

SOUTH AFRICA / JUDGMENT

Nkosi v Road Accident Fund (10465/2005) [2008] ZAGPHC 57 (27 February 2008)

[2008] ZAGPHC 57

COURT

High Courts - Gauteng

BEFORE

Molopa

CASE / FILE NUMBER

10465/2005

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IN THE HIGH COURT OF
SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 27/02/2008

Case

No: 10465/2005

UNREPORTABLE

In

the matter between:

A
D NKOSI PLAINTIFF
And
ROAD
ACCIDENT FUND DEFENDANT

JUDGMENT

MOLOPAJ

In this action the Plaintiff has instituted an action against the Defendant for damages arising out a motor collision which occurred on 27 April 2003 on the Hlalanikahle and Vosman road (commonly known as the Kromdraai road), between a motor vehicle with registration letters and numbers NNC 645 GP ("the first insured vehicle"), driven by one C Seeta ('the first insured driver,) and a motor vehicle with registration letters and numbers LBN 450 GP' ('the second insured vehicle') driven by one T Mkhangwe, (' the second insured driver'), in which latter motor vehicle the Plaintiff was a passenger.

As already stated hereabove, the two motor vehicles mentioned above were involved in the collision in question. The Plaintiff seeks full liability from the Defendant. If the driver of the first insured vehicle is found to be negligent, full damages against the Defendant are recoverable by the Plaintiff. If only the driver of the second insured vehicle in which the Plaintiff was a passenger is found to be negligent, the Plaintiff will only be entitled to a limited claim in terms of section 18 of Act 56 of 1996.

It is a common cause that the collision occurred on 27 April 2003 on the Hlalanikahle and Vosman road (Kromdraai road) between the first insured vehicle driven by C Seeta (the first insured driver) and the second insured vehicle driven by T Mkhangwe (the second insured driver). It is further common cause that the Plaintiff was a passenger in the second insured vehicle. Allegations in this regard are set out in paragraph four (4) of the Plaintiff's particulars of claim, pages 3 and 4 of the paginated papers.

The issue for determination in this matter is whether the driver of the first insured motor vehicle, motor vehicle with registration letters and numbers NNC 645 GP, driven by C Seeta was negligent as alleged by the Plaintiff in paragraph 6 (6.1 to 6.10) of the Plaintiff's particulars of claim.

The first witness for the Plaintiff was Inspector Pakaneng David Napo ("Napo"). He testified that he is an Inspector of the South African Police Service ('SAPS'), stationed at the Vosman police station. That he filled in the accident report contained in the Plaintiff's bundle on pages 8 to 17 of the bundle. That two (2) motor vehicles were involved in a collision on 27 April 2003 at the Kromdraai road. That the first insured vehicle was a sedan and the second insured vehicle was a bakkie (van).

He stated that he attended to the scene of the accident, but that the accident report form was later completed at the police station because it was dark at the scene of the accident when he attended thereto. That on arrival at the scene of the accident there were two vehicles. That the one vehicle, the sedan, was facing west and the other vehicle, the bakkie was facing south. He further testified that he went to the sedan and found that the driver was trapped. The driver in the bakkie was unable to speak. That he spoke to the passengers in the bakkie and they informed him that they (bakkie) were travelling south and that the sedan was travelling north, the sedan changed lanes on the right side onto the oncoming traffic lane. That the road has dual lanes, one lane on each side. He further testified that when he attended at the scene of the accident he checked the scene to see where the accident occurred, that there was oil and glass on the side of the bakkie.

Under cross examination he stated that he has been in the police service for 20 years, and that in these 20 years he has attended lots of accidents, in a year it could approximately 30 accidents which he attended in a year. He stated that normally when he attends an accident he would fill in an accident report on the spaces provided if the space is enough, he would also draw the sketch plan, and that the sketch plan would depict the scene of the accident, and he would also show the positions of the motor vehicles involved in the collision.

