

SOUTH AFRICA / JUDGMENT

Ntoro v Road Accident Fund (37913/2018) [2023] ZAGPJHC 357 (21 April 2023)

[2023] ZAGPJHC 357**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal CSP

CASE / FILE NUMBER

37913/2018

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG LOCAL DIVISION,****JOHANNESBURG****CASE NUMBER: 37913/2018****NOT REPORTABLE****NOT OF INTEREST TO OTHER JUDGES****NOT REVISED****In the matter between:****NTORO****DISEBO BETTY****Plaintiff****and****ROAD ACCIDENT FUND****Defendant****Neutral****Citation: Ntoro Disebo Betty v Road****Accident Fund (Case No: 37913/2018)****[2023] ZAGPJHC 357 (21 April 2023)****JUDGMENT****OOSTHUIZEN-SENEKAL CSP AJ:**

Introduction

- [1] Ms Disebo Betty Ntoro (“the Plaintiff”) instituted action against the Road Accident Fund (“RAF”) in which she claims damages as a result of the injuries she sustained in an alleged pedestrian motor vehicle collision.
- [2] The issues of quantum and liability were separated in terms of Uniform Rule 33(4) and the plaintiff proceeded on the issue of liability only.
- [3] The defendant, the RAF, denied liability, contending that the plaintiff sustained injuries during an assault and that she was not injured due to a pedestrian motor vehicle collision.
- [4] The relevant portions of the plaintiff’s particulars of claim aver that she was involved in a motor vehicle collision at approximately 23h00 on 2 July 2015. The plaintiff was a pedestrian walking along Vryburg Road, Mafikeng when she was knocked from behind by an unidentified motor vehicle.
- [5] The driver of the unidentified motor vehicle caused the accident by driving at a high speed and failed to apply breaks timeously in order to avoid the collision. The plaintiff further avers that the unidentified driver failed to give any or adequate warning of his approach at the time when he could and should have done so.
- [6] As a result of the accident, the plaintiff sustained various injuries and was forced to undergo medical and hospital treatment at the Mafikeng Provincial Hospital.

The plaintiff’s case

- [7] The plaintiff was the only witness to lead evidence in support of her case. She testified that on the night of the incident she escorted her sister, Tsipiso Ntoro, and her child to the Bophelong Provincial Hospital, Mafikeng. At about 23h00 she left the hospital alone and was on her way to her home in Seweding Village. After being dropped off in town, she proceeded on foot and as she was walking on the left side of the road, approaching Home Affairs, a motor vehicle approached her from behind and hit her on her right arm with its side mirror. She then fell on her face to the ground. After hitting the tar road surface, she lifted her head and noticed that the vehicle driving away was a bakkie, similar to a Mitsubishi. She then lost consciousness.
- [8] The plaintiff stated that she regained consciousness at the Clinic and was told by the nurses that members of the South African Police Services (“SAPS”) transported her to the Clinic. The nurses further informed her that they were informed by the police officers that she was assaulted. The plaintiff testified that at that stage she was in pain and unable to respond to the nurses. However, she was shaking her head because she wanted to tell them that she was not assaulted but hit by a motor vehicle.

- [9] Due to her injuries, she was transported by ambulance to Bophelong Provincial Hospital. While she was examined by the doctor at the hospital, she was handed a piece of paper and pen, on which she wrote that she was not assaulted, but involved in a motor vehicle accident. The piece of paper was handed to the doctor. She was discharged from hospital on the same day at about 12h00.
- [10] On 7 July 2015 she experienced pain and was again transported to hospital. At the dental department x-rays were taken.
- [11] The plaintiff testified that due to the accident she sustained head and facial injuries, amongst others, a fracture and dislocated jaw, her gums were bleeding and teeth were broken. She was also bleeding from the ears.
- [12] She reported the accident to the Mafikeng Police about 13/14 days later. The police officer accompanied her to the accident scene, where she pointed out where she was walking next to the road at the time of the accident. An accident report ("AR") was compiled and during November 2015 she deposed to a sworn statement to the Police.
- [13] She testified that as the motor vehicle approached her from behind, she was walking and signalling to the driver to give her a lift. According to her the motor vehicle was not travelling at a high speed.
- [14] During cross examination by the defendant the plaintiff testified that prior to her being hit by the motor vehicle she was walking at a slow pace. She further stated that she was aware of the motor vehicle approaching because the lights of the motor vehicle were switched on.
- [15] She further testified that shortly before the motor vehicle hit her, the vehicle slowed down. The plaintiff stated that she was hit by the motor vehicle's left side mirror on the upper right arm, after which she fell on her left knee and hands hitting the road surface. She indicated that she tried to break the fall by balancing on her hands, but she was unable to and as a result she hit her head and face against the tar road.
- [16] The plaintiff conceded to the fact that the incident transpired during July, in winter and the area was dark. She stated that she was able to identify the motor vehicle as it was driving away because the lights from the Department of Home Affairs illuminated the area.
- [17] During cross examination the plaintiff was confronted with her contradicting versions contained in the AR, her sworn statement to SAPS and her section 19(f) statement.[1] She explained that the police officer who took down her sworn statement was unable to hear her clearly, as she was in pain and her jaw was fractured. She also stated that the person who assisted her at her attorney's office was impatient and he told her she was not smelling good. During the consultation with this person, she was crying and bleeding from her mouth.
- [18] The plaintiff further testified during cross examination that the AR was compiled on 14 July 2015 and that she attended to her attorney's office on 17 July 2015. She further stated that she made a sworn statement at the Mafikeng Police during November 2017.

