

SOUTH AFRICA / JUDGMENT

Ndayi v Road Accident Fund (1172/2021)

[2024] ZAMPMHC 44 (4 September 2024)

[2024] ZAMPMHC 44**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

1172/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION (MIDDELBURG LOCAL SEAT)****CASE NO: 1172/2021****(1)****REPORTABLE: NO****(2) OF****INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE: 04/09/2024****SIGNATURE****In the matter between:****VUYOLWETHU****NDAYI****PLAINTIFF****And****ROAD ACCIDENT****FUND****DEFENDANT**

JUDGMENT

Coram: Langa J

Introduction and

Facts

[1] The Plaintiff instituted an action for damages resulting from the injuries he sustained in a motor vehicle accident that occurred on the 20 July

2018. The Plaintiff was a driver at the time of the accident. The Defendant is the Road Accident Fund established in terms of the Road Accident Fund Act, 56 of 1996, as amended, (“the Act”). Although the Defendant initially raised a special defence of non-compliance with section 24(1) of the Act, when the trial commences the Defendant abandoned the special plea and the matter proceeded to trial. After hearing the submissions by the parties, the court ordered that the merits be separated from the quantum. The matter accordingly only proceeded on the determination of the liability.

Pleadings

[2] In the Particulars of Claim the Plaintiff avers that on 20 September 2018 he was driving a motor vehicle with registration number V[...] 5[...] G[...] on the Kriel – Secunda road when he was involved in the accident. In para 3.2 he avers that the collision occurred “... after the unknown insured driver lost control of his motor vehicle, faced plaintiff’s motor and collided with the plaintiff”. (sic)

Section 19 (f) Affidavit by the Plaintiff

[3] In the affidavit in terms of section 19(f) of the Act, the Plaintiff states the following about how the accident happened:

Para 3. “On or about the 20th July 2018, I was a driver of a motor vehicle driving at (sic) Kriel, Mpumalanga. As I drove at Kriel, another vehicle left its path of travel and came to my lane of travel and collided with my vehicle”.

Para 4. The sole cause of the accident was due to the negligent driving of your (sic) driver in that, he failed to keep a proper control of his motor vehicle who left his path of travel and came to my lane of travel and collided with my motor vehicle.”

Viva Voce Evidence

- [4] However, in his viva voce evidence the Plaintiff stated that the same collision happened as he was driving on the same road followed from behind by a truck. When he neared a certain bridge, he noticed two oncoming cars approaching with one of them driving on his lane of travel. They appeared to be racing. When he realised this at about 100 meters away, he reduced speed in order to evade a collision with the on-coming vehicle traveling in his path of travel . As he reduced speed the truck coming from behind him drove into his vehicle from behind. As a result, he lost control of his motor vehicle and it overturned. He lost consciousness and does not know what happened thereafter. He does not even know who the driver of the truck was. He regained his senses later in hospital. The Plaintiff further testified that he only reported the accident thereafter when he was discharged from hospital.

Defendant's

Submissions

- [5] The Defendant contends that although it is common cause that the Plaintiff was involved in a motor vehicle incident, he has however given contradictory versions regarding how the alleged collision took place. The Defendant argues that the court should find that the Plaintiff was negligent and substantially contributed to the occurrence of the accident.

The Plaintiff's

Submissions

- [6] The Plaintiff contends that the Defendant adduced no evidence on the alleged contributory negligence or that he caused the accident. It was submitted on behalf of the Plaintiff that the correct version was that the Plaintiff reduced speed when he saw oncoming vehicle in his lane and was hit by a truck coming from behind him. It was argued that the Plaintiff did not expect the truck behind him to ignore the brake-lights of his motor vehicle or the reduction of his speed. The Plaintiff in essence denied the description of the accident as outlined in the Particulars of Claim and the section 19(f) affidavit. It was further argued that the Plaintiff was entitled to the amendment of the pleadings in order to bring same in line with his evidence.

Onus

- [7] It is settled law that the standard of proof in a civil case is proof on the balance of probabilities. This entails that the Plaintiff, who bears the burden of proof, must prove that his version is more probable than that of the Defendant. Even though the Defendant has some duty to adduce evidence, the burden of proof remains on the Plaintiff throughout the trial. In *Salamolele v Makhado* 1988 (2) SA 372 V, at para 374 stated the following in respect of the onus of proof:

“It is common cause that plaintiff bears the overall onus of proof . . . It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff.”

