

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



**CASE NO: 2014/08898**

(1) REPORTABLE:NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED:NO

**15 MAY 2017**

**JS NYATHI**

In the matter between

**ANDRE SWART**

**PLAINTIFF**

And

**VAN DER ELST ATTORNEYS**

**DEFENDANT**

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**J U D G M E N T**

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**NYATHI AJ:**

## **A. INTRODUCTION AND BACKGROUND**

- (1) The genesis of this matter is a motor vehicle accident that occurred during the early hours of the 16<sup>th</sup> November 2008 at or near Victor Road in Brakpan North.
- (2) The plaintiff was the driver of the motor vehicle, an olive green metallic coloured BMW 323i with registration particulars JZM [...] GP, which was involved in the collision. The plaintiff collided with a tree situated on the pavement adjacent to Victor Road between house number 17 and 19.
- (3) It is common cause that the plaintiff sustained serious bodily injuries as a result of the collision.
- (4) Plaintiff alleges that the Road Accident Fund was liable in terms of the provisions of section 17 of the Road Accident Fund Amendment Act (Act 19 of 2005) to compensate him for the aforesaid injuries and subsequent damages.
- (5) The defendant is a firm of attorneys that formerly acted on behalf of the plaintiff in prosecuting a claim against the Road

Accident Fund. This was consequent to the accident at issue in this trial.

- (6) A contract of mandate was thus entered into between the plaintiff and the defendant.
- (7) Plaintiff now alleges that in breach of the aforesaid mandate agreement, the defendant wrongfully neglected to lodge his claim within the two year prescriptive period from the date of the accident in terms of section 17(1)(b) of the Road Accident Fund Amendment Act 19 of 2005.
- (8) The prescriptive period being such because, so alleges plaintiff, the accident arose in that shortly before the crash he had been pursued by an unknown driver of an unidentified red Toyota Conquest motor vehicle which had "clipped" the rear of his BMW, leading him to lose control. Plaintiff's version, in short, is that the collision was caused by an unidentified second vehicle.
- (9) It is common cause that if there was no second vehicle involved in the collision, plaintiff would not have qualified for compensation in terms of the Road Accident Fund.

- (10) The process to determine liability for professional negligence is therefore a two-stepped enquiry. Namely, the plaintiff must present credible evidence that on a balance of probabilities he would have succeeded in proving a claim against the Road Accident Fund. In other words, but for the alleged negligence which deprived him of his claim, he would have had a valid claim. If he does not succeed in showing a valid claim, "...the defendant's alleged negligence would be negligence in the air."<sup>1</sup>
- (11) Once plaintiff overcomes this hurdle then the determination of whether or not there was professional negligence may follow. If the plaintiff is unable to clear the first hurdle, the matter ends there as it will serve no purpose to take the next step.
- (12) The parties agreed to a separation of the issues prior to the commencement of the trial.

## **B. PLAINTIFF'S EVIDENCE**

- (13) The sole witness for the plaintiff was Mr. André Swart himself. He testified as follows:

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<sup>1</sup> Rampai J, in Mlenzana v. Goodrich and Franklin Incorporated Unreported case No 4423/2008 FSHC

- (14) That he worked a nightshift during the night of 15/16 November 2008 and that he worked until approximately 05h00 in the morning.
- (15) That he had to travel approximately 30 kilometres from his place of work to his house situated in Victor Road, Brakpan.
- (16) He explained in detail to the Court the usual route that he drove. He referred specifically to turning off the N17 main road into Brakpan. He testified that he noticed at this intersection two vehicles, one of which was a red Toyota Conquest.
- (17) He continued to explain exactly the lay-out of the different traffic lanes as one enters Brakpan exiting the N17 main road.
- (18) He narrated in detail about which traffic lights were green and which ones were red. He related when and at what stage of his travel he picked up speed and slowed down.
- (19) He recalled in detail which traffic lights he ignored and skipped.

- (20) He explained that he noticed that the purported red Toyota Conquest followed him.
- (21) He declared that he became concerned for his safety because:
- i. His uncle was recently hi-jacked and shot;
  - ii. That he had just sold his own motor vehicle and had the cash received from the purchaser on his person;
- (22) He conceded however that nobody knew of the fact that he had the cash on his person.
- (23) He stated that he turned out of Hospital Road into the road which he identified as "*Alice*" Road; Whereafter he turned into Victor Road. At that stage he was travelling at approximately 100 – 120 km/h but had to slow down to make the turn into Victor Road. He decreased his speed to approximately 40-50 km/h. He skidded across the concrete corner epavement where he lost control of the vehicle, pulled the steering wheel to the right and collided with the tree.