He further stated that there was a STOP sign approximately 10 metres from the scene of the accident that the sedan and the bakkie were travelling in opposite directions and that closer to where the collision occurred there is a T junction. He further stated that the sedan and the bakkie were travelling in opposite directions. He stated that it is important to know where the point of impact was. He further stated that the sedan (the first insured vehicle) stopped between the lanes facing west, and that the bakkie (the second insured vehicle) was outside the road after the collision in question. He stated that he had made a mistake when it was shown to him by counsel for the Defendant that on page 9 of the accident report form he states that the motor vehicles were travelling east and west whereas in his testimony he stated that they were travelling north and south, stating that the sedan was travelling north and the bakkie was travelling south.

He further stated that at the scene of the accident he checked the conditions of the motor vehicles involved in the collision, that there were pieces of glass of the head lamps and indicators of both motor vehicles. That he established the point of impact as the place where there was oil and glasses, and that most oil and glasses were on the right hand side of the road of the vehicles travelling north to south. When referred to page two (2) of the bundle, to a page from the investigation diary where in he had indicated that the collision occurred on 27 April 2003 at 06:00, i.e. in the morning, he stated that he could be mistaken because the accident occurred long ago and he did not look at the docket to remind himself.

He reiterated that he established the point of impact by debris on the road, that the lights/lamps of the bakkie were broken on the right side and the lights/lamps of the sedan were also broken on the right side.

Under re-examination he stated that the Kromdraai road runs between Vosman and Hlalanikahle extension 14, that the bakkie (second insured vehicle) was travelling from Hlalanikahle to Vosman and that the sedan (the first insured vehicle) was travelling from the Vosman to Hlalanikahle direction.

The next witness for the Plaintiff was Inspector Selby Alex Mokgope ("Mokgope"). He testified that he attended to the collision that occurred on 27 April 2003 between a bakkie and a sedan. That the accident occurred between 5H00 and 6H00 in the morning. That it was still dark when he arrived at the scene of the accident, and that the motor vehicles involved in the collision were still at the scene and the people involved were also still at the scene of the accident.

He further testified that the collision occurred at the Kromdraai road. That on his arrival at the scene of the accident he found a blue mazda sedan and a cream white mazda bakkie. He testified that the Kromdraai road runs across Vosman and Hlalanikahle.

That on arrival at the scene he inspected the scene and he ascertained the point of impact. He ascertained the point of impact where he found glass and oil on the road surface. That if one was driving towards Vosman most glass and oil was on the left side and a little on the right side. He indicated on a paper which he drew which was admitted as exhibit A the directions of the Kromdraai road (Hlalanikahle/Vosman direction) and indicated that where there is a big circle indicated on exhibit A more on the Vosman direction as the place where he found more oil and

glasses and that the oil moved from the road surface to where the sedan had stopped outside the road. He stated that he was informed by the passengers that the sedan was driving from Vosman to Hlalanikahle direction and that thebakkie was from the Hlalanikahle to Vosman direction, and that glass and oil were on the side of Vosman (i.e. in the lane of travel of the bakkie).

Under cross examination he stated that he has been a member of the South African Police services for 19 years and he attended lots of accidents and scenes of accidents, that he has gained experience there from. That on the day in question he and Napo arrived at the scene of the accident at the same time since they were in the same car. That they were the first police to arrive at the scene of the accident and they had to share tasks/responsibilities. He further stated that the passenger in the sedan was hysterical, she (the passenger in the sedan) said that they were coming from Vosman to Hlalanikahle. He confirmed that the road travelled from Vosman to Hlalanikahle and that there is a side junction in the vicinity going to extension 14. He further stated that while Napo was gathering information for the accident report form he was busy securing the scene of the accident, and that the street where the accident occurred did not have lights, they (the police) did not have torches, but that when he arrived at the scene of the accident he kept the police car lights on as well as the blue lights of the police vehicle and by the lights of the police vehicle he could see where the impact was. Further he could see that the bakkie was cream white and the sedan was blue.

