IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delete whichever is not applicable

(1) Reportable Yes / No
(2) Of interest to other Judges Yes / No
(3) Revised.

Date: 27th May 2016 _____

CASE NO: 41989**/** 2012

In the matter between:-

MBHEKISENI BUTHELEZI Plaintiff

And

ROAD ACCIDENT FUND Defendant

J U D G M E N T

Ismail J:

[1] The plaintiff instituted an action against the defendant for damages for bodily injuries which he sustained in a motor vehicle accident on the 17 December 2013.

[2] The accident occurred at the intersection of Wolmarans and Claim streets in Joubert Park, Johannesburg, between a vehicle driven by the plaintiff and an alleged unknown vehicle driven by an unknown person.

[3] The plaintiff alleges that the accident was a rear end collision and that the insured driver was the sole cause of the accident.

Issues to be determined:

[4] The following issues were to be determined by the court:

(1) the question of liability, whether the insured driver was the cause of the collision;
(2) past loss of earnings
(3) future loss of earnings
(4) the issue of general damages (serious injury claim) was only rejected on the 13 May 2016

[5] According to the particulars of claim the plaintiff sustained a " fracture of the right tibial plateau"

[6] The plaintiff testified. In brief his evidence was that he was

travelling along Claim street from Hillbrow in the direction of the city centre. At the intersection with Wolmarans street the traffic light was red for him. He stopped at the intersection. He was on the extreme right lane as he intended to turn into Wolmarans street. As he waited for the traffic lights to change, he heard a bang into his mini bus causing him to move across the intersection and collide with a pole. He stopped near a tree. He was trapped in the vehicle and he was assisted and taken out of the vehicle by onlookers. He was thereafter transported by ambulance to hospital. He was an in- patient at the hospital until his discharge on the 30 December 2013, a period of seventeen days.

[7] During cross examination he was confronted with several versions he gave to various people. He testified in court that the vehicle came to a stand still without mentioning that it collided with the pole which hoisted the traffic light. He was also confronted with a version which he apparently gave to the policeman who noted the details of the accident report where he is alleged to have said:

" the driver of m/vehicle A alleges that he was driving along Claim cnr Wolmarans (sic) Whilst waiting for the robot an unknown black male driving a taxi bumped his car from behind and it never stops (sic) the driver of m/vehicle A sustained injuries on his right leg and he was admitted to hospital from 2013-12-17 until 2013-12-30"

Counsel for the defendant questioned him about this report and particularly in regard to the vehicle which collided into his vehicle, which he described as a taxi. When he testified under oath he stated that he could not identify the vehicle and he had no idea whether the vehicle was a sedan, truck, bus or taxi. Mr Buthelezi in response to the

statement which was noted on the accident report , responded that he did not tell the policeman that it was a taxi or that the driver was a black man.

[8] He was confronted about what he allegedly said to the Occupational Therapist, David Stone, in his report at page 6 (exhibit D33), namely that:

"He had a collision with a taxi that was driving out of its lane"

He was asked to comment on what was noted by occupational therapist to which he responded that it was not correct.

[9] Regarding his earnings he stated that he earned between R800 and R900 per week prior to the accident. Since the accident he earned between R500 to R600 per week. He also stated that he could not drive for lengthy period of time as he experienced pain on his knee.

[10] The plaintiff thereafter called Mr Freeman Ntshaba to testify. He stated that he is the plaintiff's current employer. He inherited the taxi business from his father, upon the latter's death. The plaintiff is in his employ and he currently earns R500 to R600 per week. He retained the plaintiff as a driver after the accident, however he gave him an easier or less demanding route, in order for him to cope.