- [19] She also confirmed that on 29 June 2022, her attorneys appointed a private investigator to investigate the accident and furthermore that she was present when the accident scene was photographed by the private investigator. The plaintiff testified that the private investigator did not understand her during their consultation and that could have been the reason why her statement to the investigator contradicted her oral evidence.

The defendant's case

- [20] No evidence was presented in the defendant's case.

Submissions by the plaintiff and defendant

- [21] Written submissions were provided by both parties to the court on 16 and 17 March 2023 respectively.
- [22] Counsel for the plaintiff argued that the plaintiff's evidence should be accepted in that her injuries were a result of a pedestrian motor vehicle collision as detailed in her section 19(f) statement. She further contended that the attending doctor at Bophelong Provincial Hospital mistakenly recorded that the injuries were caused as a result of an assault.
- [23] Therefore, she contended that the court should find in favour of the plaintiff and the defendant is liable for the plaintiff damages.
- [24] The defendant argued that the plaintiff's evidence was riddled with inconsistencies and contradictions when compared with her previous statements. Furthermore, the defendant asserts that the plaintiff's explanations for the contradictions were not plausible. Therefore, the defendant argued that the only inference that could be drawn from her contradictory evidence was that the plaintiff was fabricating evidence and she was not injured during a pedestrian motor vehicle accident. Counsel submitted that the plaintiff's claim should be dismissed.

Issues

- [25] What stands for decision from the evidence before me is whether or not there was a pedestrian motor vehicle collision and whether the unknown driver of the unidentified vehicle drove negligently and that such negligent driving caused the collision. If he/she did, the plaintiff must succeed with her claim. On the contrary, if he/she did not, the plaintiff must fail.

The Law

- [26] The question before me in the present matter is whether the plaintiff proved her case on a balance of probabilities in that she was injured during a pedestrian motor vehicle accident.
- [27] In *National Employees General Insurance v Jagers*,^[2] Eksteen AJP (as he was known then) had this to say about onus of proof:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a 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 ...”

[28] The following remarks were made:

“I would merely stress however that when in circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separable fields of enquiry. In fact, as I have pointed out it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.”[3]

[29] In *JM Grove v The Road Accident Fund*[4] the Court held as follows:

“The RAF is obliged to compensate for damages arising from bodily injury ‘caused by or arising from driving of a motor vehicle. The causal link that is required is essentially the same as the causal link that is required for Aquiline liability. 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 the act can be identified as a cause, depends on a conclusion drawn from the available facts and the relevant probabilities. The important question is how one should determine the causal nexus namely whether one fact follows from another.”

[30] The basic rule is that the person, in this case the plaintiff, who asserts must prove.[5] The defendant can deny the allegations or make positive allegations aimed at refuting the plaintiff's evidence.

[31] Therefore, the plaintiff during a trial must present the court with evidence, be it through witnesses, documents or other means accepted in law. Once the plaintiff presents evidence to the court, it is up to the defendant to respond to the evidence presented.

[32] Furthermore, I am alive to the fact that the plaintiff is a single witness. I have to be satisfied that the evidence of the single witness is reliable and trustworthy.

[33] Therefore, the court will weigh up and test the plaintiff's allegation against the general probabilities to determine whether the evidence is true or not. If the probabilities favour the plaintiff, then the court will accept her version as being probably true.

