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**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 310/2021

REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:YES
REVISED: YES
24/10/2022

In the matter between:

ATTEMPT UBISI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE J:

[1] This is a delictual claim emanating from a motor vehicle collision between the Plaintiff and motor vehicle with Registration letters and numbers [...]. The collision happened on 8 February 2020 at or near Tintswalo Hospital in the district of Acornhoek in Mpumalanga Province. When the collision occurred, the Plaintiff was a pedestrian. In consequence of the collision described aforesaid, the Plaintiff sustained multiple injuries most notably, a severe head and maxilo-facial injuries.

[2] Believing that the accident was as a result of the negligent driving of the driver of motor vehicle with registration letters and number [...], liable to compensate him for the resultant injuries, he lodged a motor vehicle accident claim in terms of the Road Accident Fund Act, 56 of 1996, as amended ("the Act") against it under the headings of general damages, future medical treatment, past and future loss of earnings. As has become accustomed, the action was never defended because the Defendant had, at the time of the institution of the action, withdrawn its mandate that it had given to its attorneys.

[3] When the matter served before me I was advised that the Court was to adjudicate both merits and quantum. Naturally, the first part to be considered will be the merits. If the Plaintiff fails to establish negligence on the part of the insured driver, the claim will be dismissed making it unnecessary to proceed to determine quantum. The converse will imply progression to the next leg, quantum.

[4] As a result of the view that I take of the matter, I do not deem it essential to assess the evidence of the experts. The only testimony critical to the outcome of this judgment is that of the Plaintiff who testified on his own behalf on merits and to a limited degree, quantum. The evidence of the two witnesses contained in the two affidavits, which Counsel for the Plaintiff sought to improperly introduce was, besides it not having been preceded by the application envisaged in Rule 38(2) and therefore inadmissible and valueless. I now proceed to describe the evidence of the Plaintiff below.

[5] The Plaintiff confirmed the date of accident as 8 February 2020. He said that he was in the company of his former girlfriend, Khanyisa Ngobeneni ("Ngobeneni"), who had

asked him to accompany her to her home. They were walking on a tarred road in the vicinity of Tintswalo Hospital when a white NT200 Corsa vehicle (“the insured vehicle”) pulled next to them. It is imperative to mention at this point that there is a discrepancy between the description of the insured vehicle in the particulars of claim and the section 19f affidavit, on the one hand, and the Plaintiff’s evidence. In Court, he described it as a white NT 200 Corsa van whereas in the particulars of claim and the section 19f affidavit its referred to as a White Opel Corsa vehicle. A voice coming from the insured vehicle asked what was going on whereupon Ngobeni took flight. He decided to turn back to head back into the direction of his home.

[6] The insured vehicle followed him. He picked up pace. He noticed the insured vehicle gathering momentum too. The insured vehicle then collided with him from behind. He did not know why the insured vehicle pursued him. Ngobeni was his ex-girlfriend. He Did not know the driver of the vehicle that collided with him. He was totally oblivious of the relationship between Ngobeni, his ex-girlfriend, and the driver of the insured vehicle. He subsequently learned that the driver was one Mr M[....] (“the insured driver”), her husband. He testified that he was convinced that the insured driver deliberately collided with him.

[7] In reply to a question whether or not he had seen the vehicle that collided with him, he said that he did because while running away he regularly looked back to see if the vehicle was still following him. Furthermore, there was no traffic in that road making the insured vehicle the only one that was travelling behind him at the time. He estimated the speed to have been at its highest when the insured vehicle collided with him. He testified further that the insured vehicle first collided with his lower limbs following which he fell to the ground. The insured vehicle then drove over him and failed to stop thereafter.

[8] He explained that his lower limbs were not injured despite that the first contact was with them. He said that shortly before the impact, he jumped and fell to the ground and the vehicle ran over him. His explanation was still insufficient as it was not a satisfactory account for his limbs being free of injury especially after coming into contact

with a fast-moving vehicle. His testimony in his examination in chief was that the vehicle came from behind, collided with him and drove away. He was further adamant that he did not see it collide with him but when the Court sought clarity, he categorically stated that he saw it.

[9] Although he initially stated that Kenneth Ndlovu (“Ndlovu”), the person who drove him to hospital after the accident, witnessed the accident, it later transpired that it was not true. This became evident when he testified that Ndlovu was called to come and assist a person who had been knocked down by a vehicle. This made Ndlovu a person who came after the fact of the accident. That said, he testified that Ndlovu assisted the police officers to draw up the officer’s accident report. Again, this could not have been correct because Ndlovu was not present when the accident occurred.