- (24) His initial testimony was that he was travelling at approximately 40 – 50 km/h at the time when he took the last corner before losing control of the vehicle. He is uncertain whether the alleged red motor vehicle collided with the rear end of his car. According to him, the red car must have been travelling at a distance of 1 meter behind the plaintiff's car.
  
- (25) He avers that he did not complete the documents and/or affidavit that appear on paginated pages 1 to 6 of the trial bundle (Exhibit A), but that these documents were completed in part by him and in part by the defendant's representatives.
  
- (26) He contended specifically that the description of the collision as appears on paginated page 3 as well as the sketch plan were not filled in or completed by him.
  
- (27) He further recounted that the narrative of the motor vehicle collision forming part of the affidavit that appears on paginated pages 4 and 5 were not filled in or completed by him; and that the contents in respect of the description of the collision, as well as the sketch plan, were left blank at the time that he commissioned the affidavit before the South African Police Services.

- (28) He declared quite emphatically, that the defendant never contacted him to explain why his claim was repudiated by the Road Accident Fund. He denied to have undertaken to provide the defendant with the registration particulars of the alleged second vehicle involved in the collision.
- (29) From the cross-examination of Mr Swart the following evidence emerged:
- a. Mr Swart explained that he was afraid that the occupants of the unidentified, red Toyota Conquest intended to hi-jack or rob him.
  - b. That he therefore decided to drive at high speed to his house situated at No 9 Victor Road, where, according to him, there were three male persons, who would be able to assist him.
  - c. He conceded that he could easily have driven to the Brakpan Police Station that was situated approximately one block away from the main road down which he travelled.
  - d. That he could have phoned for help using his cell phone but that he did not do so.



- e. That on the probabilities all the persons at his house to which he was speeding were fast asleep, yet he did not phone to wake them up and warn them of his impending arrival. He could not explain how these persons would have been able to protect him against what he perceived to be a life threatening situation.
- f. In light of Mr Swart's testimony in chief that he could recall which traffic lights, at the different intersections through which he passed were either red, yellow or green (in most instances), he was invited to testify to the state of these traffic lights during the preceding morning that he travelled from work. He accepted this challenge and attempted to convince the Court that he could recall which lights were green and which were red on the preceding day as well.
- g. He was hereafter invited to recall which traffic lights were red and which were green on the Friday preceding the collision. He again attempted to convince the Court that most of the lights would have been green since he travelled the route in the early hours of the morning.

- h. On behalf of the defendant, it was pointed out to Mr Swart that the time of the day was irrelevant with regard to whether traffic lights are red or green. He conceded that he had just assumed what the colours of the different traffic lights were.
- i. He could not explain why he testified in chief to the colour of the specific intersections and how it would be possible for him to remember such detail more than eight years after the events.
- j. He could further not explain to the Court why it was not possible then for him to remember the following important detail:
  - i. What the surname was of the person to whom he sold his car as alleged?
  - ii. What the registration plate details were of the motor vehicle he had sold?
  - iii. How much money he received from the aforesaid motor vehicle sale? He offered differing versions. It could either have been R25, 000.00 or maybe R26, 000.00? Whereafter he settled on a figure of R25, 500.00.

- iv. He could not remember how many occupants were inside the alleged red Toyota Conquest.
- v. He could not provide the registration number of the Toyota Conquest despite the fact that this motor vehicle travelled behind him for several kilometres and his attention was focused on the car.
- vi. He could not provide a description of the driver of the motor vehicle save for the fact that he was black.
- vii. He could not provide any detail of the clothes or other distinguishing features of the occupants or the motor vehicle itself.
- viii. He incorrectly identified his own motor vehicle as being a BMW "325" whilst it was in actual fact a BMW "323".
- ix. He incorrectly referred to the road from which he turned into Victor Road as Alice Road whereas it is in actual fact Du Preez Road.

