

SOUTH AFRICA / JUDGMENT

Schade v Road Accident Fund (2198/2020)

[2024] ZAECKMKHC 80 (30 July 2024)

[2024] ZAECKMKHC 80**COURT**

Eastern Cape High Court, Makhanda

BEFORE

Gqamana

CASE / FILE NUMBER

2198/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, MAKHANDA)****NOT****REPORTABLE****Case****no: 2198/2020****In**

the matter between:

IVAN

SCHADE

Plaintiff

and

ROAD

ACCIDENT FUND

Defendant

JUDGMENT**GQAMANA J**

- [1] This case involves a collision between two vehicles on 25th May 2017, on the T23 national road between Flagstaff and Holly Cross. The plaintiff was the driver of one of the vehicles, a Toyota bakkie with the registration numbers and letters [HRN EC] and Mr Lufefe Ntsenyana, was the driver of the insured vehicle, a Nissan bakkie with the registration numbers and letters [ND] (the insured vehicle). The plaintiff now sues the Road Accident

Fund, (the defendant) for damages in respect of the bodily injuries he sustained on the basis that the collision was caused by the negligent driving of the driver of the insured vehicle.

- [2] The defendant has denied that the insured driver was negligent and consequently denied liability.
- [3] At the commencement of trial, I granted an order separating merits and quantum in terms of Rule 33(4) and the trial proceeded only in respect of the determination of liability. The plaintiff submitted a trial bundle which was marked exhibit A.
- [4] Before I proceed to analyse and evaluate the evidence adduced, I must mention the following common cause facts: that a collision occurred on the day in question between the plaintiff's vehicle and the insured vehicle. The collision occurred during daytime and on a clear day. Both vehicles were travelling on the same direction from Flagstaff towards Holly Cross. The roadway where the collision occurred is a tarred road with two lanes in opposite directions. The road surface is dissected by a broken white line and adjacent to it on both sides is a reserve section.
- [5] In order to prove his case, the plaintiff testified and adduced evidence of his colleague, Mr Eduard Potgieter (Potgieter). On the plaintiff's version, he was travelling from Flagstaff towards Holly Cross region with his bakkie on his way to a site visit. He had no passengers in his bakkie. The time was approximately 14h00. There was a bakkie travelling ahead of him. This bakkie stopped, half over the yellow line in front of his vehicle. He noticed that there were school children getting out of this bakkie. To avoid a collision with it, he then moved slightly closer to the middle line, and he did not cross over the middle line. He was driving at a speed of 80km/hour. The insured vehicle came from his right- hand side and the plaintiff served out, but the insured vehicle bumped the plaintiff's vehicle from the right rear fender behind the back wheel. He did not see the insured vehicle before the collision, but he assumed that it was behind him. Both vehicles ended up in a ditch on the right- hand side out of the roadway. The damages to the plaintiff's vehicle are evident in photograph 8 of exhibit A. It was put to the plaintiff in cross-examination that while overtaking the stationery bakkie which was dropping the school children, he moved and encroached onto the insured vehicle lane without indicating and without a proper lookout. That proposition was denied by the plaintiff.
- [6] Shortly after the collision the plaintiff got out of his vehicle and noticed that the insured driver was alone in the insured vehicle. However, there were other members of the public in the vicinity. Within 20 or 30 seconds after the collision, his colleague Potgieter arrived at the scene. An argument between the plaintiff and the insured driver. Each one was imputing fault on the other as the sole cause of the collision. In cross-examination, it was put to the plaintiff that the insured driver would testify that the plaintiff admitted that he was the sole cause of the collision and had apologised to the insured driver. The plaintiff denied that.

- [7] The other members of the public who were nearby came to the scene. The plaintiff took out his diary and asked the insured driver for his personal details including his driver's license. The insured driver did not supply him with the requested information, instead an unknown male person grabbed the plaintiff's diary and wrote an identity number, a name and surname, a residential address, two cellphone numbers and the license number. The plaintiff only learned during this trial that he was misled about the details of the insured driver. After his bakkie was towed out of the ditch, the plaintiff went to Flagstaff police station to report the accident. He gave the details of the driver of the insured vehicle to the police based on the information which was written in his diary as indicated above. The name of the driver of the insured vehicle as given to him was "Asanda Sipho Ngozi". The insured driver did not accompany him nor reported the accident to the police.
- [8] Months later, the plaintiff received WhatsApp and SMS threats from an unknown cellphone number that he must pay for the repairs of the damages of the insured vehicle.
- [9] The next witness was Potgieter. He testified that he works with the plaintiff at Northern Construction Company. On the day in question, he was driving his vehicle at approximately 50 meters behind the plaintiff's vehicle. In front of the plaintiff's vehicle, there was a Hyundai bakkie. The insured vehicle overtook him at high speed and remained on the right-hand lane. The bakkie which was in front of the plaintiff's vehicle stopped, with two of the wheels in the reserve section and two wheels in the lane of travel. The plaintiff served and moved closer to the middle line to avoid the collision. He stopped his vehicle and noticed that the damages on the plaintiff's vehicle were on the rear right side, and the damages to the insured vehicle were on the left front. He was cross-examined at length on the position of the damages to the plaintiff's vehicle, the relevance of the point of impact is key to the defendant's defense and I deal with that later in this judgment. Potgieter further testified that there was an argument between the plaintiff and the insured driver and that there was a crowd that started to build up. He phoned one of his colleagues to come to the scene with a grader to pull out both vehicles from the ditch. The plaintiff thereafter closed his case.
- [10] Counsel for the defendant at her opening statement she said the following:

