

SOUTH AFRICA / JUDGMENT

Mathebula v Road Accident Fund (734/2016) [2017] ZAGPPHC 713 (15 November 2017)

[2017] ZAGPPHC 713

COURT

North Gauteng High Court, Pretoria

BEFORE

M F Legodi

CASE / FILE NUMBER

734/2016

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IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

CASE NUMBER 734/2016

DATE 15/11/2017

GIDION JABULANI MATHEBULA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

LEGODI J,

[1] The dispute in this case against the Road Accident Fund (the defendant) is whether when the plaintiff lost control of his vehicle

was because he was trying to avoid a head-on collision with a truck which suddenly appeared on his lane.

- [2] The suggestion by the defendant is that the plaintiff must have lost control of his vehicle without any truck being involved or any insured vehicle been involved. For the suggestion the defendant relied on the evidence of a police official, Constable Mondlane who is said to have arrived at the scene after he was so directed to the scene.
- [3] The plaintiff was the only witness who testified as to how the collision took place. At the end of his evidence he closed his case. The court was in a way confronted with two mutually destructive versions.
- [4] Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told is not satisfactory in every respect, it must be clear to the court that the version of the litigant upon whom the onus rests is the true version[1].
- [5] In any civil case, as in any criminal cases the onus can only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he or she satisfies the court that on a preponderance of probabilities that his or her version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiffs allegations against general probabilities. The estimate of the credibility of a witness will therefore be inextricable bound up with consideration of the probabilities of the case, and if balance of probabilities favours the plaintiff, then the court will accept his or her version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiffs case any more than they do the defendant; the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false[2].
- [6] In the present case, the plaintiff's version can be summed up as follows: It was in the evening of 13 September 2013 round about 20h00 to 21h00 when driving from the direction of Graskop to Bushbuckridge next to Konwys-Pass in a misty and drizzling weather, at a curve going down mountainous area, a truck at a distance of about 3 to 5 metres was seen on the plaintiffs lane. The plaintiff tried to avoid head- on-collision by swerving to his right and in the process lost control of his vehicle which went down the mountain into a bushy area. It took the plaintiff some hours to be back onto the road when he was met by the towing personnel who reported that they have been looking for him. Immediately thereafter an ambulance arrived and whilst in the ambulance police officials arrived and told how lucky he was to survive because many people who lost control of their vehicles at the spot in question did not survive. Thereafter he was taken to a hospital and only spoken to the police about how the accident occurred on 1 December 2013 after he was released from the hospital.

[7] In an attempt to refute the plaintiff's evidence as to how the collision occurred, the defendant's version put to the plaintiff

under cross-examination was that the road was clear and dry on the evening in question. This version did not last for long because

Constable Mondlane on behalf of the defendant having taken the witness stand, was not led on the condition of the road. It must

therefore be accepted that it was misty and drizzling. This perhaps explains why the plaintiff lost control of his vehicle. I deal later in this judgment with the question whether the version of the plaintiff as to what happened is more probable than that of the defendant.

[8] The plaintiff's evidence that the first people who met with him were towing people, ambulance staff and only thereafter the police who spoke to him whilst inside the ambulance arrived, was not refuted by Constable Mondlane neither was he asked to comment on the plaintiff's version in this regard. I understood counsel for the defendant to contend that it was not necessary to do so because Constable Mondlane's version was that he met with the plaintiff next to the Air Wing. The Air Wing in question is about few metres from the spot where the plaintiff went off the road and therefore the fact that he allegedly met with the plaintiff next to Air Wing meant nothing significant to justify omission to comment through Constable Mondlane on the version of the plaintiff as indicated in this paragraph and paragraph

[6] above.

[9] There are various factors which clearly border around the credibility of Constable Mondlane. As a start, he says he received a call from 10111 number when the accident was reported. Then in his oral evidence he indicated that it took him sometime to locate the place because initially he thought it was on the mountains towards the direction of a place called Pilgrim's Rest. This version too did not last for long and is unsatisfactory on a number of factors. For example, Constable Mondlane in his affidavit deposed on 13 September 2013 at 02h05 stated:

"At about 00:35 on Friday 2013-09-13 I received a call from Lima Control

(10111) about an accident on the road to Bushbuckridge. We searched for the involved person and found him at the Konwyspass"

[10] Two issues arise from the statement. Firstly, Pilgrimrest direction is direct opposite to Bushbuckridge direction if one moves from Graskop Police station. Why would Constable Mondlane head to the direction of Pilgrimrest to look for the plaintiff instead of going towards Bushbuckridge direction beats one sense of logic and has a bearing on Constable Mondlane's credibility and reliability.