He further stated that there is a police station near the scene of the collision, about 50 metres away. Still under cross examination he confirmed that the collision occurred on the side of the bakkie (second insured vehicle) and that he could establish that by the oil on the surface of the road. He further confirmed that he could see where the oil and the glass was despite that it was dark because he had lit the light of the police vehicle which enabled him to see where the point of impact was, ie by the oil and the glass on the surface of the road. He further stated that he could conclude that the glasses and the oil on the surface of the road were those of the two motor vehicles which were involved in the collision herein.

He confirmed that the glasses (found on the surface of the road) were those of the vehicles which were involved in the collision, that he could conclude that that is where the collision occurred.

He stated that after the collision the bakkie was further away from the scene and that the sedan was nearer. That the oil spilled through/moved from the point of impact (where glasses and oil was) to where the mazda sedan (1st insured vehicle) came to a stop/stand still. That there was more oil towards the 1st insured vehicle (sedan). That on arrival he saw that the 1st insured vehicle (mazda sedan) was damaged on the right side and on the grill, and the bakkie was also damaged on the right side. He saw that the lights of both vehicles were broken; hence he did not deem it necessary to compare the glasses' on the surface with the glasses involved in the collision.

The version of the Defendant's witness was put to him; obviously he could not comment on how the accident allegedly happened since he only came after it had happened.

The Plaintiff herself, Mrs Anna Dina Nkosi, also testified. She testified that on 27 April 2003 between 5H00 and 6H00 in the morning she was involved in the collision. She was a passenger in a van (bakkie- The- second insured vehicle), seated at the back.

That they were going to the location in Ackerville in the direction of Vosman. That Vosman goes to Ackerville. They were coming from phase 4.

That before the accident in question their vehicle came to a stop, it stopped, it moved and just further away from the stop the collision occurred. That she does not know how the collision occurred.

That after the accident an ambulance came, she was injured in the collision, and she was taken from the van (bakkie) with a stretcher to the ambulance.

That at the time of the collision she was employed as a domestic worker at Devon, Witbank, by Mr Van den Berg, that she is still employed by Mr van den Berg and she earns R750.00 per month, and transport money is given to her separately when she does not have money. That she stays at her place of employment from Monday to Friday.

Under Cross examination she stated that she did not see the 1st insured vehicle (sedan) before the accident, she could not see oncoming vehicles from where she was sitting.

The version of Defendant's witness was put to her; she stated that although she could not see other oncoming vehicles and/or an alleged vehicle which might have stopped before their bakkie/ van at the STOP sign, prior to the accident, she was adamant that their bakkie had stopped at the STOP sign prior to the collision. She also stated that the collision occurred on the side of the police station, (which would be in the lane of travel of the bakkie, i.e. Hlalanikahle to Vosman and not on the side of the sedan. She was adamant that the collision occurred on their lane/side of travel.

She further stated that she arrived at the hospital after (past) 6H00, she was conscious, nurses filled in forms, asked her names address and names of family members. They did not ask her how much she earned. That when she got to the hospital they found that she was injured on the leg. They took X rays, gave her tablets and some rubbing compound.

No other witnesses were called for the Plaintiff. That concluded the evidence for the Plaintiff.

That was the Plaintiff's case.

For the Defendant Tshepo Wandile Shongwe ("Shongwe") testified.

He testified that he was a passenger in the First Insured Vehicle, the 'Mazda sedan.

He testified that on 27 April 2003 in the early hours, approximately 4H00 (am) they were coming from Vosman going to extension 14 (Hlalanikahle) to off load his grandmother. He was in a silver grey Mazda sting. The driver of the vehicle was Calvin Seeta ("Calvin"). He cannot remember who else was in the vehicle, it was a lady. The lady was sitting in front. That he knew Calvin (the first insured driver), they were friends. That Calvin passed away in 2004; he had hanged himself (committed suicide).

