HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

Case Number 4683/2016

14/12/2017

MUNERI MADZUNYA Plaintiff

And

ROAD ACCIDENT FUND Defendant

ORDER

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1. The plaintiff and the insured driver are declared to be liable for the collision on a 50/50 basis;
2. The defendant shall pay the plaintiff an amount ofR349 237 to the trust account of the plaintiff's attorneys of record, Malao Incorporated;
3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to compensate him for 50% of the costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of

goods to the plaintiff resulting from injuries sustained by him as a result of an accident that occurred on 20 August 2014, in respect of the said costs after costs have been incurred and upon proof thereof;

4. Should any of the parties wish to argue the aspect referred to in paragraph 3 of this order, such party shall within ten (10) court days of this judgment enrol the matter down for argument on at least five (5) days' notice to the other party. Should the time frame referred to above lapse, the order made in that paragraph shall be final
5. The Defendant is to pay the Plaintiff's taxed or agreed 50% costs of the action, which shall include all costs in respect of the experts instructed by the plaintiff in order to prepare expert reports, if any.

JUDGMENT

MAKGOKA, J

[1] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996, as amended (the Act), pursuant to a motor vehicle accident which occurred on 20 August 2014. The plaintiff, Mr Muneri Madzunya, was a pedestrian when a vehicle with registration letters and numbers [….] (the insured vehicle) collided with him. It was driven by Mr Selatuli Mokgoatjane (the insured driver).

[2] The plaintiff suffered a head injury, fracture of the right tibia and fibula; and fracture of the right knee. He was admitted to a hospital where he was treated for

a week before being discharged. As a result of the injuries, the plaintiff issued summons against the defendant for payment of a sum of RJ 000 000 under different heads of damages, namely: estimated medical expenses, past loss of earnings, future loss of earnings[1] and general damages.

[3] Both the issues of liability and quantum are in dispute. However, the parties have agreed on certain amounts in respect of general damages and loss of earning capacity in the event the plaintiff succeeds to establish the defendant's liability.

[4] Only three witnesses testified during the trial: the plaintiff and his wife, Mrs Kelebogile Madzunya, on the one hand, and the insured driver, Mr Selatuli Mokgoatjane, on the other. As a prelude to their evidence, it is necessary to sketch out the scene of the accident. The accident occurred at approximately 17h30 in the vicinity of a traffic light-controlled intersection of Church (renamed Helen Joseph) and Prinsloo (renamed Sisulu) streets in the Pretoria city centre. Prinsloo is a one-way. street. with three traffic lanes in a southerly direction. The State Theatre is on the right. On the northern end, Prinsloo intersects with Church street from east, and on the southern end, it intersects with Pretorius street.

[5] The evidence can be summarized as follows. The plaintiff testified that on the day of the accident, he was to meet his wife in the Pretoria city centre. She was travelling from Rustenburg by taxi, and having large amounts of cash with her. He stood next to the traffic light on the State Theatre side (western side)

[1] Technically speaking, this refers to loss of earning capacity.

planning to cross over to the eastern side. He was talking with his wife on his cellular phone. However, he could not see where she was. He started crossing the street because the traffic light was green in his favour.

[6] Once he had started crossing, he heard his wife screaming out his name. He saw the insured vehicle and tried to tum back to the pavement, but it was too late as the insured vehicle collided with him. That, according to him, explains why he sustained injury to his right knee. He could not tell whether at the point of the collision, the traffic light was still green as he 'was not looking there anymore.'

[7] According to him, he had just stepped into the road, and the collision happened in the first lane of travel, and that explained why he ended up near the pavement. He vehemently denied that the accident happened in the middle of the road. Asked whether he saw the insured vehicle approaching, the plaintiff testified:

To be honest, no, I was on the phone. I only saw the vehicle when [my wife] called me. I looked up and saw the robot is green and I proceeded walking, I did not look left or right, because the robot was green.'

[8] When asked whether he checked whether there were vehicles approaching before he crossed the road, the plaintiff said that he did not do so because when his wife called, he looked up and because the traffic light was green, ' I started walking [and] I did not bother looking for any vehicles corning or anything like that, I was on the phone.'

[9] During cross-examination he was pressed to explain the reason why he did not see the approaching insured vehicle. He testified that ' it is obvious [that]

if I see a green man, which is a green robot I would not expect any other car expect for the guys who were going to be turning into the road, which is the last lane when I am jumping the street.' He insisted that because the traffic light was green for him as a pedestrian, he was entitled to cross the road without looking out for on-corning traffic. According to him, ' by law' if there is a green man for pedestrians, it is safe for them to cross, and ' the duty is for the driver not to jump the robot.'

