

SOUTH AFRICA / JUDGMENT

Moloi v Road Accident Fund (84024/2016) [2020] ZAGPPHC 87 (26 March 2020)

[2020] ZAGPPHC 87

COURT

North Gauteng High Court, Pretoria

BEFORE

Senyatsi

CASE / FILE NUMBER

84024/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 84024/2016

In

the matter between:

KGOLOKOE

ISHMAEL MOLOI

Plaintiff

and

ROAD

ACCIDENT

FUND

Defendant

JUDGMENT

SENYATSI J:

- [1] This is a claim for damages arising out of an accident that took place on 1 November 2015 at R103, Vrede, Free State Province.
- [2] The Plaintiff is an adult male born on 21 July 1988 and resides at 1[...] M[...] Park, Section 2 Phutadichaba, Free State Province.
- [3] At that time of the accident the plaintiff was the driver of a blue Opel Corsa with registration F[...]. The Plaintiff alleges in his particulars of claim that an unknown motor vehicle came to the Plaintiff's lane of travel as the said vehicle was overtaking a truck in front of him.
- [4] The Plaintiff alleges that he swerved to the left to avoid the collision with the unknown driver and lost control of his car. As a consequence, his car overturned several times and he sustained serious injuries.
- [5] The common facts between the parties are:
 - 5.1. The issue of merits is separated from the quantum;
 - 5.2. The defendant did not object to the validity of the plaintiff's claim in terms of the Section 24(5) of the Road Accident Fund Act 56 of 1996;
 - 5.3. The admission that the Plaintiff was involved in a motor vehicle accident on 1 November 2015;
 - 5.4. Mabuse J, already found that this accident; occurred on the 1 November 2015 on the linked claim under case number:
84025/2016 which arose from the same cause of action and that the accident was caused by the negligence of the unidentified vehicle;
 - 5.5. The owner of the vehicle driven by the Plaintiff was Mr P.H. Radebe with identity number 870[...] who was a passenger and that the Defendant had already conceded merits on the basis that he was a passenger;
 - 5.6. Mr Radebe the owner of the vehicle and the passenger of the motor vehicle driven by the Plaintiff at the time of the accident had a valid driving licence issued to him on 23 October 2015;
 - 5.7. The Defendant admitted that, it was obliged to compensate the Plaintiff for his proven or agreed damages suffered as a result of the motor vehicle accident on the 1 November 2015;
 - 5.8. The Defendant admitted that no merits apportionment was applicable in this matter , during pre-trial conference;
 - 5.9. The Defendant's version is per the accident report and plea;

5.10. The Defendants admitted the Plaintiff's hospital records which state that the Plaintiff's injuries were as a direct result of the motor vehicle accident caused by an unidentified motor vehicle;

5.11. The parties also agreed that the documents filed of record are what they purport to be without further proof thereof and that copies may be used.

5.12. The Defendant did not have a version to put to the Court and the Plaintiff's version on how the accident happened was not Contested

5.13. The Defendant did not have any witness to call to testify and contradict the version of the Plaintiff.

[6] During the trial of this matter, the evidence of the Plaintiff was not contested nor challenged.

[7] The only issue that required determination at trial was whether there was contributory negligence by the Plaintiff. The Defendant called no witnesses to prove such contributory negligence. It follows therefore that the Plaintiff's version on the cause of the accident remained unchallenged and therefore no contributory negligence could be established by the Defendant.

[8] In *Fox v RAF (A548/16)* [2018] ZAGPPHC (26 April 2018) at paragraph [13] the full bench of this Court stated as follows on failure to call a witness to prove contributory negligence:

"Where the defendant had in the alternative pleaded contributory negligence and an apportionment the defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities. *Johnson Daniel James v Road Accident Fund* case number 13020/2014 GHC paragraph 17, confirming *Solomon and Another v Musset and Bright Ltd* 1926 AD 427 at 435."

