

SOUTH AFRICA / JUDGMENT

Mofokeng v Road Accident Fund (50753/2015) [2017] ZAGPPHC 283 (18 May 2017) [2017] ZAGPPHC 283

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa

CASE / FILE NUMBER

50753/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 50753/201

Reportable

Of

interest to other judges

Revised.

18/5/2017

In

the matter between:

PHILLEMONT

RATLANG

MOFOKENG Plaintiff

and

ROAD

ACCIDENT

FUND Defendant

JUDGMENT

Baqwa J

[1] This is an application for that absolution from the instance after close of the plaintiff's case.

[2] The law in this regard is succinctly dealt with by the authors Herbststein and Van Winsen in *The Civil Practice of the High Courts of South Africa* (fifth edition) page 20 as follows:

"Rule 39 (6) provides as follows:

(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.

After the plaintiff has closed the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance. The correct approach to an application for absolution at the end of a plaintiff's case was stated by Harms JA in *Gordon Lloyd Page & Associates v Rivera*:

"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 409 G-H in these terms:

"... (W)hen 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 T PD 170 at 173; *Rufu 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 37 G - 38 A *Schmidt Bewysreg* 4th ed at 91 - 2). The test has from time to time been formulated in different terms, especially it has been said that the Court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne* (see cit)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Rufu Flour Mills*). Such a formulation tends to cloud the issue. 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 the 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."

- [3] The plaintiff testified how an unknown taxi driver drove alongside his motor vehicle in the vicinity of the taxi exchange spot and that the said driver suddenly cut in front of him without any indication that he intended to do so, thereby forcing him to swerve to the right and in that action causing a collision with the insured driver.
- [4] Bearing in mind that the issue to decide here is negligence and the fact that the onus to prove that is on the plaintiff, the plaintiff ought to make out at least a prima facie case by alleging some act of negligence on the part of the defendant insured driver in order to put him on his defence.
- [5] The plaintiff gave his evidence but there is no such allegation in the plaintiff's testimony. Counsel for the plaintiff submits that the court should draw an inference of negligence. The challenge in drawing such an inference is that on the plaintiff's own evidence it is his swerving action that caused the accident. If there is any inference to be drawn, it would be against the plaintiff and not in favour of the plaintiff in the absence of any evidence attributing any negligence to the defendant/insured driver. As already stated, there is no such evidence.
- [6] This is even more the case when one considers the plaintiff's counsel's submission that "the plaintiff was not in possession

of any other facts to place before the court". If he was not in possession of the facts that would attribute negligence to the insured driver the court cannot provide such facts for him by drawing inferences as there is simply no basis for drawing such an inference.

- [7] Counsel for the defendant submits and I accept that being in the proximity of the middle lane in a single lane road in each direction cannot lead to an inference of negligence in the absence of a specific allegation of negligence on the part of the insured driver.
- [8] On the evidence led before me thus far I would accept that the plaintiff has made out a case, but against the unknown taxi driver,

but certainly not against the insured driver. Put differently, there is no evidence thus far upon which a Court, applying its mind

reasonably could or might find for the plaintiff.

- [9] In the circumstances I cannot but come to the conclusion that absolution from the instance be granted (in terms of Rule 39 (6)) in favour of the defendant with costs.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on: 16 March 2017

Delivered on: 16 March 2017

For the Plaintiff: Advocate S. Maritz

Instructed by: Nothnagel Attorneys

For the Defendant: Advocate A. Lubbe

Instructed by: Mothle Jooma Sabdia Incorporated

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/283.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mofokeng-v-road-unknown-topic-agpphc-2017>

Prepared on 29 October 2026 · Esheria