- x. He was not certain whether the alleged unidentified vehicle collided with or clipped his vehicle.
- k. It was put to Mr Swart that he testified to a selective memory of certain facts. He could not explain why he could remember certain detail clearly but other important facts he could either not remember or chose not to testify to.
- l. He could not provide any explanation why he did not inform any of the policemen or emergency personnel on the scene of the collision of the fact that he was a victim of an attempted hi-jacking or why he did not inform them of the large amount of cash on his person.
- m. He did not dispute that one would have expected him to have made mention of the attempted hi-jacking and cash to the police at the scene.
- n. He could not dispute the testimony of the defendant's witnesses; being the police officers, Mr Roderick Underhay and Ms McKenzie. They stated that:

- i. As police officers attending the scene, they did not observe any physical features indicative of a second motor vehicle being involved in the collision;
  - ii. That they did not notice any damage to the rear of the plaintiff's motor vehicle which would indicate a rear-end collision;
  - iii. That they did not receive any communication or indication of an attempted hi-jacking or any other criminal act from the plaintiff or anybody else.
- o. Despite Mr Swart's testimony-in-chief, he conceded that consultations were conducted with him by the defendant's Ms Raath in respect of the merits of his claim (i.e. how the collision occurred).
- p. He denied, despite the consultation notes by Ms Raath indicating the contrary; that he undertook to provide her with the registration particulars of the alleged unidentified motor vehicle.
- q. Most surprisingly, Mr Swart conceded at the end of the cross-examination that he cannot even recall whether the alleged

unidentified motor vehicle followed him into Victor Road or not. He conceded that he does not even know if a red motor vehicle turned into Victor Road or carried on straight down Du Preez Street.

- r. Regarding the sizable sum of money that had been in his possession earlier, he told the court that he found it in the drawer next to his hospital bed some days later after he had regained consciousness.

(30) At this point, I have to turn to the requisite onus of proof and the probabilities apparent in this matter.

(31) As Van Oosten J held in *Masingi v Road Accident Fund*<sup>2</sup>, "The credibility of the witnesses is decisive to a determination of the dispute: the plaintiff, in order to succeed, must discharge the burden of proof that his version is true and that of the insured driver false (see *Stellenbosch Farmer's Winery Group Ltd and another v Martell et CIE and others* 2003 (1) SA 11 (SCA); *Selamole v Makhado* **1988 (2) SA 372** (V); *Mabona and Another v Minister of Law and Order and others* 1988 (2) SA 654 (SE); and *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V);"

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<sup>2</sup> Gauteng Local Division, Johannesburg Case No: 139004/12 delivered on 15 October 2013. also [SAFLII ZAGPJHC/2013/255.pdf]

- (32) Having regard to the totality of the evidence in this matter, I come to the conclusion that the plaintiff has discharged the burden of proof that his version is true and that of the defendant false.
- (33) The various aspects of the plaintiff's version, when viewed in totality and contrasted with the defendant's version appear to be a fabrication; to put it lightly. The plaintiff suffered serious injuries which needed and will no doubt continue to need expensive medical treatment. In the Masingi v. RAF matter already referred to above, Van Oosten J said, in similar circumstances, "The possibility of recent fabrication, having regard to the plaintiff's pecuniary interest in the matter, accordingly, cannot be discounted."<sup>3</sup>
- (34) I accordingly find that the plaintiff's negligence was the sole cause of the collision.
- (35) In the result the plaintiff's claim is dismissed with costs.

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<sup>3</sup> Masingi v. Road Accident Fund 2013

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JS Nyathi

Judge of the High Court

Date of hearing: 16-18 May 2017

Date of judgment: 23 July 2017

Counsel for plaintiff: Adv D.A. Louw

Instructed by:

Barbara Cheiman Attorneys

152 Beyers Naudé Drive

Roosevelt, Northcliff, Johannesburg

Tel: (011) 782-4837

Fax: (011) 782-2402

**Ref: MS B CHEIMAN/rn/S182J**

Counsel for defendant: Adv J.P. Van den Berg

Instructed by:

GILDENHUYS MALATJI INC.

C/O SWANEPOEL ATTORNEYS

Schreiner Chambers

17<sup>th</sup> Floor, No 94 Pritchard Street

JOHANNESBURG

Tel: (012) 483-8600 & Fax (012) 482-8601

**Ref: JAQUES SWANEPOEL/MP**



