

SOUTH AFRICA / JUDGMENT

Selemela v Road Accident Fund (89870/2015) [2019] ZAGPPHC 339 (31 July 2019)

[2019] ZAGPPHC 339

COURT

North Gauteng High Court, Pretoria

BEFORE

MH Van Twisk

CASE / FILE NUMBER

89870/2015

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE

NO: 89870/2015

31/7/2019

In

the matter between:

K

H SELEMELA

Plaintiff

and

THE

ROAD ACCIDENT

FUND

Defendant

JUDGMENT

M.H VAN TWISK (AJ)

1. This matter again illustrates the difficulties that the Defendant ("the Fund") encounters when faced with a claim where neither the identity of the insured driver nor the insured vehicle is known.

2. It is not in dispute that the Plaintiff was involved in a motor vehicle

accident that took place on 10th June 2014 on the road between Brits and Lethlabile. The accident took place at approximately 00h50 in the morning.

3. The Plaintiff testified that he was driving on the Brits-Lethlabile road

on 10th June 2014 in a northerly direction to collect one of his employer's employees. He testified that he saw a motor vehicle

coming from a southerly directly and it was on his side of the road. The road is a single carriage road. The Plaintiff, according to him, flashed his bright lights to alert the driver of this vehicle of his {the Claimant's} presence on the road. He further testified that when this vehicle was approximately 50 metres away from him he swerved to the right hand side to avoid a head on collision and lost control and the vehicle fell on its side into a ditch. The Plaintiff exited the vehicle through the passenger door whereupon he telephoned his employer, who in turn arranged for the ambulance and the breakdown vehicle to attend at the scene. He further testified that he cannot estimate how far the other vehicle was away from him when he saw it for the first time.

4. The Plaintiff continued with his evidence, but now testified that when he

saw the other motor vehicle's lights for the first time he could not see that it was in his lane. He flashed his bright lights when it was 50 metres away from him and turned to the right hand side to avoid the collision. It was then that he saw that it was a big truck that was driving on the wrong side of the road. He testified that a policeman came to the hospital on 11th June 2014 and informed him to attend at the police station once discharged to obtain a case number. He said that although he gave an oral statement to this policeman, it was not written down.

5. The Plaintiff further testified that on 8th August 2015 he asked (I assume from the police) a copy of the accident report as his employer requested it. The Plaintiff then testified further that the content

of the accident report differs from what he told the police as to how the accident happened. He pointed out that the accident report states that he was driving from north to south whereas he was driving from south to north and furthermore that the description of the accident as it appears at page 17 of the merits bundle is incorrect as there is no bridge where his motor vehicle went off the road. The Plaintiff was then asked what steps did he take to rectify what was

contained in the accident report. He testified that he asked the police to give him an opportunity to provide them with a correct statement which opportunity they provided to him. On 18th August 2015 he gave a more detailed statement. a copy of which appears at pages 20 and 21 of the merits bundle. Probably nothing turns on it, but it seems as if the police stamp indicates that the affidavit was deposed to on 8th October 2015 and not 18th August 2015. The Plaintiff then confirmed the correctness of what is contained in the statement which appears at pages 20 and 21 of the merits bundle. The Plaintiff was then taken to pages 13 and 14 of the merits bundle which is the so-called Section 19(f) affidavit which he confirms is a correct reflection of the events when the accident took place.

6. The Plaintiff was cross-examined extensively on the content of the medical reports which forms part of the claim documents bundle. Advocate Mpe, who appeared on behalf of the Plaintiff, objected when Advocate Roos, appearing on behalf of the Fund, proceeded to cross-examine the Plaintiff on those records. I dismissed the objection. It is so that no witnesses were called to corroborate the content of the hospital records. The following is however of importance in my view regarding the evidentiary value of the medical reports and the answers solicited during cross-examination:

6.1. Mohala-Moifo Attorneys, acting on behalf of the Plaintiff, lodged the RAF1 third party claim form together with its annexures;

6.2. The covering letter contains the following paragraph:

6.2.1. "Please find the following claim documents attached hereto:

1 RAF Form 1;

2 Special Power of Attorney;

3 Consent form;

4 Authorisation form;

5 Claimant's Section 19(f) affidavit;

6 Copy of Claimant's identity document;

7 Officer's accident report; and

8 Hospital records." [1]

6.3. Dr Pienaar who treated the patient at the Brits Medi-Clinic on the morning of the accident completed the medical report. [2]

6.4. The following medical records, submitted on behalf of the Plaintiff to the Fund to substantiate his claim, forms part of the lodgement documents:

6.4.1. Hartbeespoort Emergency Rescue Unit Handover Sheet [3], Brits Medi-Clinic Emergency Centre records completed by a nurse and doctor Pieterse [4].