He testified that the vehicle in which he was travelling (1st insured vehicle) was involved in a collision with a white bakkie (2nd insured vehicle). That the collision occurred next to the Vosman police station. That the road is straight. That the road from Vosman goes towards extension 14, one has to turn at the STOP sign to go to extension 14. That the collision occurred before the STOP sign. That he was seated in the middle (at the back) between the driver and the passenger.

He testified that he saw a corolla at the STOP sign; he saw the bakkie overtaking the corolla and coming to their side. That the bakkie did not stop because it was running away from the corolla. That when the bakkie went past the STOP sign it was on the right side of the sedan, That their driver swerved a bit so that they should not have a head on collision but it was already late, the collision occurred.

He further testified that the collision occurred at about 4H40, at dawn, there was mist. He denied that the collision was on the side of the bakkie but said that he did not know if glass and oil were on the side of the bakkie.

He testified that after the accident they were all trapped, that he did not see the glass and oil. That he was conscious, he could see but was in the car, in pains.

Under cross examination he stated that he did not observe whether there were glasses on the tar or not, that he could not dispute that the police saw the glasses on the tar road.

He stated that they had gone to offload his grandmother, they had offloaded her. They took the grandmother from extension 14, she (grandmother) had came to his (Shongwe's) mother's birthday party. The party started at approximately 15H00 (3pm) on Saturday afternoon i.e. 26 April 2003. The first insured diver, Calvin, was not at the party, he only came at approximately 03H00 (am) the next morning (27th April 2003), coming from Kempton Park, which is approximately 120km away, about 1 hour's drive. The lady passenger also came along with Calvin at about 3H00 (a.m).

Shongwe further stated that at his mother's party there was alcohol. That he (Shongwe) was also drinking at the party though he started late, from around 11 pm (23H00), that he was drinking Savannah, he had had about 12 bottles of savannah. That Calvin (the first insured driver) also had had drinks, that he (Calvin) had a bottle of klipdrift (Brandy) which was still full.

He further stated that the collision occurred approximately 18 metres from the STOP sign. That he does not know where the point of impact was, and he does not know what speed Calvin (the first insured driver) was driving.

No other witnesses were called for the Defendant. That concluded the evidence for the Defendant.

That was the case for the Defendant.

In evaluating all the evidence before court, it is important at the outset to state that, it is not in dispute that the two motor vehicles involved in the collision herein were travelling in opposite directions along the Kromdraai road i.e. Vosman- Hlalanikahle road.

It is clear that the witnesses, especially the police officers were not very clear on the cardinal points, whether South-North (S-N) or East to West (E- W). However, all witnesses herein were ad idem that the collision occurred along the Vosman/Hlalanikahle (Hlalanikahle/Vosman) road also known as the Kromdraai road, also that the collision occurred next to the Vosman police station. The confusion about whether the vehicles were travelling N-S/S-N or E-W/W-E is immaterial in my opinion. What is important is that both the Plaintiff and her witnesses and the Defendant's witness agree on the direction of the motor vehicles in question and that they were travelling in opposite direction.

The issue in point is whether the collision occurred on the side of the first insured vehicle (Mazda sedan) or whether it occurred on the side of the second insured vehicle (Mazda bakkie). Also whether the driver of the first insured vehicle, Calvin Seeta, was negligent and the cause of the collision aforesaid.

Both the police officers who testified on behalf of the Plaintiff ie. Inspector Napo and Inspector Mokgope testified that they established the point of impact through glasses and oils on the tar surface on the lane of travel of the second insured vehicle (the bakkie); the Plaintiff herself was also adamant that the collision occurred next/nearer the police station, although she sat at the back of the bakkie, she remained conscious. Shongwe on the other hand testified that he could not say where the point of impact was, and that he did not see glasses and oil because he did not look, he was in their vehicle. He stated that however that the collision occurred on the side of the sedan. It is suspect that Defendant seeks to impress on this court (through Shongwe) that the collision occurred on the side of the first insured vehicle despite the undisputed evidence of Napo and Mokgope about where the established the point of impact through broken glass and oil on the second insured vehicle. It is clear that the first insured vehicle was on its wrong side when the collision occurred.