[11] A joint minute by Dr Gama and Dr Sugreen was handed in as Exhibit F. In the joint minute the industrial psychologist at para 2.6 of the report agreed that the retirement age of drivers in the taxi industry was 60- 65 years. Dr Gama testified to the effect that as an injured person,

due to the sequelae, the plaintiff was disadvantaged in the open labour market ,to a lesser or greater extent in respect of:

- Competitiveness with uninjured counterparts;
- efficiency, effectiveness and productivity due to physical constraints
- retirement age
- work attendance
- long distance driving.

The abovementioned view expressed by Dr Gama was subsequently endorsed by Dr Sugreen when she gave evidence.

Application for absolution from the instance at the end of plaintiff's case

[12] Mr Kajee, acting for the defendant, applied at the end of the plaintiff's case for an order for absolution from the instance. I gave brief reasons for refusing the application and i undertook to provide reasons for so doing in the judgment. I propose to do so hereunder.

[13] The application was predicated on the basis of the unreliability of the plaintiff's version as referred to in para's [7] and [8] supra, coupled with the fact that there was no independent evidence, of a physical or oral type, of a collision apart from the say so of the plaintiff. The fact that the plaintiff gave several versions did not assist his cause or claim.

[14] In short it was submitted that no reasonable court acting prudently would find for the plaintiff on the evidence presented as a prima facie case was not made out. In this regard reliance was placed on the locus

classicus of *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173 and *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at par [10] where Brand JA stated:

" This implies that a plaintiff has to make out a prima facie case- in the sense that there is evidence relating to all the elements of the claim..... Such formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court..."

[15] The reason I refused the granting of the application for absolution was that the thrust of the application was premised on the issue of credibility, and I would have had to make a finding on Mr Buthelezi's evidence exclusively. Apart from that the notion of a prima facie case is a less burdensome hurdle to overcome as opposed to proof on a balance of probabilities.

[16] The defendant thereafter called Dr Sugreen to testify and in the main her evidence related to the joint minute alluded to earlier and her report exhibit E. Her evidence essentially related to the issue of quantum and had very little if any connotation regarding the issue of liability and/or negligence.

Legal issues

[17] For the plaintiff to succeed in obtaining damages he would have to establish that the insured driver caused the collision or that the

accident was attributable to the negligent driving of the insured driver. It is trite that if the plaintiff fails to establish negligence on the part of the 'offending' driver the defendant cannot be held liable for any damages.

Res ipsa loquitor

[18] The gravamen of the dispute between the parties centred around what the plaintiff considered to be the *raison d' etre* of its claim, namely the maxim *res ipsa loquitor.* Counsel for the plaintiff submitted that because the allegations are that the plaintiffs vehicle was propelled across the intersection, referred to above, whilst it had stopped, the only inference was that it had been collided into from behind. This is premised merely on the say so of the plaintiff who under oath before me testified that he did not see the other vehicle and was merely told that there was another vehicle by others.

[19] The problem with the plaintiff's evidence is that it is firstly of a hearsay nature and secondly no one came to court to testify that another vehicle collided into the rear of the plaintiff's vehicle which 'drove off' without stopping.

[20] To put it differently there is no factual basis for the belief that a rear end collision took place. At the very least there should be some evidence thereof before the maxim comes into play or before the court can make any inferences. To simply make inferences without a scintilla of any facts is to make inferences in the air.
In this regard the authors *Hoffmann and Zeffert – The South African Law of Evidence 4 th Edition* at p. 591 deal with the question of inferences.

Selke J in Govan v Skidmore that the selected inference must " by the balancing of probabilities be the more natural, or plausible conclusion from among several conceivable ones..." This has been approved by the Appellate Division in the AA Onderlinge case and in the Accident Gauranteed Corporation Ltd v Koch where Holmes J A remarked that "plausible", in this context, means 'acceptable, credible, suitable"

[21] Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 [3] All ER 722 at 733 remarked:

" Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer other facts which it is sought to establish... But if there are no positive proved facts from which the inference can be made, the method opf inference fails and what is left is mere speculation or conjecture."