6.5. The Defendant required the Plaintiff, in terms of Rule 36(4), to make available to the Defendant any medical reports, hospital records, x-ray photographs or other documentary information of alike nature relevant to the assessment of the Plaintiff's damages and to provide copies thereof upon request.[5]

6.6. The Plaintiff responded to the Rule 36(4) Notice in annexing to his reply a copy of the RAF Form 1 and copies of the hospital records which also forms part of the claim documents bundle and which have been referred to earlier.[6]

6.7. The minutes of the first pre-trial conference held on 2nd March 2016 records that the parties agreed that all documents in the bundle will, without further

proof, serve as evidence of what they purport to be without admitting the correctness or content. [7]

7. In my view Advocate Roos was entitled to cross-examine the Plaintiff on the hospital records which he i.e. the Plaintiff, himself, through his attorneys of record, submitted to the Fund.

8. The following was elicited during cross-examination:

8.1. That the Plaintiff consulted his attorneys for purposes of lodging a claim against the Fund during August 2015;

8.2. The policeman who came to the hospital on the morning of 11th June 2014 is not the same police officer who completed the accident report form;

8.3. The Plaintiff confirmed that he was transported from the scene of the accident by Hartbeespoort Emergency Rescue Unit but when referred to the content of the handover sheet he pointed out that his first name is spelled incorrectly in that a "c" is missing and that the identity number is also incorrect as the numbers "3" and "9" should read "96". The Plaintiff testified that he did not speak to the ambulance man at the scene and he does not know where the ambulance man obtained the information that he has written down on the handover sheet;

8.4. The Plaintiff was asked whether he had a medical history of hypertension and whether he uses or knows what "rikwat" is. The Plaintiff answered that he suffers from hypertension after the accident. Counsel for the Fund did not take this questioning any further but it is obvious that the question was asked as the handover sheet evidences that the word "hypertension" is written after "medical history" and "rikwat" is written after "chronic medication";

8.5. The Plaintiff testified further that he was injured on his head which was bleeding and on his left leg and that he was dizzy;

8.6. The Plaintiff testified further that he disagrees with the injuries as listed in the medical records which only refers to injuries to the left ribs, left elbow and both knees. The Plaintiff reiterated that he was only injured on his head and the back part of his body;

8.7. The Plaintiff testified that when he arrived at the hospital he had blood on his face and had bandages on his head and left leg;

8.8. The Plaintiff was shown the pictures of the front and back of a male person appearing at page 30 of the claim documents bundle. It was pointed out to him that the nurse who completed the form, save for where it is obvious that Dr Pieterse completed it, indicated that he had indicated and/or that she had found injuries to his left elbow, left ribs and both knees. The Plaintiff denied that he provided such information to the nurse and that he does not know where she got the information from to make the crosses on the areas indicated on the pictures. The Plaintiff was asked whether he spoke to the nurse and he replied "no", he only spoke to the doctor;

8.9. The Plaintiff was then referred to page 34 of the claim documents bundle where it is indicated that the patient, i.e. the Plaintiff, arrived at the hospital at 02h00 and walked out of the hospital with a pain indication of 5/10 at 02h55. The Plaintiff stated that all that is written down on page 34 is incorrect and that he left the hospital at 06:00 when a friend collected him;

8.10. The Plaintiff was asked whether he informed the doctor that a truck forced him to swerve which caused the accident, whereupon the Plaintiff answered "no, the doctor only asked me about my pain that I felt.";

8.11. The Plaintiff was again asked whether he spoke to the ambulance man whereupon the Plaintiff answered he did not speak to the ambulance personnel. The Plaintiff was asked that when the police officer came to see him at the hospital whether he informed the police officer exactly how the accident happened and

the Plaintiff answered "no, the policeman only said that I must come to the police station to obtain the case number";