Evaluation

[34] In the present matter the plaintiff did not make a good impression on the court and I was left with the distinct impression that she was attempting to adjust her evidence, particularly during cross examination by the defendant. The plaintiff was questioned regarding various inconsistent statements made after the incident and such raise concerns.

[35] In view of the above, amongst others, I have to consider the averments made in the documentation lodged by the plaintiff with the RAF in support of her claim.

[36] Firstly, an AR was compiled on 2 July 2015 and the following was stated in the said report;

“The pedestrian, a victim in this case alleges that she was hiking for a lift when unknown motor vehicle hit her and run away. She had serious injuries with fractures on the upper and lower jaw, bruises on the left eye and nose, scratches on the stomach.”

[37] Secondly, in terms of the section 19(f) statement dated 17 July 2015, the plaintiff stated the following;

“On or about 02 July 2015 at about 23h00 I was involved in a pedestrian-motor vehicle accident. I was hiking for a lift at Vryburg road, Mafikeng next to home affairs.(sic) An unknown motor vehicle travelling at high speed hit me and thereafter failed to stop and ran.”

[38] Thirdly, on 12 November 2015, the plaintiff made a sworn statement to the SAPS regarding the incident and stated as follows;

“On Thursday 2015-07-03 at about 00:30 I was from Provincial hospital walking at Home Affairs department road building. When I approached the tar road the unknown vehicle came in front of me and I was on the left side of the road it came and hit me and threw on the ground and never stop and runaway. I did not noticed/identified anyone of them because it night, I felt on the ground and faint I do not who call the police to rescued me because I was waken by the police who took me to the clinic with the sense that I was assaulted by unknown people. And they also give a reported to the clinic that they suspect that I was assaulted. The sister at the clinic also called the ambulance and referred me to provincial hospital also give them reported that I was assaulted not hit by the unknown vehicle accident. I gave the fully reported to the doctor after I noticed from the file that the write assault not accident. I explained the story to the doctor 07/07/2015 what had happened.”(sic)

[39] The following contradictions and inconsistencies were noted during the plaintiff’s evidence in court;

39.1. The plaintiff testified that she was walking next to the road when the unknown motor vehicle approached her from behind, as the motor vehicle turned in front of her to stop, it knocked her down. However, in the statement made to SAPS on 12 November 2015, nearly four months after the incident, she stated that the motor vehicle came from the front and not from behind. She

furthermore did not indicate that prior to being hit by the motor vehicle she was hitchhiking and that the motor vehicle slowed down to stop in front of her.

39.2. The plaintiff contradicted her statement made to the private investigator on 29 June 2022 on how the collision occurred. In this statement, she stated that as she arrived at the crossing at the Mafikeng Department of Home Affairs, she stopped walking and while standing on the side of the road she lifted her hand hitching a ride. The motor vehicle approached her, slowed down, and without any reason the motor vehicle increased speed. As a result, she was hit on her right hand, after which she fell to the ground and lost consciousness. In contradiction to that she testified in court that when the collision occurred, she was walking in the direction of her residence. What's more, she never mentioned to the private investigator that she was able to identify the motor vehicle as a white bakkie similar to a Mitsubishi.

39.3. During her evidence in court, she stated that after she was hit by the motor vehicle she fell to the ground and as she lifted her head, she noticed the motor vehicle that collided with her was a white bakkie similar to a Mitsubishi. The plaintiff only provided a description of the motor vehicle during her evidence in court. She never mentioned this fact in the AR, the section 19(f) statement, her statement made to the investigator appointed by her legal representatives or in her sworn statement to the SAPS.

39.4. In the Particulars of Claim[6] the plaintiff avers that the accident was caused solely by the negligent driving of the insured driver of the motor vehicle who was negligent because h/she drove at an excessive speed in the circumstances. This allegation was also made in the AR dated 2 July 2015, however during her testimony in court, the plaintiff stated that the motor vehicle was travelling at normal speed.

39.5. The plaintiff also testified that after identifying the motor vehicle, she fainted and was unconscious, she only regained consciousness at the Clinic. She stated that the averment in her sworn statement that the police officers woke her at the accident scene was incorrect and the officer who took down her statement did not understand her and he was impatient during the interview.

39.6. Furthermore, the plaintiff testified that when she regained consciousness at the Clinic the police officers who transported her were not present. She disputed the fact that she told the private investigator that when she regained consciousness at the Clinic, the police officers and nurses were present.

[40] The plaintiff, when confronted with the above-mentioned contradictions, testified that;

40.1. The police officers who completed the AR did not understand her.

40.2. The person who took down her statement at the office of her attorney was impatient and she was also crying during the interview.