[10] His stance in this regard is best summed up by his evidence during cross-examination:

·As I said earlier, I was on the phone when my wife called [looked up and I saw the green man and I proceeded to walk and the one thing that I know it was a one way street up. If I was on a four way path I would have understood that I need to look left and right because there is a difference. but it was just the one way going up. So, when l saw the green, I decided to just proceed walking, while l was still speaking to her on the phone.'

[11] Mrs Madzunya briefly testified that she was standing on Prinsloo street and clearly observed how the collision happened. She confirmed that she was talking to the plaintiff on the cellphone. The robot was green in favour of the plaintiff. According her, the plaintiff was already in the middle of the road - in the second lane going to the third - when she saw the insured vehicle approaching. She screamed out to alert the plaintiff of the imminent danger. At that stage the plaintiff·turned' and the collision occurred.

[12] The insured driver, Mr Mokgoatjane, testified that he was driving along Prinsloo street in a southerly direction towards Pretorius street. He occupied the far right lane. The traffic light was green in his favour, and thus he had the right of way. Suddenly the person with whom he was in the vehicle alerted him to the plaintiff, who was crossing the road despite the red traffic light in his path. Whilst the plaintiff was crossing and was in middle of the road, he (the plaintiff) turned back to the direction he was coming from. He had already crossed his lane when he tried to tum back, when he heard a female voice screaming from the outside. When he applied the brakes, ' it was already too late' as he had already co11ided with the plaintiff.

[13] According to him, he first observed the plaintiff while still at the set of traffic lights at the comer of Prinsloo and Church streets. When he saw the plaintiff crossing from State Theatre to the other side, he did not foresee that he might tum back to the direction of the State Theatre. In his mind, he was satisfied that the plaintiff had already crossed the street, and it was safe for him to proceed. According to him:

‘I could not foresee that he would jump and then go back again. J just heard by the people or the pedestrians who were by the side of the road that the plaintiff had crossed the road, and then he went back again.'

[14] As far as other evasive measures, he testified that in addition to reducing speed, he put on the vehicles' indicators in order to alert the motor vehicle behind him. He did not hoot at all, because according to him, the plaintiff had already past his lane. and he did not foresee that he would tum back. Neither did he swerve, because had he swerved, he would 'have caused a very big accident'

because the plaintiff had moved to the left side where he could not see what was happening because it was dark.

[15] Unsurprisingly, he denied the version of the plaintiff that he skipped a red traffic light. He proffered two reasons for disputing that version. First, that had that been the position, he would have collided not only with the plaintiff, but other pedestrians who were also waiting to cross the street. Second, that there were traffic officers at the traffic lights at the time of the collision, with whom he interacted after the collision, and explained to them how the collision occurred.

[16] That concluded the evidence. It remains for the court to determine whether the plaintiff has discharged the onus resting no him on a balance of probabilities. It i clear from the totality of the evidence that the court is confronted with two mutually destructive versions. The correct approach to be adopted under such circumstances was succinctly set out in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) 440E-G, where Eksteen AJP said:

·... Where the onus rests on the plaintiff as in the present case. and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities arc evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court

nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[17] This approach was approved by the Supreme Court of Appeal in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA)para 5, where Nienaber JA developed the following technique:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. 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) [credibility], 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 fact or with his own extra curial statements or actions; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' [reliability] will depend, apart from the factors mentioned under (a)(ii), (iv) and (vi) above, on (i)the opportunities he had to experience or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c) [probabilities], this necessitates an analysis and evaluation of the probability or improbability breach party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as the 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.'

[18] The principle is therefore firmly established that when there are mutually destructive versions before the court, the plaintiff's onus of proof can only be discharged if he or she establishes his or her case on a preponderance of probabilities. The corollary principle is that a court has to be satisfied that the plaintiffs version is true and that of the defendant false in order for the plaintiff to succeed in discharging his onus of proof is only applicable in cases where there are no probabilities one way or the other (see *African Eagle Life Assuranc eCo Ltd v Cainer* 1980 (2) SA 324 (W)).

[19] Applying the above principles to the facts of the present matter it is first necessary to consider the credibility of the plaintiff and the insured driver. The plaintiff impressed me as a witness. He answered questions promptly, directly and spontaneously. His evidence was simple and straight-forward. Despite arduous and thorough cross-examination by Mr *Mphela,* counsel for the defendant, he maintained an animated, confident, if over-zealous demeanour. This was evident by his constant interruption of counsel, against which the court warned him several times. He maintained his version that the robot was green in his favour, but was candid enough to admit that he did not keep a proper look-out.

