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

CASE NO: 311/2021

REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:YES
REVISED: YES
01/12/2022

In the matter between:

LUCY FORTUNATE MOKONE Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MASHILE J:

[1] The Plaintiff sues in her personal capacity in terms of the Road Accident Fund Act, 56 of 1996, as amended, for damages stemming from serious bodily injuries sustained in a motor vehicle accident on 8 May 2020 as a Passenger in motor vehicle with registration letters and number [....], which collided with motor vehicle bearing registration letters and number [....]. The collision happened at or along R40 Road at Matsikitsane Next to Greentile, Acornhoek, Mpumalanga Province at approximately 08H50.

[2] From a perusal of the pleadings, medico-legal reports and medical records, the injuries suffered by the Plaintiff are not readily discernable. The records from Tintswalo Hospital describe them as swollen left eye and upper lip, and right leg 3CM abrasions. On arrival at hospital, she was described as somewhat shocked but orientated. In the evening of 8 May 2020, it is noted that she complained of forehead headache and painful finger.

[3] Dr Matekane, an Orthopaedic Surgeon who examined the Plaintiff on 31 July 2021 and compiled his report on 30 August 2021, sets out the Plaintiff's injuries as soft tissue injuries of the spine, right leg, right wrist and facial laceration. Dr Buatre who is also an Orthopaedic Surgeon and completed the statutory RAF1 Form states them to be a head injury (concussion), facial STI, laceration of the left eye lid (0.5 CM), STI chest and abrasion on the right leg. Lastly, Dr Mkhonza, a Neurosurgeon, lists the injuries as soft tissue injuries of the left side of the face, left shoulder, wrist and right lower limb.

[4] There was no application to separate merits and quantum. As such, the matter is proceeding on both issues. To support her claim, the Plaintiff testified on her own behalf followed by various experts. These were Dr Matekane, an Orthopaedic Surgeon, Dr Mkhonza, a Neurosurgeon, Ms Sebapu, an Occupational Therapist, Ms Baloyi, an Industrial Psychologist and Dr Modiba, a Clinical Psychologist. The experts' testimony mainly related to quantum.

[5] The testimony concerning the manner in which the accident occurred was levied by the Plaintiff as a single witness. She stated that the Collision was caused by the negligent driving of the driver of motor vehicle [....] as she drove on the lane of oncoming traffic. In that process, the vehicle collided with motor vehicle [....] travelling into the opposite direction. She further told the Court that following the impact, motor vehicle [....] lost balance, overturned and its passengers injured. In consequence of the collision, she said that she sustained the following injuries:

5.1 Swollen left eye;

5.2 Swollen upper lip;

5.3 Forehead;

5.4 Right leg abrasions;

5.5 Spine and right wrist.

The Plaintiff was treated and discharged on the same day.

[6] In view of there being no separation of issues, the obvious starting point has to be a decision on whether or not the Defendant is liable to compensate the Plaintiff at all given the merits. The Plaintiff's evidence was not rebutted at all as the Defendant did not participate in the proceedings. That said, it is still incumbent upon the Plaintiff to persuade the Court that the case that she has presented was solid and that on a balance of probabilities she should succeed.

[7] All the documents that pertain to the manner in which the collision occurred were not presented before Court notwithstanding that they might have been discovered. I could not have regard to the officer's accident report (OAR) because the officer who drew it up was not called to take the stand consequently it is unproved and as such, hearsay. I alerted the counsel for the Plaintiff that the OAR would have to be proved

prior to admission into evidence. His answer was that it was properly before Court and that it has been discovered anyway.

[8] I cannot have regard to the injuries mentioned by the various experts in their reports as being somehow connected to the collision because the collision itself has not been established. So, even though the experts testified about injuries having been sustained, there remains no causal link to the collision. The medical records too allude to injuries but they too were not proved as neither the nurse/s nor doctor/s were called to prove them. The result is that I cannot admit them into evidence. Thus, the disconnect is not only between the collision and the reports of the experts but also the medical records.

[9] As though the above was not sufficient, the Plaintiff was in the company of other passengers who were also injured. Her attorneys have made no attempt to call these witnesses to support the Plaintiff's allegation of involvement in a motor vehicle collision. Furthermore, no effort was made to secure the evidence of the driver of the motor vehicle in which she was a passenger and no attempt to explain why these witnesses were not called was made.

