

SOUTH AFRICA / JUDGMENT

Maphosa v Road Accident Fund (4912/14) [2017] ZAGPPHC 379 (18 May 2017)

[2017] ZAGPPHC 379

COURT

North Gauteng High Court, Pretoria

BEFORE

Petersen

CASE / FILE NUMBER

4912/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 4912/14

DATE: 18/5/17

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED
In

the matter between:

ANNA
PINOCHET NOMTHANDAZO
MAPHOSA
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

PETERSEN AJ:

- [1] The plaintiff instituted action against the defendant for damages arising from a motor vehicle collision on the 30 October 2012 in which she sustained serious bodily injuries. The plaintiff alleges that she was the driver of a motor vehicle with registration number [W...] when an unknown motor vehicle entered her lane of travel causing her to lose control of her motor vehicle whilst trying to avoid colliding with the said motor vehicle.
- [2] The plaintiff pleads that "the said collision was caused by the negligent driving of insured driver in one or more of the following respects:
1. He/She travelled at a high speed in the prevailing circumstances;
 2. He/She failed to keep a proper lookout and had no regard for the other users of the road and particular the Plaintiff;
 3. He/She failed to apply brakes timeously or at all;
 4. He/She failed to have sufficient regard for the rules of the road;
 5. He/She failed to avoid the collision when by the exercise of reasonable care they could and should have done so;
 6. He/She failed to exercise the care of a reasonable person would have exercise under the prevailing circumstances."
- [3] The plaintiff, Ms Maphosa, testified in support of her claim and relied on the evidence of a passenger in her motor vehicle at the time of the collision, Mr Mpho Samuel Motsepe. The plaintiff's case was then closed.
- [4] At the close of the case for the Plaintiff, the defendant brought an application for absolution from the instance, which the plaintiff opposed. The approach to an application for absolution from the instance is trite. In *Gordon Lloyd Page & Associates v Riviera and Another* 2001 (1) SA 88 (SCA) Harms JA set out the definitive approach to an application for absolution from the instance as follows: "The test for absolution to be applied by a trial court at the end of a Plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976

(4) SA 403 (A) at 409G - in these terms: 'When absolution from the instance is sought at the close of Plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)' This implies that a Plaintiff has to make out a prima facie case - in the sense 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 (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). ... The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a Plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

- [5] The defendant's application is premised in the main on the forms of negligence pleaded at paragraph 5 of the particulars of claim and the evidence tendered in proof thereof. Whilst the focus of the defendant's application is on the pleaded case and the evidence presented in relation thereto, it is intrinsically linked to the quality of the evidence and the credibility of Ms Maphosa and Mr Motsepe.
- [6] The sentiments of Williamson J in S v Mpetha 1983(4) SA 262 (C) at 265d-g, albeit in an application for discharge of an accused in terms of section 174 of the Criminal Procedure Act 51 of 1977, are apposite in an application for absolution at the close of the case of a plaintiff. Williamson J stated: "However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. If a witness gives evidence which is relevant to the charges being considered by the Court then that evidence can only be ignored

if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional

case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled "while rejecting one portion of the sworn testimony of a witness, to accept another portion". See R v Kumalo 1916 AD 480 at 484 .. "

- [7] I turn to the pleaded case. In considering the evidence of the plaintiff, no evidence was tendered on the speed of the alleged

unknown motor vehicle; that the driver of said vehicle failed to keep a proper lookout; failed to apply brakes timeously or at all; failed to have regard to the rules of the road; that there was no collision with that vehicle which could have been avoided; or any indication as to what the prevailing circumstances were requiring of the said other driver to exercise the care of a

reasonable person. The only aspect of the pleaded case that stands out is that the unknown vehicle as at paragraph 4 of the particulars of claim "came into the Plaintiffs lane of travel", causing her to lose control of her vehicle in trying to avoid colliding with the said vehicle.