"M'Lord, the defendant would like to call the insured driver. The defendant will bear calling two witnesses in this matter. The insured driver and a witness who had also witnessed the accident".

However, only the insured driver was called as a witness. As to what happened to the second witness remains a mystery, even though he was available and had attended court throughout the trial proceedings.

- [11] The witness called by the defendant was Mr Lufefe Ntsenyana, the insured driver. In summary his evidence was that, on the day in question he was driving the insured vehicle coming from work and he had just dropped his friend Mr Asanda Ngozi (referred hereinafter as Ngozi). There were two vehicles ahead of him and one of these vehicles was the plaintiff's bakkie. The other vehicle stopped far off the road and the driver thereof was busy assisting the children to cross over the road. The insured driver was alone in the

insured vehicle, contrary to the content of his affidavit [1] filed in court by the defendant, that he had a passenger with him. The plaintiff's vehicle was at approximately 100m ahead of the insured vehicle and driving slowly. He noticed that the plaintiff was on his cellphone. He decided to overtake the plaintiff's

vehicle. He was driving at a speed of 80km/h. He switched on his indicator signaling his intention to overtake and he moved to the right-hand lane. When the front nose of his vehicle was parallel to the back of the plaintiff's vehicle, the latter moved from his side to the side of the insured vehicle, and it then that the collision occurred. The insured driver had served out to avoid the collision, but it was too late. The plaintiff's vehicle collided with the insured vehicle on the left side. Both vehicles lost control and ended up in the ditch on the right-hand side of the road. The insured driver did not apply brakes to avoid the collision because there was no opportunity to do so, as everything happened quickly. The insured driver testified that his driver's license as was suspended because he was caught driving at a high speed of 280km/h at Johannesburg, and as such at the time of the collision herein he had no valid driver's license and was not allowed to drive a vehicle.

- [12] From the start of the cross-examination the contradictions and inconsistencies between his oral evidence and the content of his affidavit [2] as well the affidavits of Ngozi and Majola were exposed. The insured driver maintained his version that he was alone in the insured vehicle at the time of the collision. Further-on and for the first time in cross-examination the insured driver testified that the collision happened as the plaintiff attempted to execute a right-hand turn in the direction of the school. That version is not only inconsistent with his evidence in chief of how the collision occurred but it was neither put to the plaintiff nor his witness. Cross-examination further exposed that the insured driver's version does not tally up with the damages to the plaintiff's vehicle which were on the rear right-hand side as depicted on the photographs. In addition, the insured driver's version that the plaintiff was on his cellphone was never put to the latter.
- [13] The insured driver also denied that Potgieter witnessed the accident. In his version Potgieter was driving ahead of the plaintiff and he only arrived at the scene approximately 15 to minutes after the collision. Again, Potgieter's version that he was driving behind the plaintiff's vehicle was not challenged.
- [14] From the evidence at my disposal, clearly there are two mutually destructive versions of how the accident happened. The approach of the court when faced with two mutually destructive and irreconcilable versions is set out in *Stellenbosch Farmers' Winery v Martel et Cie and Others*[3] that:

"To come to a conclusions on the disputed issues a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on