[20] There were no internal contradictions in his evidence. His evidence is to a great extent, corroborated by his wife. Here, I must warn myself of the uncritical acceptance of the wife's evidence. She is not an independent eye-witness. Her evidence suffers inherent latent bias. However, having said this, I did not gain

any impression that there was blatant bias in her evidence, or that she and the plaintiff had colluded as to what to say in court.

[21] On the contrary, they differed as to the point of collision. According to the plaintiff, the point of collision was just after he had entered the street to cross, while his wife testified that it was way well in the middle of the street. This on its own, rules out collusion on their part, and strengthens the independence of their respective testimonies. I shall deal with the effect of the difference, later.

[22] The complimentary remarks made in respect of the plaintiff, can unfortunately not be attributed to the insured driver, Mr Mokgoatjane. His evidence was unsatisfactory in a number of respects. He was guarded and tentative in his answers, lacking in the spontaneity with which the plaintiff testified. During cross-examination I gained a distinct impression that he was being evasive. He was often long-winded and garrulous. What struck me most about his testimony *is* that he simply could not tell how the collision occurred. It is to be borne in mind that he testified that he in fact did not witness the plaintiff when he turned back. He only heard members of the public that he did.

[23] He also could not explain how it happened that the plaintiff ended up landing in his lane if he had already went past his lane and the second one, and going to the third. He could not explain how the plaintiff got back into his lane if he was that far. According to him, this was the first time he had encountered a pedestrian acting negligently by crossing a street against a red traffic light. This is most improbable for a driver of his experience.

[24] However, his testimony was not all negative. Some aspects of it are corroborated by objective facts. For example, the location of the damage to the

insure d vehicle (which is undisputed) seems to confirm his version *as* to the point of impact. If he collided with the plaintiff with the left side of his bonnet, it suggests that the plaintiff was much further in the lane or even having reached the second lane. This version finds support in the testimony of the plaintiff's wife.

[25] Given the above, it is clear that both the testimonies of the plaintiff and the insured driver are not without criticism. Assuming, without finding, that the traffic light was green in his favour, the plaintiff was undoubtedly negligent by not keeping a proper look-out. On the other hand, the insured driver was alerted to a potential danger (in the plaintiff crossing against a red traffic light). He should have been more alert as to the plaintiffs possible next movement, and keep a closer look-out. He did not, and as a result, he collided with him without even noticing him. This could only have happened because he was not keeping a proper look-out. He was therefore equally negligent.

[26] The upshot of all these considerations is that both the plaintiff and the insured driver were responsible for the collision. The divergence in the testimonies of the plaintiff and his wife as to the actual point of impact recedes into the insignificance when the matter is viewed in this light. Even if the point of impact was where the insured driver says it was, that does not detract from the conclusion that both were negligent. Given this conclusion, it is unnecessary, and indeed unwise, to make any firm finding on the state of the traffic light at the point of the collision - whether they were green in favour of the plaintiff or the insured driver. See *Biddlecombe v Road Accident Fund* (797/10) [2011 ZASCA 225. In my view, the negligence should be split on a 50-50 basis.

[27] The parties had agreed on the plaintiffs globular quantum in the sum of R698 474. A 50 percent apportionment should accordingly be applied to this amount. Counsel for the parties did not address me on the plaintiffs future medical treatment. I assume it was an oversight. It certainly was an oversight on my part not to have invited counsel to deal with this aspect. Customarily, the defendant would give an undertaking in terms of section 17(4)(a) to a successful claimant to cater for future medical expenses. I will make a provisional order in this regard.

[28] Costs should follow the result. The plaintiff has only been partly successful. this should be reflected in the costs order.

[29] In the result the following order is made:

1. The plaintiff and the insured driver are declared to be liable for the collision on a 50/50 basis;

2. The defendant shall pay the plaintiff an amount of R349 237 to the trust account of the plaintiff's attorneys of record, Malao Incorporated;
3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section l 7(4)(a) of the Road Accident Fund Act, No 56 of 1996, to compensate him for 50% of the costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff resulting from injuries sustained by him as a result of an accident that occurred on 20 August 2014, in respect of the said costs after costs have been incurred and upon proof thereof;

4. Should any of the parties wish to argue the aspect referred to in paragraph 3 of this order, such party shall within ten (10) court days of this judgment enrol the matter down for argument on at least five (5) days' notice to the other party. Should the time frame referred to above lapse, the order made in that paragraph shall be final;
5. The Defendant is to pay the Plaintiff's taxed or agreed 50% costs of the action, which shall include all costs in respect of the experts instructed by the plaintiff in order to prepare expert reports, if any.

T M Makoga
Judge of the High Court

APPEARANCES:

For the Plaintiff:	MG Molai Instructed by: K. Malao Incorporated, Pretoria
For the Defendant:	B Mphela Instructed by: Diale Mogashoa, Pretoria