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**IN THE HIGH COURT OF SOUTH AFRICA/  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 42 /2018

In the matter between:-

**MOKONE ANTHONY MAGOKOLO**

**PLAINTIFF**

and

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

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**CORAM:**

**MBHELE, J**

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**HEARD ON: 4 FEBRUARY 2019**

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**DELIVERED ON: 29 APRIL 2019**

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**MBHELE J**

[1] This is an action for damages in terms of the Road Accident Fund Act, 56 of 1996, as amended (the Act). The plaintiff

claims an amount of R 1 545 197 .76 as a result of the injuries he sustained on 31 January 2016, allegedly as a result of a collision that occurred on the N5 road Between Bethlehem and Paul Roux , Free State. The plaintiff alleges, in his particulars of claim, that he was the driver of a motor vehicle with registration numbers [...] when he swerved off the road to avoid an oncoming unidentified motor vehicle being driven at a high speed while overtaking a truck at an inopportune and unsafe moment. His vehicle veered off the road into vegetation and overturned. As a result of the accident the plaintiff suffered bodily injuries.

[2] The Plaintiff alleges that the collision occurred as a result of the sole negligence of the unknown driver (hereafter referred to as an insured driver) who was negligent in one or more of the following respects:

- He travelled at a speed which was excessive in the circumstances;

- He failed to keep a proper lookout;
- He failed to apply breaks vehicle at all, alternatively timeously and/ or insufficiently;
- He failed to avoid the collision when, by taking reasonable and proper care, he both could and should have avoided;
- He overtook a truck when it was inopportune and unsafe to do so.

- [3] The defendant has denied the allegations of negligence against the driver of an unidentified vehicle. Defendant, with reference to the accident report, denies that the accident happened as alleged in paragraphs 3 and 4 of the particulars of claim. It pleaded that the plaintiff's motor vehicle was the only vehicle involved in the accident. It denies that there was an unidentified vehicle that collided with the plaintiff's vehicle.
- [4] The issues of quantum and liability were separated by the pre- trial Judge. Accordingly, the matter is before me for the determination of liability.
- [5] Plaintiff testified, inter alia, to the effect that on 31 January 2016 he was travelling from Bethlehem to Paul Roux on the N5 road when he saw a vehicle emerging from the back of a large truck that was pulling two trailers on the opposite lane. Both the vehicle and the truck were travelling towards Bethlehem and the former was overtaking the truck. The overtaking vehicle came into contact with the rear right part of the plaintiff's vehicle causing the plaintiff to lose control of his vehicle. The vehicle left the road surface, overturned and

landed in the vegetation. Neither the truck nor the insured driver stopped after the accident scene. When he first saw the vehicle overtaking the truck it was at a distance of about 12 meters advancing towards him. He was taken to the hospital together with his passenger. He denied that the accident was caused by tyre burst when put to him during cross examination. He was driving at 85 kilometers per hour before the collision occurred. In cross examination he testified that the insured vehicle hit his vehicle immediately after it completed its maneuver back to its original lane, in front of the truck. He explained failure to mention a collision with another vehicle in his affidavit that accompanied his claim with the defendant as an omission on the part of the person who reduced his affidavit into writing.

- [6] Themba Malinga confirmed the plaintiff's testimony in relation to how the accident occurred. He denied that he told the doctor and the police officer at the hospital that the plaintiff's vehicle had a tyre burst before it strayed into the vegetation.

### **Defendant's case:**

- [7] The defendant called two police officers who inspected the scene of the accident as its witnesses.

Malefetsane Simon Mphuthi, a warrant officer in the South African Police Service, stationed at Bethlehem with 26 years' experience in the police services. In the past 26 years he attended to about 100 accident scenes. Him and his colleague, Mofumahadi Radebe were called to the accident scene where they did preliminary investigation on the

accident. They received information that the accident occurred between Bethlehem and Paul Roux. They drove from Bethlehem to the scene of accident. While driving to the scene they did not know the exact spot where the accident occurred and had to observe the road surface so as to know where the accident occurred. They did not observe anything on the surface that could indicate that there was a contact between two vehicles. He expected to see debris from the vehicles that collided and skid marks on the road surface. Skid marks on the road surface are an indication that the driver tried to apply breaks before the collision occurred. There was no indication that there was a collision from the second vehicle. The only marks he observed were on the side of the road where the vehicle strayed into the veld. There was no indication that before the vehicle strayed into the veld there was contact with another vehicle. They found the plaintiff's vehicle in the veld, with two burst tyres in front, damages on its sides and roof and without a wind screen. The occupants of the vehicle were already in hospital. On their arrival at the hospital they found the driver with serious injuries and being attended to by doctors. They managed to speak to the passenger and Radebe wrote down the information they obtained from the passenger who identified himself as Themba Malinga.

- [8] Mofumahadi Radebe, a constable with 10 years' experience in the South African Police Service stationed at Bethlehem. He confirmed Mphuthi's version that they attended a scene of accident together and found a motor vehicle that had

veered off the road and overturned into the vegetation. There was no indication that the vehicle collided with another vehicle. They proceeded to the hospital where she interviewed one Themba Malinga who informed him that the vehicle had a tyre burst, veered off the road and overturned as a result. There was no indication that the vehicle found at the scene collided with another vehicle.

### **CONTENTIONS BY THE PARTIES**

- [9] Mr. Ploos van Amstel submitted that submitted that the plaintiff managed to prove his case on a balance of probabilities. He contended that the plaintiff's version is the most probable. He further contended that the plaintiff's version shows that an unidentified collided with the plaintiff's vehicle. He implored me to reject the defendant's version as untrue.

Mr. Nkhahle, on behalf of the defendant, submitted that the plaintiff's version is improbable and his claim falls to be rejected.

