


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/8508

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
A/BERKOWITZ	
08 APRIL 2024	

In the matter between:

TOKISO JAMES TSOTETSI

Plaintiff

and

ARNOLD MKHABELA

First Defendant

MKHABELA INCORPORATED ATTORNEYS

Second Defendant

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 08 April 2024

JUDGMENT

BERKOWITZ AJ

INTRODUCTION

- [1] On or about 20 August 2019 at about 2 am, the plaintiff was the victim of what is colloquially known as a 'hit and run' when a motor vehicle being driven by an unknown driver collided with him from behind while he was a pedestrian on Dan Avenue Extension 23, Ratanda, Heidelberg.

- [2] The collision was caused solely by the negligence of the unknown driver and which caused severe bodily injuries to the plaintiff, including a purported head injury (**the injury**).
- [3] It is alleged by the plaintiff that, as a consequence of the injury, he has suffered damages in the sum of R1 million. This issue was not dealt with at the trial because, at the outset thereof, the plaintiff applied for and was granted a separation of issues. The defendants recorded their approval of this separation in the pre-trial minutes. The trial proceeded on merits only.
- [4] The plaintiff alleges that during November 2019 he was approached by the first defendant, on behalf of the second defendant, and they concluded an oral agreement in terms of which the second defendant would:
- 4.1 Investigate the circumstances relating to the accident in which the plaintiff was injured;
 - 4.2 Lodge a third party claim timeously against the Road Accident Fund (**RAF**) under the Road Accident Fund Act as amended; and
 - 4.3 To institute and prosecute an action for damages against the RAF.
- [5] The plaintiff alleges that the first and second defendants breached the agreement and/or failed to execute the obligations by failing and/or neglecting timeously to lodge, institute and/or prosecute a personal injury claim on behalf of the plaintiff in terms of the agreement, with the result that the claim against the RAF has become prescribed.
- [6] The plaintiff alleges that, had the defendants executed their mandate timeously in terms of the agreement, the plaintiff's claim against the RAF would have become finalised in the plaintiff's favour through the exercise by the defendants' reasonable care as could be expected of a reasonable and professional attorney.
- [7] In consequence of the defendants' breach, the plaintiff seeks that this court find the defendants liable, jointly and severally, for payment of damages he is able to prove in due course.

LITIGATION

- [8] The plaintiff served his summons on the defendants on 30 March 2022. On 31 March 2022 the defendants, apparently being represented by the second defendant, served and filed their notice of intention to defend. The defendants served and filed their plea during January 2023.

- [9] The defendants filed their discovery affidavit on or about 25 January 2023.
- [10] On 31 January 2023 and 19 January 2024, approximately one week before the trial was set down to be heard, the parties held virtual pre-trial conferences. The minutes of those pre-trial conferences were part of the bundle before me.
- [11] At the hearing of the trial Mr Maphutha, counsel for the plaintiff, brought to my attention that neither the defendants nor its legal representatives were present in court. I adjourned the hearing for twenty minutes in order for the plaintiff's legal representatives to contact the defendants or their legal representatives.
- [12] After recommencing the hearing, I was informed that the defendants could not be contacted via mobile phone or on the second defendant's landline number. At that point the trial commenced and I granted the application for separation after which the trial proceeded on the issue of merits.
- [13] The plaintiff was called to give his evidence through an interpreter. The plaintiff's uncontroverted evidence was that:
- 13.1 During August 2019 he was involved in a 'hit and run' collision with an unidentified motor vehicle driven by an unidentified individual;
- 13.2 He was rendered unconscious by the collision and he was taken to and treated at Heidelberg hospital where he regained consciousness. After five days of treatment he was transferred to Natalspruit hospital;
- 13.3 After a further five days of treatment he was discharged from Natalspruit hospital and went home;
- 13.4 While at home he was approached by a representative of the second defendant, one Albert Mofokeng (**Mofokeng**) who explained to him that the second defendant could assist him in lodging a claim for damages against the RAF. The plaintiff was adamant that it was not he who had approached the second defendant but the second defendant who had sought him out;
- 13.5 The plaintiff agreed to appoint the second defendant to represent him and he filled in and signed the documents that Mofokeng had brought with him. Mofokeng did not leave copies of the documents with the plaintiff, or a business card but he did leave the plaintiff a telephone number on which he could be contacted. Mofokeng informed the plaintiff that he would contact the plaintiff to inform him of the progress of his claim. Although the plaintiff alleges an oral agreement he gave evidence of having signed documents which Mofokeng had brought with him. I assume that these documents would have included a power of attorney, some type of fee agreement which would, in all likelihood have

catered for a contingency fee, but I am unable to take this point further in the absence of any evidence to this effect. The bald denial recorded in the defendants' plea does not assist this court, particularly in circumstances where neither the first defendant nor the second defendant attended at the trial to give evidence in chief or test the plaintiff's version under cross examination;

- 13.6 After Mofokeng left the plaintiff's home, he did not hear from the second defendant or anyone on its behalf until January 2021 at which point he contacted Mofokeng telephonically to enquire about the progress of his claim;
- 13.7 Mofokeng informed the plaintiff that his claim against the RAF was not progressing because of the COVID pandemic;
- 13.8 Thereafter the plaintiff did not hear from the second defendant or any of its employees again;
- 13.9 It was at that point that the plaintiff approached his current attorney, Mr Kutama to assist him.

