr Olivier.

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L. D KEMP
ACTING JUDGE OF THE HIGH COURT

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