Secondly, his assertion that he met with the complainant at or near Air Wings before the spot where the incident took place in my view is in direct contrast to the statement that he "found him at the Konwyspas".

[11] There is another aspect which throws one into darkness regarding the sequence of events as described by Constable Mondlane. In a statement deposed to on 20 September 2013 at 19h00 he stated as follows:

"That on 2013-09-13 at about 02:20 I was doing patrol with Constable Qhibi and received a complaint about an accident at Konwyspass, the road to Bushbuckridge".

[12] Again, "the road to Bushbuckridge" disqualified constable Mondlane from taking the road to Pilgrimrest which is the opposite road or direction to Bushbuckridge. But even most importantly with regard to the statement, 02h20 being the time mentioned as the time at which he received a report about the plaintiff being involved in a motor vehicle accident at Konwyspass, is in contrast to his previous statement deposed to on 13 September 2013 wherein is stated that he received a report at 00h35. Why the difference as to the time at which he received the report also defeats one sense of logic. To suggest that this is immaterial not affecting his credibility in my view, signifies the wrong approach to evaluation of his evidence and his duty to rebut or refute the plaintiff's evidence.

[13] The contention smells the same approach in dealing with the critical version of the plaintiff which was left unchallenged as indicated in paragraph 7 of this judgment. The suggestion that what is stated in paragraph 7 of this judgment has been covered by the suggestion that Constable Mondlane had met or found the plaintiff next to Air Wings in my view, holds no water particularly seen in the context of the unreliability of the evidence of Constable Mondlane as articulated in the preceding paragraphs. The version of the defendant can safely be rejected as false in this regard. Put differently, I nevertheless believe the plaintiff who impressed this court as a credible witness and his evidence is found to be true. That is, the accident occurred as explained by the plaintiff.

[14] The findings above bring me to another consideration. That is, whether the plaintiff in anyway contributed to any cause of the accident. The plaintiff was well acquainted with the road and spot in question. Misty and drizzling weather could not have come as a surprise to him. He was therefore required to be more careful taking into account the fact that the road would have been slippery. His speed and alertness

should have been primary. He saw a truck with headlamps (green lights and reflectors) when he was just about 3 to 5 metres away from the truck in question. The thickness of the mist was not alluded to and therefore it cannot be assumed it was so

thick that he could not have seen the truck timeously. He was asked as to why he would not have succeeded in keeping his vehicle on the correct lane of the truck after he had avoided head-on collision on his lane. He could not give a satisfactory answer to the question. When asked about the speed he was travelling at, he said he was not so fast. The plaintiff must have been travelling at an unreasonable speed in the circumstance, for if he was not, he would have been in a position to control his vehicle.

I therefore come to the conclusion that the plaintiff contributed 30% to the cause of the collision.

[15] The unidentified driver of the truck was reckless in driving on the wrong lane particularly at the spot in question when it was misty and drizzling. Such an action was suicidal and as I said reckless taking into account the condition of the road at the time. He should be found to have been more negligent.

[15] Consequently I make an order as follows:

15.1 The defendant is hereby found to be 70% liable to compensate the plaintiff for his proven damages to be determined at a later stage.

15.2 Determination of the claim for damages is hereby postponed sine die.

15.3 The costs of the action to date to be costs in the cause to be determined upon consideration of the amount of damages payable to the plaintiff.

M F LEGODI

JUDGE OF THE HIGH COURT

DATE OF HEARING: 06 NOVEMBER 2017

DATE OF JUDGMENT: 15 NOVEMBER 2017

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- [1] National Employers, General Insurance Association v Gany 1931AD 187. African Eagle life Assurance Co Ltd v Cainer 1980(2) SA 235 (W) at 2370-H
- [2] National Employers 'General v Jagers 1984 (4) SA 437 (E) at 4400; Stellenbosch Farmers 'Winery Group Ltd v Martell et Cie 2003 (1) SA 1 (SCA) para 5; Dreyer v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) at 558 E-G.

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