

SOUTH AFRICA / JUDGMENT

Hattingh v Road Accident Fund (17406/2007) [2015] ZAGPPHC 659 (2 September 2015)

[2015] ZAGPPHC 659

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

17406/2007

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 17406/2007

2/9/2015

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Signature:

Date: 02/09/2015

HESTER

ELENA

HATTINGH

PLAINTIFF

and

ROAD

ACCIDENT

FUND

DEFENDANT

JUDGMENT**KHUMALO J**

[1] The Plaintiff instituted an action against the Defendant as a statutory insurer in terms of s 17 (1) of the Road Accident Fund Act 56 of 1996, (“the Act”) as amended, for compensation for damages she allegedly suffered as a result of injuries she sustained in a motor collision between a motor vehicle with registration number WTC 232 GP in which she alleges to have been a passenger, driven by Markus Visagie, her erstwhile boyfriend (“Visagie”) and a motor vehicle whose owner or driver she was unable to identify (“the insured driver”). She brought the claim under s 17 (1) (b) or alternatively under s 17 (1) (a), claiming that either the negligent driving of the unidentified driver, alternatively that of Visagie caused the accident.

[2] The Plaintiff alleges that the unidentified driver was negligent in one or all of the followings ways:

[2.1.] by failing to take a proper lookout;

[2.2.] by failing to avoid a collision with the other motor vehicle in which she was a passenger when with the exercise of proper and reasonable care he should and could have avoided the collision.

[2.3.] by driving in an excessive speed without taking into consideration the safety of other road users;

[2.4.] by stopping suddenly without warning in front of the other motor vehicle;

[2.5.] by failing to take the right of other road users into consideration, or alternatively, to act responsibly.

[3] or Visagie was negligent in one or all of the following ways:

[3.1.] He drove speedily behind the unidentified motor vehicle;

[3.2.] He failed to take a proper lookout;

[3.3.] He failed to avoid a collision with the other motor vehicle when he could have and should have done so with the exercise of a proper lookout;

[3.4.] He failed to stop or to stop in time;

[3.5.] He failed to take into consideration the right of the driver of the unidentified motor vehicle and or of other road users into consideration or to exercise caution.

[4] She alleges that from the collision she sustained an injury on her neck, a fracture of the left femur and suffered from a headache.

Consequently she is claiming compensation for damages as follows:

[4.1.] Medical Expenses

R30 000

[4.2.] Future Medical Expenses

R100 000.00

[4.3.] Past and Future Loss of Earnings

R800 000.00

[4.4.] General damages R400

000.00

[5] The Defendant denies liability, specifically denies that the Plaintiff had an accident or collision or suffered any damages as a result thereof, and has pleaded in the alternative that if it is found that the collision occurred as alleged, it denies that it was the negligence of either of the alleged drivers that caused the collision from which the Plaintiff sustained her injuries and puts the Plaintiff to the proof thereof. The Defendant further denies that the bodily injuries allegedly sustained by the Plaintiff are of a serious nature and therefore denies that it is liable to the Plaintiff for non-pecuniary damages.

[6] In a minute of a pre-trial conference held by the parties on 24 October 2014, a few days before trial, the parties confirmed that the issue of negligence and of the occurrence of the accident remains in dispute. They further agreed that the matter will proceed on the merits only and the issue of quantum be postponed sine die.

[7] Plaintiff subsequently amended her particulars of claim to add a sentence that reads: 'the accident happened in a public parking area in Welkom and annexed thereon a document titled "a statement of Plaintiff's version of facts." The statement reads:

"on the night of 26 April 2009, Plaintiff and Mr Visagie visited Milky lane in Welkom where they met up with family. Later on their way home, Mr Visagie pulled out of the parking and started to drive towards the left exit of the parking when an unidentified motor vehicle that was driving in front of them suddenly applied brakes and stopped without any warning. Visagie also tried to stop but could not do so in time and his motor vehicle collided with that of the unidentified motor vehicle. The Plaintiff hit her head on the left side of the door of the motor vehicle. She had severe pains and was also confused and dizzy. Her family who were also at Milky lane came to the gate and she at that time realised that her arm has also been injured. She was taken to Medi-clinic in Welkom where x-rays were done on her arm and was told that her arm was broken. She was there overnight. "

[8] At the beginning of the trial I accordingly made an order that the matter proceed on the merits and postponed the issue of quantum sine die.

[9] On the merits the issue that was in dispute and clearly of concern to the Plaintiff right from the beginning of the trial was whether or not at the time of the alleged collision Mr Visagie or Plaintiff was the driver of the motor vehicle they were travelling in? due to the fact that in her particulars of claim Plaintiff alleges that Visagie was the driver however in her hospital records that she discovered (hereinafter referred to as "Exhibit A") it is stated that the patient (Plaintiff) said "syt aan ander voertuig gebots" (she collided into another motor vehicle). Negligence was therefore in that context also in dispute. There was no police report on the accident and therefore there was no other independent evidence from which the statement could have been verified.