[10] As stated earlier, Counsel for the Plaintiff tried to introduce evidence by affidavits. The Court told him that it would be irregular without an application setting out why the Court should accept such evidence. In any event, the evidence contained in those two affidavits do not advance the Plaintiff’s case one step further. If anything, they are destructive to the version put forward by the Plaintiff. Ndlovu says that when he arrived at the scene, he found a stationary vehicle. He also states that an injured person was lying down on the ground. In the affidavit Ndlovu is silent on whether or not the injured person is the person that he ultimately conveyed to hospital in his vehicle, the Plaintiff.

[11] Ngobeni is the ex-girlfriend of the Plaintiff. The Plaintiff and Ngobeni apparently retained friendship relations after severing their love relationship. Ngobeni confirms in her affidavit that she had requested the Plaintiff to accompany her to her parents’ home. She further states that while walking together with the Plaintiff, she received a message on her mobile from her husband advising her that he was on his way to Gandagaza village. At that point she told the Plaintiff that he could go back as her husband would be giving her a lift. The Plaintiff did as requested.

[12] Not long thereafter, her husband arrived and picked her up. She says that while travelling in the vehicle, her attention was on her mobile phone. She suddenly heard a

thud-like sound. She immediately stopped her focus on the mobile phone and checked what was happening. She was shocked to notice that her husband had just collided with the Plaintiff. She got out of the vehicle and ran to Tintswalo Hospital to seek assistance. She spoke to a nurse who gave her a telephone number to call an ambulance. She did so and thereafter she was again on her way to her parents' house in Thulamahashe albeit that she does not state whether or not she continued the journey with her husband.

[13] Paragraph 4 of the amended particulars of claim describes the manner in which the accident occurred as follows:

“On or about the 08th of February 2020 at or near Tintswalo, Acornhoek, Plaintiff was a pedestrian while trying to cross the road when a White Opel Corsa motor vehicle bearing registration numbers and letters [...] (herein referred to as insured motor vehicle) driven by one Mr. B[...] M[...] (herein referred to as insured driver) came at a high speed in a gravel road without observing pedestrians crossing on the road and knocked down the plaintiff.”

[14] In the Section 19(f) affidavit at paragraph 2, the Plaintiff describes the way in which the accident happened almost in similar terms as does the amended particulars of claim and he states:

“During or on the 08th of February 2020 at or near Tintswalo Village, Acornhoek, Mpumalanga Province at approximately 17h40, I was a pedestrian while trying to cross the road when a White Opel Corsa motor vehicle bearing registration numbers and letters [...] driven by one, Mr B[...] M[...] knocked me down.”

[15] The version of the driver of the insured vehicle is captured in the officer's accident report. It is stated that the driver told the police officer that he was driving into an easterly direction on a gravel road when a pedestrian suddenly entered his path of travel in an attempt to cross. He collided with the pedestrian and could not avoid the accident.

[16] The liability of the Defendant must be assessed against the facts described above. The Plaintiff bears the onus of proving, on a balance of probabilities, the facts upon which he claims the accident happened. The issue is therefore, aside from the fact that the Defendant did not contest the merits, whether or not he has established that firstly, he collided with the insured vehicle and secondly, that the accident occurred as a result of the insured driver's negligent driving.

[17] Put differently, the issue is simply to determine whether or not the facts as outlined support a case of negligence against the insured driver. Needless to state that if the facts underpin such a case, the Plaintiff should succeed. On the other hand, if they do not, the claim must be dismissed. Since the case revolves around the negligent driving of the insured driver, it will be helpful to refer to some case authority on negligence.

[18] The *locus classicus* on negligence is set out in the case of *Kruger v Coetzee*¹ where it was stated:

“For the purposes of liability culpa arises if –

(a) A diligens paterfamilias in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.”

[19] The instances in which the insured driver is said to have been negligent are stated in the particulars of claim in the following terms:

¹ 1966 (2) SA 428

“The aforesaid collision was caused by the sole and exclusive negligence of the driver of the insured motor vehicles, who was negligent in one or more or all of the following respects:

5.1. He failed to keep any proper look-out pedestrian more specifically Plaintiff;

5.2. He executed an inherently dangerous maneuver without exercising the degree of a skilled reasonably person required under the circumstances;

5.3 He failed to avoid the accident by the exercising of the skills of a reasonable person skill he could and should have done so; and

5.4 He failed to apply the brakes of the motor vehicle either timeously or at all, alternatively he drove the said motor vehicles with defective brakes.”