The

issues

- [8] The issues raised in this matter concern the determination of liability. The issue is whether the cause of the accident was due to the negligent driving of the unknown insured driver. In other words, there is a dispute of fact as to the cause of the accident.

Discussion

- [9] The nub of this matter revolves around the evidence of the Plaintiff as the Defendant did not call any witness to testify on the merits. While it seems to be common cause that the Plaintiff was involved in a motor vehicle accident and sustained injuries, it is disputed by the Defendant that the accident was caused by the insured driver as alleged by the Plaintiff.
- [10] The predicament for the Plaintiff is that contradictory versions emerged in respect of the date of the accident and how the collision happened. Concerning the date, While in the Particulars of Claim the Plaintiff states that the incident happened on 20 September 2018, in his testimony in court as well as in the section 19(f) affidavit he states the date as 20 July 2018. There is obviously a discrepancy regarding the date of the accident. It is important to mention that despite this discrepancy, the Defendant in its plea denied that the accident took place on 20 September 2018 and pleaded that it occurred on 20 July 2018. Although this constitutes an apparent contradiction, I am however satisfied that it does not constitute a material discrepancy. As the Defendant has in essence conceded that the correct date is 20 July 2018, this issue is accordingly of no moment.
- [11] I now turn to the contradiction between the Particulars of Claim, the affidavit and the Plaintiff's viva voce evidence regarding the description of the collision. This contradiction, which goes to the heart of the issue in dispute, is important and material as the Plaintiff is expected to prove not only that a collision happened, but also that it was caused by the negligence of the insured driver. The essence of the contradiction is that the in the pleadings and the section 19(f) affidavit the Plaintiff expressly averred that the Plaintiff collided with an oncoming vehicle which left its lane of travel and collided with his. However, in his oral testimony the Plaintiff alleged that he collided with a truck which came from behind him. These two versions are not only material, but they are also diametrically opposed and irreconcilable. (my emphasis).

- [12] When confronted with these self-destructive versions, the Plaintiff blames the contradiction on his erstwhile attorneys of record. He states that the previous attorneys representing him wrote the wrong information in the Particulars of Claim and in the affidavit. This explanation is however incorrect as it is clear from the papers that the summons and the Particulars of Claim were prepared by his current attorneys of record. It could therefore not have been a mistake by his previous attorneys as how stated.
- [13] What is further striking is that the version in the Particulars of Claim is consistent with his section 19(f) affidavit also allegedly prepared by the previous attorneys. Although he concedes that the signature on the affidavit is his, the Plaintiff, however, disavows the contents of the affidavit in so far as it purports to describe the accident. The rest of the contents of the affidavit he does not deny.
- [14] Despite the denial thereof, the similarities between the Particulars of claim and the affidavit in respect of the description of the collision is fatal. In my view the evidence clearly demonstrates that the Plaintiff put up a different case when he instituted the action. He now wants the court to accept a completely new cause of action that he was hit by an unknown truck from behind. This contradiction relating to the accident is clearly significant and presents a fatal dilemma for him.
- [15] When this conundrum became apparent, the Plaintiff's counsel indicated that he intends making an application for the amendment of the Particulars of Claim in order to bring same in line with the viva voce evidence. The problem I have with the proposed amendment is that the Plaintiff essentially wants to materially change its case by alleging a new cause of action after the evidence has been adduced. The amendment is proposed in circumstances where there is no good explanation for the contradiction.
- [16] The Plaintiff cannot be allowed to remedy its contradictory version by amending the Particulars of claim. In any event the Plaintiff has not brought an application for the amendment. Furthermore, this random amendment of the pleadings will clearly be prejudicial to the Defendant whose defence is based on the case made in the Particulars of Claim and section 19(f) affidavit. The amendment under these circumstances will be improper and cannot be countenanced.
- [17] It is trite that a party stands or falls by its pleadings. Unless there is a proper and reasonable explanation, It is impermissible for a party to make up its case by altering the pleadings as it goes or when the evidence does not support the pleadings. The Plaintiff in this case simply failed to explain this material difference in his summons and evidence.
- [18] Counsel for the Plaintiff suggested that this is a case of two mutually destructive versions which should be dealt with in line with the principles enunciated in *Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others* 2003 (1) SA 11 (SCA). I disagree with this proposition which is incorrect as the principles in that case generally find application where the court is confronted with two different versions from different persons. In that case the accepted approach is that a court must make findings on the

credibility of the various factual witnesses, their reliability and the probabilities. See also *National Employers' General Insurance Co Ltd v Jagers* 1984(4) 437 (ECD) 440.