40.3. The police officer who took down her statement at the SAPS during November 2015 was unable to hear what she was saying because her jaw and teeth were wired, as a result she had difficulty in communicating clearly. Furthermore, the police officer also said her breath was smelly. However, it is evident from the hospital records that the implants in her jaw were removed on 3 September 2015 before her deposed to the sworn statement.

40.4. The collision occurred in 2015, seven years ago, and therefore she was unable to recall exact details of what transpired on the night of the collision.

- [41] I am of the view, that the explanations provided by the plaintiff regarding the contradictions as noted above are not plausible.
- [42] Undoubtedly, the oral testimony of the plaintiff in relation to how and where the alleged collision occurred appeared to be contradictory and improbable. The contradictions were pointed out earlier in the judgment. It is peculiar that the plaintiff never mentioned the description of the motor vehicle in any of her statements after the collision. The only inference in this regard is that the plaintiff did not see the motor vehicle or that she was uncertain as to what happened on the night she was injured. Furthermore, I find it improbable in the circumstances that she would have been able to identify the motor vehicle.
- [43] Furthermore, the plaintiff was not a credible and reliable witness because she failed to provide the court with a coherent version as to what transpired on the night of the collision.
- [44] I am of the view, that the reason why the plaintiff contradicted her evidence during cross examination, was because she fabricated evidence regarding the identification of the motor vehicle involved.
- [45] Most disquieting was that she testified that the motor vehicle collided with her right arm. It is extraordinary that there was no sign of her right arm having been involved in some kind of blunt trauma. One would have expected that if her right arm came into contact with a fast-moving object such as a motor vehicle that there would have been visible injuries such as abrasions or even a fracture. Contrary to any injuries to the plaintiff's right arm, she only sustained facial injuries.
- [46] Furthermore, the plaintiff testified that after the vehicle struck her right arm, she attempted to break the fall, stretching out her hands and she landed on her left knee whereafter she plummeted face down on the road. Strangely, she sustained only facial injuries. Considering that she landed on her left knee and only then fell forward, I find it highly unlikely that she would have sustained a dislocated and broken jaw and teeth. She presented with no injuries to her left knee or her hands.
- [47] How the plaintiff sustained the facial injuries remains unclear. It is not the duty of the court to investigate what their cause is, but suffice to state, that her injuries are not consistent with her description of the collision.

[48] It is important to note that the police officers who transported the plaintiff to the Clinic reported to the nurses that the plaintiff was assaulted, the same information was provided to the doctor treating the plaintiff at the Bophelong Provincial Hospital. The plaintiff testified that she was handed a pen and paper by the doctor treating her and she noted on the paper that she was involved in a motor vehicle collision. The doctor was not called to testify, furthermore the note she made was not produced in the matter and therefore no independent corroborating evidence was presented by the plaintiff as to how she was injured.

Conclusion

[49] On a conspectus of the totality of the evidence and taking into account the concerns raised in relation to the plaintiff's evidence in this matter, I am not satisfied that the plaintiff has discharged the onus of establishing her case in respect of liability.

[50] I again emphasise that the burden of proving that a pedestrian motor vehicle collision happened as a result of the negligent driving of another in consequence of which the plaintiff sustained injuries, remains the duty of the plaintiff.

[51] Against this background, I find that the plaintiff in the present case has failed to discharge the onus that rested on her of proving that the defendant is liable to compensate her for her damages. I am therefore not persuaded that the injuries sustained by the plaintiff arose from a pedestrian motor vehicle accident.

[52] In the premises, I make the following order:

1. The plaintiff's claim is dismissed with costs

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to Case Lines and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 21 April 2023.

DATE OF HEARING: 8 & 9 March 2023

DATE JUDGMENT DELIVERED: 21 April 2023

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[1] Section 19 of the Road Accident Fund Act, 56 of 1996 provides: “The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damages- (a)..., or (b)... (c)... (i)....; or (ii)... (d)... (i)....; or (ii)....; or (e)... (i)....;or (ii)....; or (iii)... (f) if the third party refuses or fails-

- (i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or
- (ii)to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof”

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rise to the claim concerned, within a reasonable period after having come into possession thereof”

[2] 1984

(4) SA 437 (E) at 44D.

[3] Page 440G-H.

[4] (974/10)

[2011] ZASCA 55 (31 March 2011) at para 7.

[5] Van Wyk v Lewis 1924 AD 438 at page 444.

[6] Para [5.3].

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