[20] The discrepancies between the Plaintiff's testimony in Court and those alleged in the papers are disturbing. The following are glaring:

20.1 According to the Section 19(f) affidavit and the particulars of claim, the Plaintiff was in the process of crossing a road when the insured vehicle came driving in a high speed, failed to observe the rights of pedestrians and collided with him. In his evidence in Court, the vehicle collided with him from behind, knocked him down and drove over him;

20.2 The Plaintiff was very explicit when asked about the condition of the road. He said that the accident happened on a tarred road yet in his particulars of claim, he is unambiguous that it was a gravel road.

[21] If it is correct that the vehicle collided with him from behind and then drove over him, no explanation was proffered why his injuries were concentrated around his head. The Plaintiff had no noticeable injuries to his lower limbs. Save for the soft tissue lumbar spine referred to by the occupational therapist, his back was free of bruises or

lacerations. I find this lack of bruises or lacerations inconsistent with someone who was run over by a vehicle from behind.

[22] He contradicted himself on whether or not he saw the vehicle that collided with him. At one point he stated that he did not see it and does not remember what transpired thereafter as he woke up in hospital. In an answer to the Court, however, he said that he saw the vehicle collide with him and that his lower limbs came into contact with the fast moving vehicle. Asked why he did not have any serious injuries to his lower limbs and his back, he explained that he jumped thereby making the impact with the insured vehicle less effective.

[23] He did not state the direction into which he had jumped nor did he say how doing so weakened the impact of a fast-moving vehicle coming into contact with him. The contradiction between colliding with a vehicle while crossing a road and running away from a vehicle that was seemingly pursuing him is remarkable. These anomalies cannot be ignored in favour of simply wanting to find in favour of the Plaintiff. The pleaded case ought to be supported by the evidence that is ultimately presented in Court. If there is incongruity between the two, no Court can find for a Plaintiff.

[24] The version of the insured driver as captured by the police officers in the officer's accident report is that the Plaintiff suddenly entered the road without first checking if there were motor vehicles approaching from either side. Assuming that the police docket was properly introduced into evidence, the Plaintiff did not deal with the version of the insured driver. While there is convergence on crossing of the road between the insured driver and the Plaintiff, the latter in his evidence never intimated that he was crossing a road.

[25] A further inconsistency pertains to Ngobeni's statement and the Plaintiff's evidence in Court, assuming that it was introduced into evidence. The Plaintiff testified that he was walking with Ngobeni when the insured vehicle pulled next to them and the insured driver asked what was going on. He stated that Ngobeni ran away. At that

juncture, he turned back and the insured vehicle followed him. He then picked up pace. Likewise, the insured vehicle accelerated.

[26] From the perusal of the sworn statement of Ngobeni, this could not have been possible because according to her, she had received a text message from the insured driver informing her that he was on his way to Gandagaza Village and that he would give her a lift. The message prompted her to ask the Plaintiff's to turn back because her husband, the insured driver, was on his way. So, at the time when the insured driver picked her up, the Plaintiff had already turned back.

[27] Furthermore, Ngobeni states that she was driving with her husband, the insured driver, concentrating on her mobile phone. She suddenly heard a bang. When she checked, she noticed that her husband had collided with the Plaintiff. She got off the vehicle and went to hospital to seek assistance in the form of ambulance. Thereafter, she proceeded with her journey to her parents' house in Thulamahashe.

[28] These contradictions are enormous and they throw doubts on whether the Plaintiff was in fact involved in a motor vehicle accident at all. I am mindful that the Defendant did not defend this action. That said, the Court cannot simply because of the lack of participation by the Defendant in these proceedings assume that the insured driver was to blame without the Plaintiff, on a balance of probabilities, demonstrating negligence on the part of the insured driver. In the result, the action fails.

[29] My findings on the merits necessarily makes it gratuitous to proceed to assess quantum. Accordingly, I make the following order:

The action is dismissed with costs.

B A MASHILE

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 24 October 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:

Instructed by:

Adv P Tshavhungwe

Ngomana & Associates Attorneys

Counsel for the Defendant:

Instructed by:

No Appearance

Date of Judgment:

24 October 2022