- [19] In this case the issue is one of self-destructive versions in the Plaintiff's own case. The enquiry in my view is not about which version of the Plaintiff to accept but it is whether or not the Plaintiff is a reliable witness. Further, the question is about whether the Plaintiff has adduced evidence to prove, on a balance of probabilities, that the insured driver was negligent. In other words, the plaintiff ought to prove causation on the balance of probabilities. The Plaintiff must show, by way of evidence, that it was the negligence of the insured driver that caused the accident in which he sustained injuries.
- [20] The main issue concerning the merits of the matter therefore turns on whether the driver of the insured motor vehicle was the cause of the accident. It is generally assumed that wrongfulness exists once negligence on the part of the insured driver is proven. It is common cause that the plaintiff's evidence is at odds with the averments made in the pleadings. The Plaintiff has failed to adduce evidence necessary to prove the material facts. He has therefore failed to prove that the insured driver caused the accident.
- [21] In *Molusi v Voges* N.O. 2016 (3) SA 370 CC, the Constitutional Court confirmed the long-established principle that it is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. This principle is clearly applicable in this case. As stated in the preceding paragraphs, the case put up by the Plaintiff in his viva voce evidence is not the same case that the Defendant was called upon to answer. It is trite that one stands or falls by his or her pleadings. See *Kali v Incorporated General Insurances Limited* 1976
- (2) SA 179 (D) at 182A; *Imprefed (Pty) Ltd v National Transport Commission* 1993
- (3) SA 94 (A) at 107.
- [22] It is trite that the obligation of the Defendant to compensate a plaintiff for damages for bodily injury must arise from the negligent driving by the insured driver. In *Grove v Road Accident Fund*
- [2011] ZASCA 55 (31 March 2011), the court held that "There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another".
- [23] In *Sardi and Others v Standard and General Insurance Co Ltd* 1977
- (3) SA 776 (A) at 780G-H, the Court held that: "At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court

does not adopt a piecemeal of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation." (my emphasis).

- [24] Further, in *Chauke v Road Accident Fund* 9 [2023] ZAFSHC 214 (31 May 2023), the court stated that "The preponderance of probabilities standard requires that the court be satisfied that an incident or event had happened if the court considers that, on all the evidence before it, the occurrence of the event is more likely than not. Thus, for the appellant to succeed the court must be satisfied that it is more likely than not that the incident happened as recounted by him."
- [25] Given the injuries sustained by the Plaintiff, I accept that he was involved in some type of accident on the day in question. I am, however, not satisfied that he has discharged the onus to show that there was a collision between his vehicle and another and that that the negligence of the driver of that other vehicle was the cause of the collision. In the light of the Plaintiff's own mutually destructive versions, I find his evidence unreliable. Having initially alleged that he collided with an oncoming vehicle which miraculously disappeared, the Plaintiff now alleges that he was rear ended by a truck which also somehow disappeared after the collision.
- [26] In conclusion, I find that the Plaintiff has failed to establish that the cause of the accident was the driving of the insured motor vehicle, if there was any. Based on the evidence it cannot be said that it is more likely than not that the incident happened as recounted by him. The Plaintiff's claim therefore stands to be dismissed. Concerning costs, it is trite that costs follow the result. The Plaintiff having failed to prove its case, I see no reason why the cost should not follow the results.

Order

[27] In the result I make the following order:

The Plaintiff's claim is dismissed with costs on a party and party scale.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Advocate D Skoti For the Respondent: Mr NB Mhlanga Date heard: 29 August 2024 Date delivered: 04 September 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 04 September 2024 at 15h30.

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