

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

[Not Reportable]

CASE NO: 3967/2018

Heard on: 10/02/2021

Delivered on: 23/02/2021

In the matter between:

S[...] N[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NHLANGULELA DJP

[1] On or about 11 June 2016 and on the R394 Road situated in in Phepheni Location, Mt Ayliff two motor vehicles driven by the plaintiff and Sakhephi Aron Timoti respectfully collided with the result that the plaintiff sustained bodily injuries which are described as a fracture of the mid shaft of the right femur for which he claims payment of damages against the defendant in terms of s 17 (1) of the Road Accident Fund Act No. 56 of 1996. The *quantum* of damages sought is in the sum of R3 500 000,00 as computed under various heads.

[2] Both issue of liability and amount of the damages sought fell to be determined at the trial, it being obvious that the determination of the amount to be paid will not be necessary if the plaintiff fails to sustain a case on the issue of liability.

[3] To succeed in these action proceedings the plaintiff must prove on a balance of probabilities that Mr Timoti drove his vehicle in a negligent manner. The test of negligence is stated succinctly in the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E as follows:

“For the purpose of liability *culpa* arises if -

(a) *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.”

[4] As the *onus* bearing party the plaintiff led evident first in order to amplify the allegations made on his behalf in the summons that Mr Timoti:

- (i) drove at an excessive speed;
- (ii) failed to apply brakes of the vehicle he was driving, timeously or at all, when he should have done so;
- (iii) drove without due care and consideration for other road users, including the plaintiff;
- (iv) failed to exercise proper control over his motor vehicle when he could and should have done so;
- (v) failed to avoid the collision with plaintiff’s motor vehicle when by exercise of reasonable care he would and should have done so,

[5] The allegations that I have paraphrased in paragraphs (4) above are not individually decisive. The cumulative effect of those allegations will assist the court in determining success or failure of the plaintiff’s claim.

[6] Briefly stated, the evidence adduced by the plaintiff is that on 11 June 2016 he had a passenger in his vehicle as he was driving in a Nissan Almera on R394 Road in the direction of Phakade junction to Bizana. The road was narrow and having two lanes. The road permitted all motorist driving in Phakade to Bizana direction to occupy one of

the two lanes; the second one being the lane for motorists driving in the opposite direction of Bizana to Phakade. Two centre lines, broken on his side but solid on the opposite side, divide the road. The weather was clear and visibility good. He was following a huge horse-and-trailer truck. He overtook it on the right side such that his vehicle had to occupy the opposite side. The road was straight, and the vehicles on his side were approaching a curve. Having overtaken the truck, he regained his correct side of the road but, suddenly, he saw a Toyota Quantum coming from the front and being followed by Mr Timoti's motor vehicle. According to him, the Toyota Quantum and Mr Timoti's vehicle were driven on his correct side and approaching directly towards the front of his vehicle. To avoid a head on collision with the Quantum he swerved back to the incorrect lane and, as he was swerving back to his correct path of travel, a collision occurred between his vehicle and that of Mr Timoti. That is, the point of impact fell on his incorrect path of travel. He located the point of impact in the area that is towards the solid line. As a result of the collision his vehicle sustained damages beyond economic repairs. He stated that there was nothing wrong with the manner of his driving, but that Mr Timoti's negligent driving was the sole cause of the collision. He told the Court that the passenger he had in his vehicle throughout until the collision occurred was unknown to him. He lost consciousness and later to regain it when he was on the hospital bed.

[7] Mr Timoti and his passenger, one Mr Siyabonga Mqikana, testified on behalf of the defendant. A third person, one Ms Nosisa Yebela, also testified. Mr Timoti told the Court that the vehicle that he was driving at the time of the collision was the property of Ms Yebela. She confirmed this when she testified. Ms Yebela also confirmed that her vehicle was damaged beyond economic repairs. She told the Court that Mr Timoti was her employee driver who had been on a business trip to Kokstad when the collision occurred. Mr Mqikana also confirmed that he was occupying the passenger seat just near the driver's seat when the collision occurred. Mr Timoti's version is that he was driving in the opposite direction to that of the plaintiff. Mr Timoti and Mr Mqikana testified that long before they reached the place where the collision occurred they had passed a Toyota Quantum which was stationed near the road. They passed the first curve and as they were approaching a second curve they saw the horse-and-trailer truck driven on its correct side of the road and heading towards Bizana. The truck was followed by three vehicles, one of which was driven by plaintiff. Just as they had commenced passing the

truck, the plaintiff's vehicle emerged from its incorrect lane overtaking the truck, and being driven at a very high speed. As the plaintiff's vehicle was approaching in the front, Mr Timoti applied the brakes and swerved to the extreme left hand side of the road in order to avoid a head on collision. As Mr Timoti was about to exit the road on his correct side the collision occurred. Mr Timoti's vehicle sustained damages on the front part, through to the driver's side and the chassis. Both Mr Timoti and Mr Mqikana contended that had the plaintiff not overtaken the truck at an inopportune moment, travelled on the incorrect lane and failed to control his vehicle to safety the collision would never occur. They contended that the plaintiff's reckless driving was the proximate cause of the collision.