[10] What then is the impact of all these shortcomings? This simply means that the evidence of the Plaintiff on the collision ought to be assessed as one presented to Court by a single witness with no supporting documentary evidence. The concept of the evidence of single witnesses occurs more regularly in criminal matters but where appropriate and, with the required modification to suit its applicability in civil trials, its efficacy should be employed. The obvious adjustment should be that the standard of proof in a civil trial will be on a balance of probabilities as opposed to beyond reasonable doubt.

[11] It might be appropriate at this juncture to refer to Section 16 of the Civil Proceedings Evidence Act, 25 of 1965, which stipulates that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. So, it is conceivable to find in favour of a Plaintiff on the basis of the evidence

of a single witness. The only requirement is that his or her evidence must be competent and credible. See also the case of *Daniels v General Accident Insurance Co Ltd*[1]**.**

[12] The onus to establish, on a balance of probabilities, that this collision happened rested on the Plaintiff. The Court cannot simply accept her uncorroborated allegation of a motor vehicle collision especially in circumstances where it is public knowledge that the Defendant is fraught with multiple fraudulent claims that cause tax payers millions of rands. Apart from all this, the attorneys failed to ascertain that all the documentary evidence necessary to prove the collision was properly before Court.

[13] It is mind-boggling for this Court to comprehend that in a claim where a Plaintiff is seeking compensation for an amount that is approximately **R3 Million**, no extra effort was made to allay any fears that the Court might have of being seized with one of the many fraudulent claims that frequently serve before our Courts. More disquieting is that it would not have involved or cost much to subpoena the police, nurses and/or hospital doctors, the driver and/or one or two of the Plaintiff's co-passengers to put the Court's concerns at ease.

[14] If this was as simple as issuing subpoenas to witnesses, which is a matter of routine insofar as attorneys are concerned, the question is why was it not done? In the light of what I have stated above, I feel compelled to draw an adverse inference against the Plaintiff –the witnesses do not exist hence they were not called or simply that the Plaintiff has failed to prove her involvement in a motor vehicle collision from which she sustained the injuries she claims she has sustained.

[15] On whether or not an adverse inference can be drawn in these circumstances, see *Sampson v Pim*[2] where Solomon JA stated that if a witness was available to confirm a party's allegations and he was not called to give evidence the inference would

[1] [1992] 3 All SA 484 (C)
[2] 1918 AD 657 662

be overwhelming that his evidence would have been unfavourable to the party not calling him. See also *Galante v Dickinson*.[3]

[16] In the circumstances, it would be proper to grant an absolution from the instance. The law that governs the granting or refusal of absolution is trite. The test to be applied for absolution, usually at the end of the Plaintiff's case, is not whether or not the evidence levied before Court by the Plaintiff demonstrates what would customarily be necessary to be proved at the conclusion of the case of both parties. Instead, a Court should ask itself whether or not there is evidence upon which a Court, applying its mind reasonably to such evidence, 'could or might' and not should, nor ought to' find for the Plaintiff were the matter to proceed to finality. See, *Claude Neon Lights (SA) Ltd v Daniel.*[4]

[17] It has been said that the test entails that a plaintiff has to make out a *prima facie* case such that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no Court could find for the Plaintiff. See, *Marine & Trade Insurance Co Ltd v Van der Schyff*[5]. That said, a Court should not be too eager to grant absolution at the end of the Plaintiff's case unless doing so, after a careful consideration of the circumstances, will be in the interest of justice. See, *Gordon Lloyd Page & Associates v Rivera*[6]**.** I have considered all the circumstances described above and am persuaded that it will be in the interest of justice to grant absolution.

[18] In the result, the claim fails and I make the following order:

An absolution from the instance is granted.

B A MASHILE

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[3] 1950 2 SA 460 (A)
[4] 1976 (4) SA 403 (A)
[5] 1972 (1) SA 26 (A) at 37G - 38A
[6] 2001 (1) SA 88 (SCA)

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 01 December 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:	**Adv Mabaso**
Instructed by:	**Ngomana Attorneys**
Counsel for the Defendant:	**No appearance**
Instructed by:	
Date of Judgment:	**01 December 2022**