[14] The plaintiff then called his father Mr Khehla Solomon Tsotetsi to give evidence (**Mr Tsotetsi**). Mr Tsotetsi was able to speak English and gave evidence without an interpreter. He testified that:

- 14.1 The plaintiff was his son;
- 14.2 He had knowledge of the accident but was not on the scene of the accident but his wife attended at the scene;
- 14.3 After the plaintiff was discharged from the hospital and returned home, the plaintiff was approached by a lawyer called Albert Mofokeng who informed the plaintiff that he represented the second defendant and that he had been sent by the first defendant to assist the plaintiff in lodging a claim against the RAF. The first defendant is the sole director of the second defendant. This is common cause on the papers;
- 14.4 He was present during the meeting with Mofokeng and personally witnessed the plaintiff signing the documents authorising the second defendant to institute a claim against the RAF;
- 14.5 After leaving, Mofokeng never returned to the plaintiff's home;
- 14.6 Mr Tsotetsi contacted Mofokeng telephonically in 2021 to enquire after the progress of his son's claim against the RAF and was told by Mofokeng that the prosecution of the claim had been disturbed by COVID; and

14.7 Neither he nor the plaintiff had been contacted by Mofokeng or the defendants again.

[15] The plaintiff then called his current attorney Mr Kutama to give evidence. Mr Kutama testified that:

15.1 He had consulted with the plaintiff in January 2020 after being informed of the plaintiff's case by his form's candidate attorney, Zanele;

15.2 He personally attended at the plaintiff's home to consult with him;

15.3 He contacted the RAF telephonically in the presence of the plaintiff and he was told that no claim had ever been lodged in the plaintiff's name and that, in terms of section 17(1)(b) of the Road Accident Fund Act, a hit and run claim prescribes after two years;

15.4 He then attempted, unsuccessfully, to contact Mr Mkhabela; and

15.5 He established that no claim had ever been lodged with the RAF under the plaintiff's full name, date of accident or the plaintiff's ID number.

[16] In the absence of the defendants, I requested Mr Maphutha to draw heads of argument on the issue of prescription which he filed on 29 January 2024.

[17] The argument advanced on the plaintiff's behalf, relying on the case of *Mdunjana v Road Accident Fund*¹ per Millar J, records that:

"The argument advanced in support of the special plea was that since the provisions of the Road Accident Fund Act did not permit the granting of an extension of the prescriptive period for lodging of claims, any claim not lodged timeously, and in particular the plaintiff's claim in the present matter, had become prescribed and unenforceable. This was predicated upon Section 17(1)(b) read together with Regulation 2(1)(a) which provides that a claim in respect of an unidentified owner or driver of a motor vehicle must be sent or delivered within two years from the date upon which the cause of action arose."

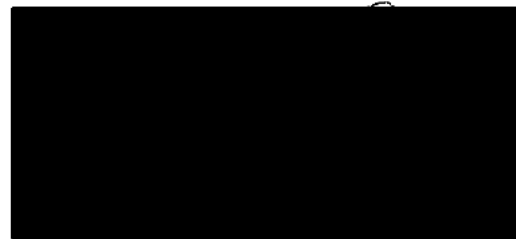
¹ (52582/2020) [2022] ZAPPHC 618 (18 August 2022) para 8.

CONCLUSION

- [18] In the absence of the defendants, who I am satisfied were aware of the date which had been allocated for the hearing of trial, I have been furnished with only one version upon which I am reliant to make a finding.
- [19] I found the plaintiff and his father Mr Tsotetsi to be forthright and honest. I am satisfied that, upon a balance of probabilities, an agreement of the type contemplated was concluded between the plaintiff and the second defendant represented by Mofokeng.

ORDER

- [20] In the absence of any version to the contrary I am inclined to grant an order, which I hereby do, in the following terms:
1. The plaintiff's claim arising from the damages he sustained in the motor vehicle accident which occurred on 20 August 2019 become prescribed in the hands of the first and/or second defendants who failed, and/or refused, and/or neglected to prosecute the claim against the RAF;
 2. The defendants, jointly and severally, are liable to the plaintiff for 100% of the damages that he is able to prove at a trial on quantum in due course;
 3. The defendants are ordered to pay the plaintiff's costs of suit up to and including costs of the trial.



A. BERKOWITZ
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 29 January 2024
Judgment: 08 April 2024

Appearances

For Plaintiff: M.R. Maphutha
Instructed by: Kutama Attorneys

For Defendants: (No Appearance)