

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: 1340/2021

In the matter between:

SAMSON SHWELE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NQUMSE AJ:

[1] This is an action for damages arising out of a collision involving a motor vehicle driven by the plaintiff with registration letters and numbers C[...] 3[...] which occurred on 27 December 2016 at or near Silindile Location towards Sterkspruit. Since the fund repudiated the plaintiff's claim, both parties agreed that the matter was to proceed only in respect of the merits and that all other heads of damages to be postponed pending the outcome on the merits.

[2] The plaintiff testified that during the morning around 06`clock of 27 December 2016, he was travelling with his vehicle a Ford Bantam with the registration letters above from a village where he had visited his aunt who was indisposed. Whilst travelling on the road towards Sterkspruit, which is well known to him, and whilst busy negotiating a bend the vehicle driven by the insured driver appeared on the bend from the opposite direction at a high speed. It moved from its lane, crossed the barrier line and drove onto his lane, thereby collided with his vehicle on the right wheel arch area towards his driver`s door.

[3] He testified that he was travelling at 80KPH, however, due to the fast pace with which the accident happened there was nothing he could do to avoid the collision.

[4] Consequent to the accident, he sustained a fracture from his right knee to his waist area as a result of which he was hospitalised for about a month. He still experiences difficulty in bending his knee and unable to walk for a long distance.

[5] He disputes the description of the accident which is indicated in the accident report which was handed into evidence as exhibit "A". His contention is that the police who attended the scene never approached him for information as to how the accident occurred. He was therefore not given the opportunity to give his side of the story on what had happened. Even after his discharge from hospital his attempts to search for the police official who was responsible for the accident came to naught. Whenever he visited the police station he would be told that the said police official is not available until he had given up and left for Cape Town to search for employment opportunities.

[6] Under cross examination he confirmed that he drove cautiously since that road has a number of curves on its downhill. He was referred to paragraph 3 of his affidavit in support of his claim which was forwarded to the fund wherein he indicated the time of the accident as 16:00. His response was that he maintains that the accident occurred in the early hours of the morning and associates himself with the time of 05:30 as indicated by the police officer in the accident report. When asked if he went to police station to report the accident or for more enquiry, he said he went to the police station in order to report the accident as well as to collect his driver's license that was taken from him at the scene of the accident.

[7] In clarification to the questions by the court, the plaintiff placed a mark on the sketch plan which was drawn by the police official. He depicted the point of impact as being on the lane he was travelling on and showed by means of making a mark where the insured driver's vehicle crossed the barrier line towards his lane of travel. He, however, has no recollection of where their cars became stationary after the accident.

[8] Before of the closing the plaintiff`s case, Mr Bester caused the plaintiff to take the witness stand to enable the court to make its own observations on the visible scar on the plaintiff`s head. The court observed an indentation on the left side of the plaintiff`s head which stretched towards the back of the head.

[9] Furthermore, Mr Bester applied without any objection to amend paragraph 6 of the Particulars of Claim to substitute the time indicated as 16:00 to 05:30 in the morning. Thereafter the plaintiff`s case was closed.

[10] The defendant`s case was also closed without adducing any evidence save the introduction into record of a document titled “**Advice on Evidence for Defendant**”. What the defendant sought to do in the said document was to refer the court to various cases where judgment was granted in favour of the defendant by reason of the plaintiff being the sole cause of the accident. The defendant further referred to the description of the accident as captured by the police officer which reads as follows:

“It is alleged that motor vehicle A coming from Sterkspruit to Silindini Administrative Area and on the way of Silindini motor vehicle C[...] 3[...] change its lane and came to the lane of motor vehicle F[...] 6[...] F[...] and it was when the collision occurred”. (sic)

[11] In argument before me, Mr Bester submitted that the only version facing the court is that of the plaintiff and there is no basis established for the claim that the plaintiff was negligent nor was there any version put to the plaintiff to show that he was negligent. Both the police officer and insured driver were not called to contradict the evidence of the plaintiff as to how the collision occurred. Mr Bester further invited the court`s attention to the pleadings by the defendant wherein no version was pleaded for negligence by the plaintiff nor any evidence that establishes contributory negligence. The plaintiff contends that it has proved its case on the merits and should be entitled to 100% of its proven damages in due course.

[12] Mr Gona for the defendant argued that the court is faced with two versions, that of the plaintiff and the accident report. His contention which is along the same vein as the document referred to above, is that the court should find that the plaintiff was the

sole cause of the accident or at the least he should be found as having contributed negligently to the accident.

