

SOUTH AFRICA / JUDGMENT

Lourens v Road Accident Fund (31816/2017) [2018] ZAGPPHC 621 (23 August 2018)

[2018] ZAGPPHC 621

COURT

North Gauteng High Court, Pretoria

BEFORE

E Van der Schyff

CASE / FILE NUMBER

31816/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 31816/2017

23/8/2018

In

the matter between:

MJ

Lourens

Plaintiff

and

Road

Accident

Fund

Defendant

Heard:

16 August 2018

Delivered:

23 August 2018

JUDGMENT

VAN DER SCHYFF, AJ

Introduction

- [1] The plaintiff instituted action against the defendant and claimed damages in accordance with section 17(1)(b) of the Road Accident Fund Act, No 56 of 1996. The plaintiff was injured in what is generally referred to as a hit-and-run accident because the owner and driver of the insured vehicle remained unidentified. The facts as they were set out in the particulars of claim will be revisited below.
- [2] At the onset of the trial the parties requested and agreed that I order a separation of the issues of merit and quantum as provided for in Rule 33(4) of the Uniform Rules of Court, and to deal first with the merit aspect of the claim. The quantum aspect was to be postponed sine die.
- [3] After considering the application, I found that it would be convenient to deal with the merits of the dispute first and to postpone the issue of quantum sine die. It was thus ordered.
- [4] Hereafter, the applicant applied for a ruling as to the party upon whom the onus of adducing evidence first falls in terms of Rule 39(11) of the Uniform Rules of Court.
- [5] The plaintiff made out a proper case that the onus to adduce evidence first rests on the defendant. Since the application brought in terms of Rule 39(11) and the relevant facts as they appear from the pleadings as supplemented by the minutes of the two pre-trial

conferences have a bearing on both the subsequent course of the trial, and the costs order that I am making, it needs to be set out in some detail.

- [6] The plaintiff stated as follows in the particulars of claim in paragraph 5:

"5.1 On or about 6th day of May 2016 at approximately 16h00 to 17h00, and at Bultfontein/Lusthof, Pretoria, the Plaintiff was the driver of a Yamaha 200 Blaster quadbike, which he drove on a gravel road adjacent to the tarmack road.

5.2 The Plaintiff was approached by an oncoming unidentified white Toyota Corolla, ("herein referred to as the insured driver") there and then driven by an unknown person, that encroached his lane of travel on the gravel road, and the Plaintiff was forced to swerve to his left."

- [7] In paragraph 6 of the particulars of claim the plaintiff averred that "[t]he aforesaid accident was caused by the sole negligence of the insured driver, who was negligent in one of the following grounds... "
- [8] The defendant pleaded in paragraph 4 of the plea: "The Defendant bears no knowledge of the allegations contained herein and put the Plaintiff to the proof thereof". In paragraph 5 of the plea the defendant denied "that the collision was caused by the sole negligence of the

said insured driver as alleged or at all . . . The Defendant avers that in the event the above honourable Court finding that indeed the Plaintiff was involved in the collision aforesaid and was a driver as alleged (both of which is denied), then in the event that the Defendant submits that the collision was caused by the sole negligence of the driver (Plaintiff s), who was negligent in one or more or all of the following respects:-" ... The defendant then pleaded in the alternative, that should the court find that the driver of the unidentified vehicle was negligent as alleged by the plaintiff, that the plaintiff was also negligent and that the damages suffered by the plaintiff must be reduced and apportioned in accordance with the provision of the Apportionment of Damages Act 34 of 1956.

[9] It is evident on the pleadings the plaintiff bore the onus to begin at the close of pleadings.

[10] However, two pre-trial conferences took place. It is apparent from the minutes of the first pre-trial conference that took place on 28 August 2017, that although the merits remained in dispute, the defendant's version as how the accident took place was in accordance with the accident report. The plaintiff's version of how the accident took place was set out in the s 19(f) affidavit. It must be stated at this stage that the explanation of how the accident occurred as set out in the respective documents are almost identical, the only difference is that there is more detail contained in the plaintiff's affidavit.