[9] During the cross-examination of the Plaintiff at trial, the Defendant contended that the Plaintiff drove the motor vehicle without a driver's licence. It was also put to the Plaintiff by the Defendant's Counsel that the accident was caused by a pothole. This challenge is without legal basis as it was not pleaded on the papers. No witness was called to corroborate the new version by the Defendant. This challenge at trial which was not pleaded, amounts to the proverbial litigation by ambush and it is rejected.

[10] In *National Director of Public Prosecutions v Phillips and Others*[1] Heher J (as he was then) held as follows:

"A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance."

[11] During the trial it was implied that as a learner driver, the Plaintiff did not possess the necessary experience to drive. However what the Defendant could not challenge was the fact that the Plaintiff had been driving since he was young.

[12] As a learner driver and in the company of a licenced driver, Mr Radebe, the Plaintiff was driving lawfully. I have already stated that the Defendant had failed to plead the contention raised in cross examination in its pleadings. I need therefore not say more.

[13] During the trial, it became evident that the driver of the unidentified vehicle was negligent due to the following grounds:

13.1. He drove on the Plaintiff's lane of travel; and failed to stop after forcing the Plaintiff's car off the road causing it to make an accident.

13.2. The driver of the unidentified vehicle failed to keep his vehicle under control and ignored the safety of other road users, particularly the Plaintiff.

13.3. He failed to apply the brakes of his vehicle timeously or at all and drove the vehicle at a high speed.

13.4. He overtook a truck without taking a proper lookout that it was safe to do so and drove at an excessive speed when it was not safe to do so. The evidence and version of the Plaintiff on the negligence of the driver of the unidentified motor vehicle remains, as already stated, uncontested.

[14] The liability for negligence depends on what a reasonable person would have done faced with the situation faced by the negligent driver.

[15] In *Kruger v Coetzee*[2], Holmes JA, writing for the full court of the Appellate Division said the following about the approach on liability for negligence:

"For the purposes of liability culpa arises if-

- (a) a deligens paterfamilias in the position of the defendant
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property, and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence;
- (b) the Defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years."

[16] The approach stated in *Kruger v Coetzee* is still law and has been applied consistently by our Courts in the Republic.

- [17] I am satisfied that the Plaintiff has discharged the onus of proving that the driver of the unidentified vehicle was negligent and was the sole cause of the accident which resulted in the injuries of the Plaintiff.
- [18] I now deal with the injuries sustained by the Plaintiff. The hospital records of the Plaintiff have been admitted by the Defendant. The records clearly link the injuries sustained to be consistent with those of a motor vehicle accident. As these records have been admitted there is no need to make any determination.
- [19] It is trite that admissions of fact made at pre-trial conference constitute sufficient proof of those facts. (See MEG FOR Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another[3]). The admissions made by the Defendant at the pre-trial conference were not an issue but rather common facts.
- [20] In the result, I am of the respectful view that the Plaintiff has proved negligence of the insured driver of an unidentified motor vehicle was the sole cause of the accident.

ORDER

[21] The following order is made:

- (a) The Defendant is ordered to pay 100% of the Plaintiff's proven or agreed damages;
- (b) The adjudication of quantum is postponed sine die;
- (c) 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 limited to the following:
 - (i) The fees of one counsel's day fee for the 22 November 2015 including drafting of heads of arguments on the 26 November 2019;
 - (ii) The reasonable travelling costs, travelling time, subsistence, accommodation and transportation costs of the Plaintiff in attending court on the trial day.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date matter heard: 22 November 2019

Date of Judgment: 26 March 2020

Plaintiff's Counsel: Miss Virginia Moifo

Instructed by: Mohala-Moifo Attorneys

Defendant's Counsel: Adv. C. Molepo

Instructed by: Messrs Maluleke Msimang & Associates

[1] 2002 (4) SA 60 (W) at 106 E-H

[2] 1996 (2) SA428 (A) at 430E-G

[3] 2010

(4) SA 122 (SCA) 126 E-127B

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