his behalf; or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

- [15] That brings me to the credibility, reliability, and probability of the plaintiff's version as against that of the insured driver. The plaintiff gave a clear version of how the collision happened. His evidence was that he was driving his vehicle at a speed of 60km/h on his left lane. The bakkie that he was following suddenly stopped on the reserve section. To avoid a collision with it, he moved slightly to the right, closer to the white centre line but still within his lane and it is then the insured vehicle bumped his vehicle from the back on the right-hand side. The plaintiff's version was corroborated by his witness Potgieter who was driving behind them. Potgieter further testified that the insured driver was speeding. Both the plaintiff and Potgieter impressed me as honest and reliable witnesses. Potgieter was following them and there was no other vehicle in between that obstructed his observation.
- [16] On the hand, I was not impressed at all with the insured driver. His evidence was riddled with contradictions and inconsistencies. He adapted his version as the trial progressed. His initial version was that there was a stationary bakkie on the left-hand side, far off the road but plaintiff as he was passing this bakkie moved to the insured vehicle's side and the collision occurred. But in cross-examination the insured driver came up with a new version that the plaintiff was attempting to execute a right-hand turn. Firstly, if the stationary vehicle was far off the road, there would have been no reason for the plaintiff to move his vehicle slightly to the right-hand side because there was no obstruction on lane. Secondly, the version that the plaintiff was executing a right-hand turn was never put to either the plaintiff or his witness in cross-examination. In *President of the Republic of South Africa v South African Rugby Football Union*[4], the Constitutional Court said that:

"As a general rule it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his/her character. If a point in dispute is left unchallenged in cross-examination, the party calling that witness is entitled to assume that the unchallenged witness's testimony is accepted as correct."

[17] Further, there were contradictions between the insured driver's oral evidence and the content of his affidavit as indicated in paragraph 12 above. The insured driver as well as Ngozi and Majova in their affidavits claimed that there was a passenger in the insured vehicle at the time of the collision. In my view the reason for them to come up with that concocted version was to cover up for the insured driver, otherwise the latter would have been faced

with a big problem of driving illegally. Because he had a learners' driver license and therefore, in terms of the road regulations there had to be a licensed driver with him when he is driving on the public road. To insulate my view, the evidence adduced by the plaintiff was that shortly after the collision, the personal details and the driver's license number of the driver of the insured vehicle that were given to him were those Ngozi. When the insured driver was confronted about his affidavit, he distanced himself from it. Because he realised that his lies were exposed by the evidence of the plaintiff and that of Mr Potgieter. Both of them testified that the insured driver was alone in his vehicle. It is therefore my view that the insured driver was not only untruthful in his testimony but he was dishonest. Further he was also evasive and argumentative at times.

[18] In addition, it is improbable that the plaintiff would have executed a right-hand turn at the time of the collision while driving at a speed of 60km/h. Further, if one has regard to the damages to both vehicles, it is also improbable that he was executing a right-hand turn. The damage on the plaintiff's vehicle were on the back fender on the right-hand side as depicted in photo 8 and they were on the left front fender.

[19] Therefore, having regard to all the evidence at my disposal and on the balance of probabilities, the plaintiff's version is true, accurate and acceptable and the version advanced by the insured driver is false and falls to be rejected. The evidence adduced on behalf of the plaintiff proved that the insured driver failed to keep the plaintiff's vehicle under observation while overtaking, and to leave a sufficient wide berth between the insured vehicle and the plaintiff's vehicle.

[20] Accordingly, the plaintiff has established negligence and that the insured driver was the sole cause of the collision between the plaintiff's vehicle and the insured vehicle. The alternative submission on behalf of the defendant that there was contributory

negligence by the plaintiff is not supported by the evidence. The mere fact that the plaintiff moved towards the centre lane without

looking at the rear mirror does not establish contributory negligence. The plaintiff was within his lane of path when he slightly moved towards the centre line, however he did not encroach the insured driver's lane.

[21] Regarding costs, there is no reason why the costs should not follow the results. In addition, having regard to the issues involved in this matter costs of employment of counsel on scale B are justified.

[22] In the circumstances the following order is issued:

1. The defendant is held liable for 100% of such damages as the plaintiff is able to prove arising out of injuries sustained by him in the collision between his vehicle and the insured vehicle on 25 May 2017.
2. The defendant is ordered to pay plaintiff's costs including costs of counsel on scale B, as well as the reasonable and travelling and accommodation costs incurred by the plaintiff's legal representatives in respect of the trial.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES: Counsel for the Plaintiff : Adv Benade Instructed by : DSC Attorneys C/O DOLD & STONE Makhanda Counsel for the Defendant : Ms V Futshane Instructed by : STATE ATTORNEY Gqeberha Dates heard on : 30 April, 2 May and 6 June 2024

Judgment

Delivered on : 30 July 2024

- [1] At paragraph 3 therein he said: "This affidavit serve to confirm that on 25th May 2017 at about 15:00 I was driving a Nissan Hardbody NP300 bakkie with registration... together with a passenger Majova Gciniwe cellphonefrom the direction of Flagstaff Town towards Holly Cross hospital.
- [2] Ngozi in his affidavit mentioned that "at the time of the accident Lufefe Ntsenyana was going with Majova Gciniwe as a passenger". Majova in his affidavit also confirmed that he was a passenger in the insured vehicle at the accident.
- [3] 2003(1) SA 11 (SCA) at para 5.
- [4] 2000
- (1) SA 1 (CC) at para 61.

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