[10] This was of significant importance as the liability of the Fund is to compensate a person (the third party) who has suffered loss or damage as a result of bodily injury to himself or herself or the death of or any bodily injury to any other person as contemplated by the Act.

[11] While the Fund is a person on whom liability is imposed in circumstances contemplated as mentioned to the third party, it is

not, as it has been found, under any liability to a negligent driver who inflicts loss or damage upon a third party or himself. However a person whose injuries were caused partly by his own fault and partly by the fault of another motorist is entitled to compensation see *Smith v RAF* 2006 (ZASCA) 15[2006] ZASCA 15; ; 2006 (4) SA 590 SCA.

[12] The onus is upon the Plaintiff to prove the liability of the Defendant on a balance of probabilities. The Plaintiff will therefore

have to prove that there was a collision caused by either Visagie or the driver of the unidentified vehicle's negligence.

EVIDENCE

[13] There was testimony only on behalf of the Plaintiff that was led by the Plaintiff and her sister, Mrs Nel. The Defendant indicated that the matter will be decided on the Plaintiff's case.

[14] The original copy of the hospital record of the Groote Schuur trauma unit where the plaintiff was admitted was submitted by the plaintiff but only to the extent that it is what it purported to be, and not as to the truthfulness of its content. There was no objection to the authenticity thereof. The Plaintiff's Counsel indicated her intention to place in issue the truthfulness of a certain recording in the document. The Defendant had no objection to such an unusual occurrence, be that as it may it was accepted as "Exhibit A".

[15] Plaintiff testified that she was no longer in a relationship with Visagie. After the accident Visagie never took her to hospital or reported the accident. She has called upon him to come and give evidence in support of her claim. When the accident occurred as recorded in Exhibit "A" ("the hospital record"), she was not driving (that is how she commenced her evidence) but was a passenger in the front seat of the two-seater bakkie. At the hospital she

told them that she was in an accident and does not remember telling anybody that she was the driver of the vehicle involved. She did not see what the hospital wrote, nevertheless she would not have driven the vehicle as Visagie did not generally allow other people to drive his vehicle anyway. She told her sister that Visagie was driving and that there were 2 vehicles involved. Theirs hit the other vehicle on the right hand side and it in turn hit their car at the back. Their car was damaged on the right front, the other car was damaged on the left rear. The other vehicle drove away after the accident. She sustained injuries on her left side body when she hit the front of the vehicle. Before the collision they were all having milkshake together. She called her sister on her cellphone to come and help her after the accident.

- [16] Under cross examination her testimony was that she was no longer in a relationship with Visagie. She confirmed that the response recorded by the hospital attributed to her came from her when she was asked what happened and, was correctly recorded by the hospital as “syt aan ander voertuig gery” “she drove into another vehicle”. The hospital staff recorded what she said. In re-examination she said she told them she was in an accident and agreed that what she said was then recorded on the document.

Answering a leading question, asked if that is what she really intended to say to the hospital and if she really meant to agree as she did under cross examination she then alleged to have misunderstood the question. Then and there she altered her

answer and alleged that on admission she actually said that “ons aan ander voertuig gery.” She could not offer a reason why Visagie did not take her to hospital or report the accident.

- [17] The second witness for the Plaintiff s was her sister Mrs Nel. According to her on that day they were all at a mall, herself,

husband, children, Plaintiff and Visagie. Plaintiff left with Visagie, they were in Visagie's bakkie and he was driving. Plaintiff

never drove the bakkie as Visagie never Jet her. She did not see the accident happen. She was called to the scene by the Plaintiff after the accident has happened. Plaintiff told her that they had just had an accident and she was hurt so she should come quickly. When she arrived she found Plaintiff in shock and serious pain sitting in the passenger seat of the car. Plaintiff thought her arm was broken so they got her in their car and left to go to medi-clinic. She went into the clinic with the Plaintiff. Plaintiff told her that Visagie was driving. At the hospital she (Nel) is the one who told them about the accident. She could not remember the exact words that were said but plaintiff did not speak to them as she was still in shock. She told them that Plaintiff was a passenger in the motor vehicle and did not tell anybody that Plaintiff was driving the car neither did she hear the Plaintiff say so. Plaintiff was sitting on the left hand side when the injuries were sustained. She does not remember anything further. She told them that Plaintiff was a passenger in a motor vehicle and involved in an accident. She never told them who was driving.

- [18] Her testimony under cross examination was that when the Plaintiff and Visagie left the parking lot she did not see who was driving the bakkie. When she arrived at the collision scene, Visagie was in the motor vehicle and very apologetic. She asked Plaintiff to allow her to take her to hospital. She spoke on Plaintiff's behalf at the hospital and they recorded what she said albeit wrongly and without any reference to her name. She confirmed that the hospital record, that is Exhibit "A" does not mention her anywhere but only mention the Plaintiff the patient.
- [19] Defendant closed its case.