According to Shongwe both himself and the first insured driver, Calvin Seeta, had had liquor on the morning in question, they even had a straight of Klipdrift (brandy) in their car that morning although he wants this court to believe that the bottle of klipdrift was still full, meaning that they only, carried it but did not drink it. I find this to be highly improbable. Anyway on his own version, they were probably drunk. I even doubt that they could have taken an old lady from the

party (Shongwe's mother's party) in those early morning hours to her home i.e. from extension 14 to Vosman at about 3H30-4H00. Shongwe is in my opinion simply misleading this court. In all probabilities they (together with the 1st insured driver) were coming from a party/place somewhere where they had been drinking. He merely proffered the explanation about taking his grandmother from his mother's party to her home to try to explain why they in the street that early in the morning and drunk for that matter. On his own version he had drunk at least 12 (twelve) bottles of Savannah that morning. This on its own would in all probabilities have made him drunk, his observations cannot be relied upon. His testimony does not in any event assist this court, he stated that he cannot say where the point of impact was, neither does he know what speed Calvin (the first insured driver) was driving.

Looking at the totality of the evidence before court I cannot find that the police officers who were called on behalf of the Plaintiff (Napo and Mokgope) would simply come to court to lie. They are in my opinion objective witnesses, (not connected to any of the parties herein), police officers who attended to the scene of the accident to do their duty. In the process of their duty they established the point of impact. I have no reason not to believe that what they established as a point of impact was actually the point of impact. As already stated they may have been confused as to the cardinal points, north-east, west-south, that is immaterial as far as I am concerned, what is important is that it is common cause that the accident occurred at the Kromdraai road/Vosman- Hlalanikahle/Hlalanikahle- Vosman road, near the Vosman police station and the point of impact (the collision) was on the side of second insured vehicle (bakkie) as established by the police officers (with glass, and oil on the surface of the tar road on the side of the bakkie). The first insured driver's vehicle also, on the evidence of the police officers, came to a stop outside the lane of travel of the bakkie.

If one looks at the evidence of Shongwe, the witness called by the Defendant it is clear that on a balance of probabilities he did not see what actually happened on the day in question, nor can he convince this court that the collision occurred as described by him, leading to the Plaintiffs vehicle moving to the other side as he alleges. In my opinion it does not need an expert to confirm his state of Sobriety. Having had at least, on his own version, 12 bottles of Savannah not having slept the whole night, having had to work the whole day attending to people at his mother's party as he alleges if this is true anyway, there is no way that by five (5H00) am the next morning he would still be sober and in his full senses after drinking so much liquor referred to above. In all probabilities he was drunk if not very drunk at the time of the collision and his evidence cannot be reliable at all. Him being a single witness one also has to approach his testimony with caution. Nothing confirms his version of events.

The version of the Plaintiff's witnesses is more probable. I guess the Defendant sought to create a case for absolution from the instance in presenting the evidence of Shongwe. As already stated above the evidence of Shongwe cannot be true, especially in so far it relates to how the collision occurred, it is rejected in so far as it is inconsistent with the evidence presented on behalf of the Plaintiff. In all probabilities the collision occurred as a result of the negligence of the 1st insured driver who was also allegedly drunk as well. From the evidence before court, the court can

deduct that on a balance of probabilities the insured driver did not keep a proper look out, otherwise he would have seen the second insured vehicle in which the Plaintiff was a passenger in time and would have taken evasive action, which he did not take; he probably also failed to keep the vehicle which he was driving under proper control, he failed to avoid the collision he was negligent and in my view the sole cause of the collision in question. In any event even it were to be accepted that the collision occurred nearer the centre of the road, (which would mean that both insured drivers were negligent), still this would not absolve the Defendant from full liability to the Plaintiff. The Plaintiff only needs to prove 1% negligence against the first insured driver (Calvin Seeta), and as already stated above I find that the first insured driver was negligent and his negligence led to the collision in question.