[13] He was invited to support his argument since there has been no evidence from the side of the defendant nor was there any version put to the plaintiff which shows negligence albeit contributory on his part. The court further asked what reliance can be placed on the accident report when the information recorded therein cannot be attributed to the police officer nor the insured driver. Instead what is recorded is a vague note which says “It is alleged” However there is no mention from which person the allegations came from.

[14] The court went further to seek his comment on the sketch plan which was lacking material information regarding the point of impact or the position of the vehicles after the collision. It suffices to say Mr Gona was at pains to show in his argument in what manner was the plaintiff negligent. He however, conceded that the issues raised by the court were extremely important and valid. As a result, he had nothing further to add to his submissions.

[15] As alluded above, the plaintiff is the only witness that had been called to give evidence on how the incident occurred. In fairness to the defendant it has to be mentioned that their attempts to find the police officer or the insured driver bore no fruit. A question that begs an answer is whether there is any evidence from the defendant to which a comparison can be made with that of the plaintiff. The only evidence the court was directed to by the legal representative of the defendant is the documentary evidence in the form of the sketch plan.

[16] As was pointed out by Mbenenge JP, in **EMV Road Accident Fund**¹ making reference to **Botha v Kirk Attorneys**² that “it is trite that the plaintiff bears the *onus* to prove that the accident was attributable to the negligence of the defendant. The defendant bears an evidentiary burden, which may be discharged by pointing to

¹ (263/2009) [2021] ZAECELLC20 (27 July 2021).

² (EL 257/2016; ECD 757/2016 [2019] ZAECELLC 1 (22 January 2019), para 32 above in para 15.

inherent contradictions in the plaintiff's testimony and other cogent factors that belie the plaintiff's version"³.

[17] The sketch plan that was introduced suffers a lot of serious shortcomings as pointed out above. More importantly it denotes no point of impact nor was its compiler called to testify therein. This is at the backdrop that its contents save the details of the drivers of the affected vehicles and the date and time of the incident are vehemently disputed by the plaintiff.

[18] Neither was there any evidence placed before me that shows the collision to have occurred at another point other than the one pointed out by the plaintiff.

[19] During his testimony, the plaintiff was never made aware of any negligence that was imputed to him as the cause of the accident. Nor was his attention drawn to any specific allegation to which he must comment on. In dealing with the lack of cross examining a witness,

In **President of the Republic of South Africa v South African Rugby Football Union (SARFU)**⁴ the Constitutional Court was quite clear on this aspect and held as follows:

"The institution of cross-examination not only contributes a right; it also imposes certain obligations. As a general rule, it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box of giving any explanation open to the witness and defending his or her character. If a point in dispute is left unchallenged in cross-examination the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct...".

[20] None of the questions put to the witness in cross-examination were suggestive that he was not speaking the truth. In fact, his entire evidence was left unchallenged.

³ Above N1 para 15.

⁴ 2001 (1) SA 1 (CC) para 61.

I am therefore unable to find any reason to disbelieve his explanation of what had happened on that fateful day. I am also satisfied that on a balance of probabilities the essential features of his story are true⁵. Consequently, I find that the plaintiff's version is within the requisite degree of proof that there was negligence on the part of the insured driver and thus, the sole cause of the accident, by crossing the barrier line and driving into the lane of the plaintiff and thereby colliding with the plaintiff's vehicle. Needless to say that the issue of contributory negligence which only arose during argument from the defendant's legal representative is not supported by any evidence and has no merit.

[21] In the result the following order is made:

1. The issue of liability and quantum are separated, with the issue of quantum standing over for determination on a future date to be arranged with the Registrar of this court.
2. The defendant is held 100% liable for the plaintiff's proven or agreed damages in consequence of the motor vehicle collision which took place along the public road from Silindile Location towards Sterkspruit on December 2016.
3. The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action incurred to date, together with interests thereon at the prescribed legal rate per annum from 14 days after taxation or agreement to date of payment.

M.V NQUMSE
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	:	Mr. Bester
Instructed by	:	Matyeshana Towley Inc. EAST LONDON
 Counsel for the Defendant	 :	 Mr. Gona
Instructed by	:	State Attorney EAST LONDON

⁵ Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) at para 10.

Date of hearing : 12 October 2022
Date of delivery : 22 November 2022