ANALYSIS

OF THE EVIDENCE

- [20] The testimony of the Plaintiff right from the beginning dealt with the content of Exhibit "A" refuting that what was recorded therein is what the Plaintiff told the hospital staff about the accident. The issue of negligence was not dealt with although that was also under dispute. Plaintiff from the outset denied ever saying she drove into the back of another car as recorded, though did not deny that she spoke to the hospital staff during her admission. She said she remembers that she told them that she was in an accident but denied that she told them that she was the driver or driving. She also told her sister Ms Nel that Visagie was driving and Visagie never let anybody drive his car anyway, a fact that was independently attested to by Nel.
- [21] Now the question that is raised by such evidence is if both the witnesses could testify to the fact that Visagie never allows anybody to drive his bakkie, also that when Plaintiff and Visagie arrived or left the centre Visagie was driving, further that when Nel arrived at the collision scene Visagie was sitting in the driver's seat and the plaintiff on the passenger seat as observed and expected by the two, there being nothing unusual about her sitting in the passenger seat, if all this being true, why would Plaintiff feel the need to tell Nel that it was not her but Visagie that was driving? Unless Nel found Plaintiff on the driver's seat. It would however not make sense if when they left Visagie was driving and there was no likelihood that he would have allowed the Plaintiff to drive. It is therefore highly probable that the supposition is correct that she was driving Visagie's vehicle at the time of the accident, otherwise the explanation would not make any sense.
- [22] Furthermore, in her evidence in chief, Plaintiff said she spoke to the admission people at the hospital even though she did not see what they recorded. According to her she told them she was in an accident and did not tell anybody that she was driving. Under cross examination she confirmed that what was written on the hospital record was exactly what she said to them. However on re-examination she then refuted her confirmation saying what was in the hospital record is not what she intended to say. When she confirmed under cross examination she did not mean to agree that what was written was correct. In essence she contradicted herself. What was noticeable as well is that when Plaintiff spoke about the

hospital and what was said there, she never mentioned Nel.

- [23] Nel on the other hand said Plaintiff could not speak to them at the hospital, she was in shock, as a result she did all the talking, notwithstanding the record confirming that the information was provided by the patient herself (Plaintiff) who spoke to them, Nel was adamant she is the one who did the talking. So not only does the Plaintiff contradict herself on the material facts, but her evidence does not correlate with the seemingly contrived evidence of her witness. Now why would Nel deem it necessary to tell lies especially on the aspect whether or not Plaintiff spoke at the hospital, if not to try and quash what is attributed to have been said by the Plaintiff which could imply that the Plaintiff was driving. So if she says Plaintiff was not talking then there will not be any likelihood that Plaintiff would have told the hospital that she drove into somebody's car. That is why it was also necessary for Nel to allege that Plaintiff told her that she was not driving when she supposedly found Plaintiff on the passenger seat. The most probable fact is that the Plaintiff was driving.
- [24] As the Plaintiff and her witness were unreliable, there is no credible evidence by the Plaintiff that the court can rely upon to establish if the plaintiff has a legitimate claim in terms of which she has to be compensated as a third party. I find on the balance of probabilities that the Plaintiff as she mentioned in the hospital record that she drove into the back of another car, was probably the driver and not a passenger of motor vehicle registration number WTC 232 GP. It explains why Visagie never reported the accident and he was not called by the Plaintiff to testify even though it is alleged that his vehicle was also damaged. It also explains Nel's contrived evidence. What aggravates the complications in this matter is that neither the Plaintiff nor Visagie reported the accident.
- [25] As pointed out already, the Defendant is responsible for and obliged to compensate victims of motor vehicle accidents for damages suffered as a result of the negligence of drivers other than themselves.
- [26] The Plaintiff has failed to prove on a balance of probabilities that the Defendant is liable for her damages, she failed to lead evidence that substantiates the particulars upon which she relies.
- [27] The Plaintiff's Counsel raised an argument on the failure by the Defendant to lead the evidence of Visagie or any evidence in rebuttal of the Plaintiff's allegations and the admissibility of the contents of Exhibit "A" as well.
- [28] In respect of the first contention there was no case for the Defendant to meet. With regard to Mr Visagie there was a disagreement

if he was to be called by the Plaintiff or Defendant. On the second, the general rule is that a party wishing to produce a document must prove the authenticity thereof; see *R v Southall* 1921 TPD 403; *Policansky Bros v L and H Policansky* 1935 AD

89. The Plaintiff is the one who introduced the document and proposed that it be admitted for the purpose of leading the evidence of the Plaintiff which was accepted and not challenged by the Defendant. It had therefore to be admitted into evidence by the Court.

[29] It is therefore ordered that:

[29.1.] The Plaintiff's claim is dismissed with costs.

N V KHUMALO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

For the Plaintiff: L Kok

Instructed by: Christo Botha Attorneys

Ref: Mr Van Aarde

For the Defendant: L Aphone

Instructed by: Diale Mogashoa Attorneys

Ref: Mr Aphone

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