




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

Case No.: 589/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
	<u>12 JUNE 2024</u>
SIGNATURE	DATE

In the application between:

PETROS BHEKI SHONGWE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOLELEKI AJ:

[1] The plaintiff, Mr Shongwe instituted these proceedings claiming damages against the Road Accident Fund for injuries sustained following a motor vehicle

accident that occurred on 24 February 2018, along the R541 Road, Ekukwathini, Mpumalanga Province.

[2] The parties agreed in terms of Uniform Rule 33(4) to separate merits from quantum. The court is therefore, proceeding on the issue of merits only. The determination of quantum is postponed *sine die*.

[3] The plaintiff testified and called two other factual witnesses.

[4] Common cause facts between the parties:

4.1 That the plaintiff has the necessary *locus standi in iudicio*;

4.2 That the court has jurisdiction to entertain the matter.

[5] This court is called upon to determine negligence on the part of the defendant.

[6] The evidence led on behalf of the plaintiff is that, he was travelling on a single carriageway road from Badplass to Nhlazatshe. There were four passengers in the Toyota Corolla motor vehicle he was driving. The plaintiff observed a vehicle driven by an unknown driver (“the insured vehicle”) approaching from the opposite direction. The insured vehicle left its correct lane of travel whilst overtaking another motor vehicle going towards Badplaas, resulting in the insured driver travelling on their lane of travel. To avoid a head-on collision, the plaintiff applied brakes, swerved his vehicle off the road to the left-hand side. The plaintiff in the process lost control of his vehicle and it overturned. There was no physical contact between his motor vehicle and the insured vehicle.

[7] The defendant led no factual witnesses in relation to the accident. The defendant’s counsel cross-examined the plaintiff and his witnesses regarding contributory negligence on the part of the plaintiff.

[8] The accident report and sketch plan were admitted into evidence as Exhibit “A”. The plaintiff and his witnesses did not participate in the compilation thereof. According to the plaintiff, he was in hospital for approximately six months after

the accident and he had never been approached by the police officers to obtain a statement from him. There was a discrepancy in the accident report and sketch plan in respect of whether there was another vehicle, the insured vehicle, involved. A similar discrepancy appeared in Exhibit “B”, an affidavit deposed to by one of the plaintiff’s affidavit, Mr Sibongiseni John Nzimande dated 9 October 2019. His explanation of the discrepancy is that the attorneys obtained information relating to the accident from the police station. He was merely required to sign. In my view, nothing much turns on this. An omission to mention the insured vehicle is not necessarily a contradiction.

- [9] The plaintiff and his witnesses appeared to be credible. They testified in a clear and consistent manner. They maintained their version regarding how the accident occurred. They corroborated each other in all material respects. It was put to the plaintiff that he would have been able to avoid the accident had he taken precautionary measures by not driving at an excessive speed. The presence of an unknown insured vehicle was also refuted.
- [10] The plaintiff refuted the assertions put to him by the defence counsel. He maintained that, had the insured vehicle kept to its lane of travel and not overtake when it was inopportune to do, the accident could not have occurred.
- [11] It is trite that the plaintiff bears the onus to prove negligence on a balance of probabilities on the part of the defendant. However, where contributory negligence and apportionment of damages is pleaded in the alternative, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities in respect of the counterclaim. The onus can only be discharged by adducing credible to support the case of the party on whom the onus rests in respect of their respective claims.
- [12] Section 1(1)(a) of the Apportionment of Damages Act, 34 of 1956 gives the court a discretion to reduce the Plaintiff’s claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court has to consider the evidence as a whole in assessing the degrees of negligence of the parties.

- [13] The defendant suggested that the plaintiff failed to keep his vehicle under control. However, the plaintiff's evidence remains unrefuted. His testimony supported by that of his witnesses was that he veered towards the left side of the road to avoid a head-on collision. He therefore refutes that he was negligent and thus contributed to the damages he sustained.
- [14] In the absence of any evidence to the contrary, it follows that the negligence of the insured driver was the cause of the damages suffered by the plaintiff. It remains undisputed that the plaintiff was confronted by an oncoming vehicle. He had to take an evasive action.
- [15] A man, who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger¹.
- [16] In judging the plaintiff, who, at the time was faced with an unexpected situation, he was required to take an immediate action to avoid a head-on collision. It cannot be said that the plaintiff should have foreseen the insured driver overtaking under the circumstances. I am unable to find that the plaintiff could have taken any preventative measures other than swerving his vehicle to the left of the road to avoid a head-on collision. At that moment, and in a split second, he had to quickly swerve out of the road. He took the only alternative available.
- [17] The Plaintiff is therefore, entitled to recover 100% of his proven damages. There is no reason to deviate from the general principle that costs follow cause.
- [18] In the result I make the following order:
- [1] The Defendant is held liable for 100% of the Plaintiff's proven damages as a consequence of the accident on 24 February 2018;
- [2] The determination of the plaintiff's quantum of damages is postponed sine die;

¹ Cawood v R 1944 GWLD 50 at 54.

[3] The defendant is to pay the cost of suit on a party and party scale.



MOLELEKI AJ
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

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Matter heard on 22, 24 & 25 April 2024

Judgment delivered on 12 June 2024