See also: *S v Naik* 1969 (2) SA 231 (N) at 242 C-D, *Joel Melamed & Hurwitz v Cleveland Estates* 1984 (3) SA 155 (A) at 164G- 165C and *Rees and Others v Harris and Others* 2012(1) SA 583 9GSJ) at par [32].

[22] Had the evidence of the plaintiff been that he saw this vehicle approaching from behind in his rear view mirror and he anticipated the accident, that would have been evidence. To reason as follows, allegations of rear end collision *ergo* res ipso loquitor and hence negligence is in my view a *non sequitor* in the absence of factual evidence supporting a rear end collision. The term res ipsa loquitor which means "the facts speak for themselves" – would obviously apply if there was evidence that a vehicle had collided into the plaintiff's vehicle from behind.

[23] All that the court has before it is inadmissible hearsay evidence of what the plaintiff was told by others regarding what happened. Plaintiff's counsel did not submit that it was an exception in terms of section 3 of Law of Evidence Amendment Act 45 of 1988.- See: *S v Ndhlovu and Others* 2002 (2) SACR 325 at 333 i- 334d

[24] Miss Docrat, acting for the plaintiff, relied on the judgment of *Macloed v Rens*1997 (3) SA 1039 ECD, where the defendant's negligence was decided upon solely by circumstantial evidence, in the absence of direct evidence. At 1048 C-E the court held that it could have regard only to reasonable possibilities. Inferences had to be carefully distinguished from conjecture or speculation. There could be no inference unless there were objective facts from which to infer the other facts which it sought to establish.

[25] There is no objective fact in this matter apart from the hearsay evidence of the plaintiff. There is no photograph depicting the damage to the rear of the plaintiff's taxi, the police were not called to the scene shortly after the accident. Had they been called to testify they could have testified about the debris caused by the collision. No witness gave evidence of the collision or in fact, the damage to the plaintiff's vehicle .

[26] Ponnan JA in *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) at par [10] stated:

" Broadly stated, res ipsa loquitor (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that the defendant was negligent and thereby to establish a prima

facie case against him. The maxim is no magic formula..... ' the expression need not be magnified into a legal rule: it simply has its place in that scheme of and search for causation upon which the mind sets itself working'.. "

See also: *Goodenough N O v Road Accident Fund* (case Number 441/2002 of the Supreme Court of Appeal delivered on 15 September 2003- judgment of Brand JA- Harms JA and Motata AJA concurring, at paras [5] and [11].

[27] On the facts as presented to me the defendant submitted that the plaintiff had not discharged the *onus* of establishing a rear end collision and therefore its claim ought to be dismissed with costs. The plaintiff on the other hand argued to the contrary.

[28] I am of the view that the only 'evidence' before me is that of the plaintiff, Mr Bulthelezi. His evidence was primarily of a hearsay nature regarding the collision. Coupled to that, he recounted several versions to different people regarding the manner in which the accident occurred. I my view it cannot be said by any stretch of the imagination that his evidence was satisfactory. In court his evidence was that he did not see the vehicle. Notwithstanding that, the court is requested to infer a rear end collision on the maxim, without any factual evidence in support thereof.

[29] I have two routes available to me if I am of the view that the plaintiff failed to discharge the onus. I could dismiss the claim with costs alternatively I could grant absolution from the instance at the end of the

defendants case.

[30] The defendant's counsel sought an order that the claim should be dismissed. I am inclined to agree with the view expressed by defendant's counsel. Accordingly I make the following order:

" The plaintiff's claim is dismissed with costs. Such costs to be taxed on a party and party scale.."

I s m a i l J

APPEARANCES:

For the plaintiff: Adv Dockrat instructed by S S Ntshangase Attorneys Marble Towers, Johannesburg

For the Defendant : Adv C Kajee instructed by Mayat, Nurick Langa Inc, Parktown North Johannesburg.

Date of hearing : 17- 19 May 2016

Date of Judgment: 27 May 2016.