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

CASE NO: 351/2018

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

In the matter between:

CHRISTINA MATSHOLE TSHOLE Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MASHILE J:

[1] This third party claim has been instituted in terms of the provisions of the Road Accident Fund Act, 56 of 1996, as amended. The claim is alleged to derive from a collision that took place on 4 May 2015 at approximately 15:50 outside Mashishing into the direction of Daalstroom, Province of Mpumalanga. The collision was between motor vehicles bearing registration letters and numbers [....], in which the Plaintiff was allegedly a passenger, and [....].

[2] Initially, the Defendant opposed the action and served a special plea and a plea addressing the merits generally. The special plea raised non-compliance with Regulation 3 dealing with seriousness of the injuries sustained by the Plaintiff. However, the special plea and plea seem to have fallen by the wayside because no other pleadings were forthcoming from the Defendant and was not present at the hearing on 14 March 2022. No application for separation of merits having been requested, the case proceeded on both merits and quantum.

[3] According to the particulars of claim, the injuries sustained by the Plaintiff are:

3.1 Open fracture of the left fibula;

3.2 Amputation of the left leg;

3.3 Fracture of the left clavicle;

3.4 Fractured ribs; and

3.5 Laceration of the liver.

[4] Insofar as liability is concerned, the Plaintiff testified on her own behalf. She called no other witnesses to support her version. Thereafter, different expert witnesses testified. All the testimony of the experts is relevant to quantum. The first part of this

judgment will deal with liability. Depending on the outcome on liability, I will then proceed to consider quantum.

[5] The Plaintiff testified that she was a passenger in motor vehicle [....]. She was a middle-seat passenger sitting three seats behind the driver. She suddenly heard fellow passengers screaming and saying that a certain vehicle was driving towards them. She did not see the vehicle that the other passengers were shouting about. She said that she then fell unconscious, which she thinks must have been after impact. In short, she does not know how the collision happened. Neither the drivers of the respective vehicles nor the passengers were called to give evidence. The Officer's Accident Report, sketch plan and key (OAR) were not proved as the officer who drew them up was not called. As such, they are hearsay.

[6] From the evidence of the Plaintiff described above I need to decide whether either driver can be found to have driven negligently. Needless to state that if either of them is so found, the Plaintiff will succeed with her claim against the Defendant. The aforesaid issue cannot be decided independently of whether or not the Plaintiff's evidence, as one adduced by a single witness who turns out to be a claimant as well, required corroboration for her to succeed.

[7] For the Plaintiff to succeed with her delictual claim she is required to establish the following:

7.1 A wrongful act on either driver;

7.2 Fault, constituted by either negligence or intention. Again, this must be on either driver;

7.3 Causation. There must be a causal link between the wrongful conduct that was caused negligently or intentionally and the loss;

7.4 Patrimonial loss that flows directly from the above.

[8] It is not possible to raise the question of negligence without mentioning the case of *Kruger v Coetzee* [1]where it was held as follows:

"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."

[9] Insofar as I have raised the issue of the evidence of single witnesses in civil trials, it is worth mentioning that Section 16 of the Civil Proceedings Evidence Act, 25 of 1965 provides that 'judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.' See also the case of *Daniels v General Accident Insurance Co Ltd*[2]. Thus, it appears from the provisions of Section 16 of the Civil Proceedings Evidence Act aforesaid that the only requirements are that the witness must be competent and credible.

[10] Another issue in this matter concerns whether or not this Court can draw an adverse inference as a result of the Plaintiff's failure to call witnesses to support her case in circumstances where there is almost an obligation to do so for her to succeed with her claim against the Defendant. Adverse inferences in these instances have been drawn in various cases in the past. This is evident from the remarks of Solomon JA in the case of *Sampson v Pim* [3]where he said that if a witness was available to confirm a

[1] 1966 (2) SA 428 (A)
[2] [1992] 3 All SA 484 (C)
[3] 1918 AD 657 662

party's allegations and he was not called to give evidence the inference would be overwhelming that his evidence would have been unfavourable to the party not calling him. See also *Galante v Dickinson*[4].

[11] The first question is whether or not any negligence can be attributed to one of the drivers of the motor vehicles alleged to have been involved in this collision. The only evidence that I have in this regard is that levied by the Plaintiff. Fundamentally, her testimony was that she does not know what happened but she could recall hearing her fellow passengers screaming, saying that a certain vehicle was driving towards them. Thereafter, she does not know what transpired because she probably fell unconscious.

[12] The Plaintiff was in the company of her companion, one Rapatsa, who according to her, had also sustained injuries albeit that his were minor. No attempt was made to call this passenger despite his identity being obviously known to the Plaintiff. Quite apart from the failure to call Rapatsa, from the Plaintiff's testimony it is apparent that she was in a taxi with many other passengers but strangely, not even one of them was called. I am also at a complete loss why both or one of the drivers of the motor vehicles involved in the collision were or was not called to corroborate or in fact enlighten this Court what transpired because the Plaintiff does not know.

[13] Other than leading the evidence of various expert witnesses, the Plaintiff failed to prove documents such as the OAR, sketch plan and key by calling the police officer who drew them up. Consequently, I cannot take the contents of the OAR, sketch plan and key into consideration because they are hearsay and therefore improperly before me. It was manifest at the end of the testimony of the Plaintiff, especially on liability, that her evidence was insufficient to sustain the allegations of negligence in the particulars of claim but still her legal representatives would not call any witnesses to fill up this gaping hole.

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[4] 1950 2 SA 460 (A)

[14] What then is the meaning of all this? The following constitute answers to this question:

14.1 On the evidence of the Plaintiff alone, the collision has not been proved;

14.2 I cannot attribute negligence to either driver because I do not know who of them drove negligently despite the allegations contained in the particulars of claim;

14.3 I cannot take the OAR, sketch plan and key because no witness was called to introduce into evidence;

14.4 The evidence of the expert witnesses is irrelevant insofar as liability is concerned.

[15] Given the gravity of the injuries sustained by the Plaintiff, as described in the particulars of claim, and that the claimed amount is approximately **R2.5 Million**, it is shocking that the Plaintiff's legal representatives failed to anticipate and circumvent these basic problems. The ease with which Rapatsa or any other passenger in motor vehicle DJF 564 GP or one of the drivers could have been called to cure the Plaintiff's single witness evidence, makes this a fertile ground from which this Court can draw the negative inference referred to in the cases of Samson and Galante *supra.*

[16] Overall, I am not satisfied that the Plaintiff has, as she is expected, proved her case. That is not so much because she was a single witness but simply that no negligence has been shown on either driver. Bearing in mind that according to *Claude Neon Lights (SA) Ltd v Daniel*[5], the test for granting or refusing absolution from the instance, 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

[5] 1976 (4) SA 403 (A)

to such evidence, ‘could or might’ and not should, nor ought to’ find for the Plaintiff were the matter to proceed to finality, absolution is appropriate in this matter.

[17] In the result the action fails and I make the following order:

Absolution from the instance is granted.

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 01 December 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv M I Thabede**
Instructed by:	**Mphokane Attorneys**
Counsel for the Respondent:	**No appearance**
Instructed by:	

Date of Judgment: **01 December 2022**