[8] The evidence adduced by parties is contradictory in material respects. The proper approach to resolving the conflicting versions lies in the application of the guidelines that were adumbrated in the case of *Stellenbosch Farmers Winery Group (Pty) Ltd vs Martell Et Cie & Others* 2003 (1) SA 11 (SCA) at 14i-j that an evaluation must be made concerning the credibility of the witnesses; their reliability; and the probabilities of their versions. Finally, upon ascertaining the side on which the truth lies, it will be easy for a court to determine if the overall *onus* cast upon the plaintiff has been discharged.

[9] *Mr Mbiko*, counsel for the defendant argued strenuously that the version of the plaintiff cannot be true because he failed dismally to tell what became of the Toyota Quantum that was in front of Mr Timoti's vehicle; what became of the passenger that was together with plaintiff in his vehicle; and why it is that the plaintiff's evidence in chief was internally contradictory. He argued that the plaintiff's version about double swerves in front of the truck cannot be true if regard is had to the admission of the defendant's case that the collision took place at the time when Mr Timoti was passing the truck and the plaintiff still overtaking the truck. It was argued further that it was disingenuous of the plaintiff to locate the point of impact both in front of the truck and near the body of the truck. These submissions made by *Mr Mbiko* are indeed persuasive.

[10] I do not believe that the circumstances under which the accident took place could have given the plaintiff the luxury of time to make the double swerves that he spoke about when he testified. It does not come as a surprise to me that the existence of a third vehicle that allegedly was travelling in front of that of Mr Timoti, is a mere fiction. The

version of the defendant that Mr Timoti was at all material times of his driving before the collision occurred, concentrating the driving of his vehicle on his correct lane is plausible. The plaintiff's version that the point of impact fixed near the body of the truck is implausible. In the same vein, had the collision impact taken place in the process of the plaintiff's alleged double swerving, the truck and the vehicle alleged to have been travelling in front of Mr Timoti's vehicle would have been involved in the accident. The two points of impact suggested by the plaintiff in his evidence is an unhelpful contradiction to his case. Instead, the point of impact near the edge of Mr Timoti's correct path of travel coupled with the damage to the driver's side of his vehicle accords with the probabilities of the defendant's case. The plaintiff's contradictions that emerged when he was cross examined render his evidence totally unreliable. To illustrate the point, the plaintiff conceded that he, not Mr Timoti, caused the collision in that the collision took place on his incorrect side of the road. This concession cancelled the earlier version that a collision took place after the truck had been successfully overtaken and during the manoeuvre that saw plaintiff's vehicle swerving back to the incorrect lane and again swerving towards the correct lane. Consequently, the plaintiff's version of the events is not correct.

[11] The proven facts of this case point plainly to the conclusion that Mr Timoti's driving did not place the safety of the plaintiff in danger. But the reverse situation is proved by the facts. The plaintiff's overtaking manoeuvre was not only ill timed but also reckless.

[12] During arguments Counsel for the plaintiff raised an issue of contributory negligence on the part of Mr Timoti. This issue is not borne out of the pleadings and proved facts. For that reason it suffices only to be said that the contributory negligence argument is baseless. Notwithstanding counsel's deliberate non-committal to the plaintiff's pleaded grounds of negligence and the evidence led to support those pleadings, it is necessary to be stated that the plaintiff's case is devoid of merit. It falls to be dismissed.

[13] The plaintiff has failed to discharge the *onus* to prove that the defendant is liable to compensate him for the damages that he suffered due to the occurrence of the accident

on 11 June 2016. For that reason the quantification of damage(s) has aborted. The defendant is entitled to the costs of these proceedings.

[14] The following order shall issue:

“The plaintiff’s claim is dismissed with costs.”

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the plaintiff : Adv. M. Rili

Instructed by : Msitshana Inc
c/o Messrs Majali Inc
MTHATHA.

Counsel for the defendant: Adv. B. N. Mbiko

Instructed by : Smith Tabatha Inc
MTHATHA.