- [10] It is indeed so that the plaintiff, in order to succeed in his claim, must show and prove that the insured driver's negligent conduct caused the harm giving rise to the claim. Section 17 (1) (b) of the Road Accident Fund 56 of 1996, provides as follows:

“(1) the fund or an agent shall -

(a).....

(b) subject to any regulation made under section 26, in the case

of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

[11] In **ROAD ACCIDENT FUND v ABRAHAMS 2018 (5) SA 169 SCA** Makgoka, JA held as follows when dealing with the liability of the defendant in a single vehicle accident as laid down in Section 17:

"It was submitted on behalf of the appellant that the respondent was the driver, and as such, cannot be a 'third party' for the purposes of s 17. He could only be a 'third party' had he been involved in a multiple vehicle collision arising from the negligence of the insured driver of another vehicle. I disagree. Section 17 defines a third party as being 'any person'. This undoubtedly is wide enough to include a driver involved in a single motor vehicle accident, such as the respondent, provided the injury arises from the negligence or wrongfulness of the owner, among others.

..... As a consequence of its focus on the respondent, the appellant loses sight of the pertinent provisions of s 17 that liability arises from, among others, blameworthy conduct of the owner of the insured vehicle. In some instances, this may have nothing to do with the actual driving."

- [12] It is clear that there are conflicting versions on how the accident occurred. In determining the factual basis of the case, all probative material admitted during the course of the trial must be evaluated.

In **Stellenbosch farmers' winery group Ltd v Martell et Cie** 2003 1 SA 11 (SCA) the following was said in resolving factual dispute:

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witness testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the dispute issues. In the light of its assessment of (a),(b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case,

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail"

- [13] I have to evaluate the evidence, assess the credibility of witnesses, consider prospects of any partiality, prejudice or self-interest on their part, and look into probabilities and improbabilities.
- [14] Both plaintiff and Malinga's testimonies differed materially with their extracurial statements. Malinga denies ever having had communication with Radebe nor that did he give her information relating to the accident. It is unfathomable how Radebe obtained his names and address if the two never had a conversation. The plaintiff's version that his vehicle was hit on its right rear while the insured driver was overtaking a truck defies logic. The plaintiff's version during his testimony is that he applied breaks and could not swerve to the left because there was a bump on the road side. The vehicle was hit while on the road surface before it veered off the road and overturned. This version is in contrast with his affidavit where he said that he turned the steering wheel to avoid collision and as a result his vehicle overturned. In his affidavit there was no mention of a contact with the insured driver's vehicle. If the plaintiff applied breaks, reduced speed and remained on the road surface before his vehicle was hit on its rear right to a point of overturning into the vegetation, it is inconceivable how there would be no debris found at the point of impact and how the insured driver would have

survived the collision unscathed regard being had that the insured vehicle was driving at a much higher speed than the plaintiff. It is unfathomable how a head on collision was avoided in the circumstances of the plaintiff's version in court.

[15] Paragraph 3 of plaintiff's particulars of claim state the following:

“a motor vehicle accident occurred when the plaintiff, who was the driver of a motor vehicle with registration letters and numbers **TTR 592 GP**, tried to avoid a head on collision with the driver of an unidentified vehicle, (hereinafter referred to as the insured driver) who was trying to overtake a truck, where after the vehicle with registration letters and numbers **TTR 592 GP**, left the road and overturned”.

In the statement that he gave to the police he stated the following:

“I then tried to avoid a head on collision and moved to the left. The other vehicle bumped into the back of my vehicle and I bumped into the pole next to the road and lost control of my vehicle. It then span several times and came to stand half on the road and the other half on the side of the road. ”

[16] The undisputed evidence of Mphuthi and Radebe shows that they were driving from Bethlehem when approaching the scene, the same direction the plaintiff was travelling from. In their testimonies they both indicated that they were observing the road surface while heading to the scene to check if there was any debris thereon indicating the point of impact. They stopped where they saw marks on the edge of

the road showing the spot where the vehicle left the road surface into the vegetation. In his testimony, Mphuthi indicated that the experience he gathered in about 100 accident scenes he attended to shows that in case of a collision there would always be loose particles on the road surface indicating a contact between colliding vehicles.

[17] I have taken due cognizance of the fact that the *viva voce* evidence of the plaintiff in court is diametrically opposed to the pleadings in his particulars of claim; the evidence that is contained in the hospital records; the affidavit made to the South African Police Service and the affidavit made by the claimant in pursuance of his claim against the defendant.

[18] I find the numerous discrepancies detailed above fatal to the plaintiff's case. Of the two versions presented before me I find the defendant's version more probable. I am unable to rely on the plaintiff's version regarding how the accident occurred with specific reference to the involvement of the insured truck and insured driver and the negligent conduct of the insured driver.

[19] In **ABRAHAMS** *supra* it was held that the driver of a single vehicle is entitled to claim from the defendant provided such driver relies on the wrongful conduct of the owner of the vehicle. In the current matter, even if I were to find that the vehicle overturned as a result of a tyre burst resulting from negligence on the part of the owner, there is no evidence to show that the plaintiff was not the owner of the vehicle.

[20] After careful consideration I am not persuaded that the plaintiff has succeeded to discharge the burden of proof that

his version was true and has failed to establish negligence on the part of the defendant.

## **ORDER**

Plaintiff's claim is dismissed with costs.

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**N.M. MBHELE, J**

On behalf of the plaintiff:

Instructed by:

**Adv. PLOOS VAN AMSTEL**

**VAN AARDT ATTORNEYS**

**c/o HONEY ATTORNEYS**

**BLOEMFONTEIN**

On behalf of the defendant:

Instructed by:

**Adv. NKHAHLE**

**Maduba Attorneys**

**BLOEMFONTEIN**