[8] The collision occurred on 30 October 2012. The plaintiff instituted the claim against the defendant at the behest of her mother. On 20 June 2013 she submitted Form RAF 1 to the defendant and deposed to a section 19(f) affidavit drafted and typed by her mother on 05 November 2013, more than one year after the collision. Mr Motsepe deposed to an affidavit more than two years later on 20 February

2015. A basis was laid for cross examination on both affidavits.

[9] The following emanated from the cross examination on the affidavits as against the oral evidence: In Ms Maphosa's affidavit she does not mention that she swerved, whether it be to the left or right to avoid a collision with the unknown vehicle. In her oral evidence she made mention for the first time that she swerved to the left, hit a kerb and lost control of her vehicle until it struck a concrete block in the centre of a traffic circle. Mr Motsepe's affidavit makes mention of Ms Maphosa swerving to avoid an oncoming vehicle, but does not state whether it was to the left or right. Mr Motsepe in his oral evidence for the first time mentions that Ms Maphosa swerved to the left and struck a kerb with the audible sound of a tyre burst.

[10] Mr Motsepe went on to make a number of concessions under cross examination. He admitted the correctness of the details of a

telephonic conversation he had with the defendant's accident reconstruction expert Mr Barry Grobbelaar on 20 March 2017, albeit

that he initially attempted to impeach the credibility of Mr Grobbelaar. The concessions include, amongst others, that he cannot indicate the speed at which they were travelling as he did not see the speedometer; it was dark and he does not think there were street lights; he cannot indicate how far the unknown vehicle was in front of their vehicle when the driver swerved, as it all happened in a split second and he cannot remember whether the plaintiff swerved to the left or to the right to avoid the approaching vehicle.

[11] Mr Motsepe initially testified that he had not spoken to police officers at the scene of the accident but later testified he could not remember if he did. An Accident Report Form was completed at 22h00pm on the evening of the 30 October 2012. The document was admitted at the commencement of the trial to be what it purports to be. It forms a crucial part of the claim instituted by the plaintiff against the defendant. It is clear from the evidence that Ms Maphosa was seriously injured and received medical attention at the scene. Mr Motsepe was injured but not to the extent that he could not speak. If Mr Motsepe had not spoken to the police officers at the scene to report what had transpired, it becomes inexplicable where the police officer completing the form would have obtained the comprehensive details of both Ms Maphosa and Mr Motsepe. To demonstrate. Both Ms Maphosa and Mr Motsepe's identity

numbers, addresses and cellular phone numbers are recorded on the Accident Report Form. There is no indication of any other witnesses to the collision yet a brief description of the accident is recorded. The description reads as follows: "Driver failed to control vehicle when approaching traffic circle. Drove over traffic circle and collided with a concrete block erected in the middle of circle." The description given at the time of the collision makes no mention of the presence of an unknown vehicle or its movements which may have given rise to the eventual collision with the concrete block.

[12] The totality of the evidence in the plaintiffs case shows the omission of relevant crucial information about the collision in the affidavits, the addition of evidence on the sequence of events leading up to and during the collision tantamount to recent

fabrication and impacts on the quality of the evidence and the credibility of Ms Maphosa and Mr Motsepe.

[13] The plaintiff bears the burden of making out a prima facie case on the elements of the claim. In light of the evidence presented the question is whether this court could or might (not should nor ought to) notwithstanding the quality of the evidence find for the Plaintiff or whether a possibility exists of the plaintiff's case being supplemented by the defendant.

[14] Having considered the totality of the plaintiffs case, the plaintiff has not made out a case on a balance of probabilities to justify a finding in her favour.

[15] In the result:

Absolution from the instance is granted with costs.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Advocate Nkabinde

Instructed by: Matsi Mailula Incorporated

On behalf of the Defendant: Advocate Kekana

Instructed by: Brian Ramaboa Incorporated

DATE HEARD: 19, 20 April 2017 and 16 May 2017

DATE OF JUDGMENT: 18 May 2017

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