In my opinion, Seeta was negligent as stated above and the Defendant is liable to compensate the Plaintiff fully for her damages. The Defendant failed to secure the attendance of the 1st insured driver to come and explain to this court what actually happened on the day in question. The court can only draw an adverse inference that he was not called because the Defendant knew and or suspected that his version would prove that it was in fact (first insured driver) Seeta who was negligent.

In the premises the plaintiff's claim is upheld.

I now turn to the question the quantum of damages. In so far as quantum is concerned the Defendant did not prepare for quantum, however it was agreed by the parties that once the court finds in favour of the Plaintiff on the merits then quantum should also be finalised. Defendant's counsel submitted that the damages should be approached with circumspection, and that the court should look at a Contingency of approximately 12½%. The court will take this into consideration in assessing the damages. Other than this the Defendant did not dispute and/or challenge the heads of damages suggested by the Plaintiff.

According to the medical records of the Witbank Hospital, the Plaintiff presented with a painful left leg on 27 April 2003 when she was brought to the hospital by paramedics after having been involved in a motor vehicle accident. On examination she was found to have tender left lower limb, soft tissue injuries. X-rays showed no fractures.

According to Dr Birrell's findings after his examination on the Plaintiff on 21 September 2004, the Plaintiff apparently sustained a ligament injury to the left knee; there was an instability of the left knee with signs of x-ray changes such as Pelligrini-Stieda and the Osteoarthritic changes in the knee joint itself. These are confirmed in the x-ray report of the radiologist Dr AJJ Van Wyk dated 21 September 2004.

In his subsequent report dated 8 August 2006 Dr Birrell, having seen Dr Beer's report dated 8 August 2006 on Plaintiff's x-rays, concludes that the Plaintiff has a very slight kink in the lumbar spine at L1/2. That the left knee shows a slight postero-medial cortical thickening and there is possibly some sharpening of the intercondylar eminences of the left knee. That there is grade 3 laxity of the left knee medial collateral which requires repair, thus the Plaintiff will require knee surgery for this purpose. The Doctor also allows for a 10% to 15% chance of requiring total knee

replacement, and that Plaintiff should be allowed two (2) years of early retirement.

Dr Birrel records in his report dated 21 September 2004 that the Plaintiff having sustained a ligament injury of the left knee, she had acute pain for three to four days, followed by moderate pain for approximately two weeks. She has residual complaints of pain in the left knee but this will be improved with treatment. She has low backache originating from the accident which will respond to conservative treatment.

In summarising the damages suffered by the Plaintiff I take cognisance of what has been stated by Dr Tony Birrel in his first report dated 21 September 2004 and his latest report dated 8 August 2006, which reports are in any event not disputed by the Defendant, and am of the opinion that the Plaintiff is entitled to the following damages:

A. Medical expenses

1. Past medical expenses R39.00
2. Future medical expenses:
 2. 1 Repair of medial collateral ligament R 50 000.00

2.2 Four months' sick leave for this surgery

R 750.00 p.m salary x 4 R 3 000.00

2.3 Knee replacement

(12½% of R 120 000.00) R 15 000.00

2.4 Future conservative treatment R 20 000.00

Subtotal R 88 039.00

B. Future Loss of Earnings

3.1 Loss of work capacity (7%-8%) R 19 466.26

3.2 Early retirement (2years) R 49 232.70

R 78 512.85

Subtotal R 68

698. 75

C. General Damages R 75 000.00

Total R 231 737.75

There will therefore be judgement for the Plaintiff in the sum of R 231 737.75 with costs, such costs to include the preparation and reservation fees (qualifying fees) of Dr Birrell.

Molopa

JUDGE OF THE HIGH COURT

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