[11] The following admissions were made by the defendant during the first pre-trial conference:

- (i) The plaintiff was involved in a motor vehicle accident on 6 May 2016 at 16h00- 17h00;
- (ii) The plaintiff was the driver of a Yamaha 200 Blaster quad bike;
- (iii) The plaintiff was driving on the Bultfontein/Lusthof road, Pretoria;
- (iv) The plaintiff was driving on the gravel portion, adjacent to the road;
- (v) The insured driver is an unidentified white Toyota Corolla, with unknown registration number and unknown particulars of the driver;
- (vi) There was another unidentified vehicle involved in the accident;
- (vii) The insured driver was contributory negligent along with the plaintiff;
- (viii) The plaintiff was wearing a helmet at the time of the accident;
- (ix) The plaintiff had no choice but to take evasive action and to swerve to his left, as a result of which he lost control of the bike.

[12] The parties conducted a second pre-trial meeting on 12 July 2018. During this pre-trial meeting the parties confirmed that the admissions and agreements and contents contained in the minutes of the pre-trial held on 28 August 2017 stand as if incorporated in the minutes of the pre-trial meeting conducted on 12 July 2018.

- [13] The defendant proposed that an apportionment should be made. It is imperative to note that at point 15 of the minutes it is stated that "The Defendant has onus & duty to start in respect of contributory negligence".
- [14] Despite this remark captured on the signed pre-trial notice the defendant opposed the application in terms of Rule 39(11).
- [15] It is imperative to note that the plaintiff never applied for the withdrawal of any of the admissions made at any of the Rule 37 pre-trial conferences.
- [16] It is trite that admissions of fact made at a rule 37 conference constitute sufficient proof of those facts-MEC v Kruizenga 2010
- (4) SA 122 (SCA) 126E-127B.
- [17] In light of the fact that the admission was made during the pre-trial conference that the insured driver of the unidentified vehicle was contributory negligent, the plaintiff relied on, amongst other, Ntsala v Mutual & Federal Ins Co Ltd 1996
- (2) SA 184 (T) 190, Alberts v Engelbrecht 1961
- (2) SA 644 (T), and Motor Insurers Association of South Africa v Boshoff 1970
- (1) SA 489 (A) 502, and argued that the onus is 'undeniably' on the defendant to adduce evidence and so is the duty to begin.
- [18] The defendant did not deny that the admissions were made but argued that the admissions were qualified by the remark in the pre-trial minutes of 12 July 2018 where it is stated "The Defendant's propose that there will be an apportionment in the matter, noting that the plaintiff was a driver. The Defendant is awaiting instructions from client."
- [19] This remark does not discount the fact that the admissions are sufficient proof that there was negligence on the part of the insured driver. In light of the fact that a plaintiff needs to prove only 1% negligence on the side of the insured driver to succeed with a claim against the Fund (Tsotetsi v RAF (72217/2009)(2016] ZAGPPHC 36), the duty is on the latter to adduce evidence to the contrary or take a risk that judgment be given against him (Ntsala supra).
- [20] I accordingly ordered that the onus rests on the defendant to begin.
- [21] It then became apparent that the defendant had no witnesses, and it is doubtful whether the defendant ever had a witness. The defendant's counsel argued that an assessor's report was received at the last minute and based on this report, he received instructions to repudiate the claim. (It must be recorded one again, that despite being in possession of this assessor's report, no application was made for the withdrawal of the admissions made during the pre-trial. It must also be noted that the assessor's report was then handed up and I was stunned to see that the defendant's counsel spent a substantial amount of time arguing that the onus to begin rests on the plaintiff despite the admissions being made during pre-trial, based on the flimsy, superficial assessor's report that contained no information that was not already

contained in the documents taken up in the court file.). The defendant thus only argued from the bar that I should apportion the blame between the plaintiff and the driver of the unidentified vehicle.

[22] Counsel for the defendant based his argument on the following points:

(i) From the sketch plan on the accident report it appears as if the plaintiff drove on the road and this contradicts the explanation as contained in the s 19 affidavit.- I looked at the sketch plan and read the brief description of the accident as set out on the accident report below the sketch plan. This contention has no merits.

(ii) The plaintiff failed to present evidence pertaining to several aspect listed in the written heads of argument submitted by defendant's

counsel. - In light of the admissions made during the pre-trial the onus shifted to the defendant who had to produce evidence, this was not done.

(iii) The only evidence before the court was the accident report and the section 19 affidavit. The parties agreed at the pre-trial of 12 July 2018 that a document contained in the bundle will only form part of the evidence before court if it is formally admitted or presented as evidence at trial. I can therefore not consider any hospital records since these are not evidence before the court. This being said, the mere fact that the plaintiff might have consumed alcohol in itself is not proof of contributory negligence.

[23] In light of the above I cannot find that the plaintiff was negligent in any manner. No apportionment of blame is made. Through the admissions made during the pre-trial it was established that the insured driver was at least 1% negligent. The plaintiff accordingly succeeds on the merits.

Costs

[24] It was argued on behalf of the plaintiff that the defendant should not have brought this matter to trial in view of the fact that there were no witnesses who could testify on the defendant's behalf regarding the merits. In view of the latter fact the submission was made that defendant conducted the litigation with disrespect and in an improper manner. This would, according to the plaintiff justify a cost order on attorney and own client scale. Plaintiff also asked for costs of two counsel as in view of the circumstances of the case it was a wise and reasonable precaution to engage two counsel.

[25] It was argued on behalf of the defendant that costs are a matter of discretion for the trial judge. The argument was then made in the written heads of argument that the defendant paid full attention to this matter and appointed assessors to investigate the claim, and that the defendant had a right to defend the action. Counsel for the defendant denies that this matter is of such a nature that it needed the attention of two counsel.

- [26] In view of the admissions made during both pre-trial conferences there is no basis on which the defendant should have proceeded without any witnesses to discharge the evidentiary burden that fell on the defendant's shoulders when the admissions were made.
- [27] It is unacceptable that a party who agrees during a pre-trial conference that the onus to begin rests on it, argue against an application to that nature, without applying for the withdrawal of the relevant admissions.
- [28] Plaintiff handed up a draft order which contained several detailed prayers pertaining to costs. I am not convinced that this matter was so complex and intricate that it required the attention of two counsel. In addition, I am not going to make a cost order pertaining to the application for default judgment since this was not argued comprehensively to enable me to make a court order in this regard.

ORDER

In view of the aforesaid it is ordered that:

- [1] The defendant is to pay 100% of the plaintiff's proven or agreed damages;
- [2] The adjudication of the issue of quantum is postponed sine die;
- [3] The defendant is ordered to pay the plaintiff's taxed or agreed attorney and client costs on a High Court Scale, which costs shall include but not be limited to the following:
- [3.1] The fees of one counsel, inclusive of the drafting of the heads of argument, advice on evidence, and consulting with experts where applicable, and plaintiff's counsel's day fee and the reservation for trial, preparation for trial, consultation with client, attorney, witnesses and conducting inspections in locos;
- [3.2] Reasonable costs for the attorney, correspondent attorney and counsel pertaining to pre-trial preparation, drafting and copying of all the documents including trial bundles and bundles for witnesses containing expert reports, pleadings and notices, travelling, travelling time, subsistence, accommodation, all necessary consultations and attendance of both pre-trial conferences, trial preparation, inspections in locos, court attendances;
- [3.3] The costs of the expert mentioned below, including but not limited to travelling, travelling time, preparation for trial, qualifying and reservation fees (if any, and upon proof thereof), court attendance (if attended), attending inspections and scene of the accident:
- [3.3.1] Prof Lemmer (Accident reconstruction expert)
- [3.4] All the costs of assessors employed by plaintiff (if any, and upon proof);
- [4] All travelling costs allowed are inclusive of toll gate and e-toll charges;

- [5] The reasonable travelling costs, traveling time, subsistence, accommodation and transportation costs, if any and upon proof thereof, of the plaintiff in attending court on the day of trial;
- [6] The costs of a consultation between the plaintiff and his attorney to discuss the settlement offer received from the defendant and the terms of this order;
- [7] Payment of the abovementioned costs by the defendant is subject to the following conditions:

[7.1] The plaintiff is ordered to serve the notice of taxation of the plaintiffs attorney and client bill of costs on the defendant's

attorneys of record;

[7.2] The defendant is ordered to pay the plaintiff's taxed or agreed upon attorney and client costs within 21 days from the date on which the accounts are taxed by the Taxing Master or agreed upon between the parties;

[7.3] Should payment not be affected timeously in accordance with paragraph 7.2 above, the plaintiff will be entitled to recover interest at the prescribed rate of 10.25% on the taxed or agreed costs from the date of the allocatur to date of final payment;

[7.4] Costs must be paid into the plaintiff's attorney's trust account.

E VAN DER SCHYFF

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

16 August 2018

For the Plaintiff /Applicant: ADV BEACH SC

ADV KEHRHAHN

Instructed by:

ROETS & VAN RENSBURG INCORPORATED

For the Defendant/Respondent: ADV MATIKA

Instructed by:

TAU PHALANE INCORPORATED

Date of Judgment:

23 AUGUST 2018

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