8.12. The Plaintiff confirmed that his employer sent someone to fetch him from the hospital and when asked whether he at least informed this person about how the accident happened i.e. that a truck forced him off the road, the Plaintiff answered "no";

8.13. The Plaintiff was then referred to page 33 of the claim documents bundle and specifically to the portion dealing with "Patient Outcome". When asked about what is written down there he stated that it is incorrect. Advocate Roos then said to Plaintiff so everything in the clinical notes and ambulance report is incorrect and the Plaintiff replied "yes". Advocate Roos again asked the Plaintiff whether everything that is written down in the hospital records is wrong, whereupon the Plaintiff replied "yes";

8.14. Advocate Roos then asked the Plaintiff whether he informed no one on the morning of the accident about how he came to leave the road and ended up in a ditch, whereupon the Plaintiff answered that he did not;

8.15. The Plaintiff was then asked whether he was informed by the attorneys when he consulted with them that he cannot claim against the Fund for a single vehicle accident whereupon the Plaintiff answered "no";

8.16. The Plaintiff was asked why it only bothered him during August 2015 that the content of the accident reports was incorrect, whereupon he answered that he saw that the report contained the wrong direction of travel and that there is no mention made of a truck that he forced him off the road;

8.17. The Plaintiff was then asked who brought it to his attention that the accident report contained incorrect and/or insufficient information whereupon the Plaintiff answered that his employer knew he drove from south to north.

9. The next witness who testified was Dr Gerhald Lemmer who is an accident reconstruction expert appointed by the Plaintiff. Mr Grobbelaar was appointed by the Defendant as its reconstruction expert. Dr Lemmer and Mr Grobbelaar compiled a joint-minute which Mr Lemmer, under oath, read out and the hand written minutes was handed in as exhibit "Y". Paragraph 5 of their joint minute reads as follows:

"The experts agree that, if the court were to accept the distance testified by the Plaintiff being 50 metres is correct, it is improbable that he would have been able to have flicked his lights or have swerved prior to collision with the truck due to reaction time being approximately 1.5s. The vehicles would probably reach one another in less than this time."

10. The intention of the Road Accident Fund Act, Act 56 of 1996, is designed to give the greatest possible protection to victims of the negligent driving of motor vehicles. That said, the Plaintiff still bears the

onus of proving negligence on the part of the (unidentified) insured driver on a balance of probabilities. Our courts on more than one occasion pointed to the fact that the possibility of fraud is greater in unidentified vehicle cases since it is usually difficult for the Fund to find evidence to controvert the claimant's allegations.[8]

11. An analysis of the Plaintiff's evidence under oath and during cross-examination shows a lack of credibility and reliability and in most parts it is against the probabilities for the following reasons:

12.1. The Plaintiff's failure to adequately explain why, 14 months after the accident occurred, it came to his attention that the accident report contained insufficient or incorrect information; so to his failure to explain why it was necessary for him to obtain the accident report at the time that he did. His only evidence was that his employer required it;

12.2. The Plaintiffs attempt in explaining how he rectified, so to speak, the omissions in the accident report by attesting to an affidavit on 18th August 2015, and as if that affidavit somehow provides corroboration for his version;

12.3. The Plaintiffs evidence that he did not give details of the accident and in particular the fact that he was nearly involved in a head-on collision with a truck had it not been that he swerved out of its way, to anyone whom he met after the accident, being the ambulance personnel, the nurse or nurses at the Brits Medi-Clinic, Dr Pieterse and the friend who collected him from the hospital. This is against all human nature when one is involved in a motor vehicle accident;

12.4. The Plaintiffs testimony that he did not speak to the ambulance personnel or the nurse at all whilst being treated;

12.5. His testimony on more than one occasion that everything that is contained in the hospital records i.e. written down by the ambulance personnel, the nurse or nurses and Dr Pieterse is incorrect and his evidence that the content of the accident report is incorrect, including the date that the Police Constable recorded when it was compiled.

12. In all, the Plaintiff's evidence lacks credibility and is so against the probabilities that I reject his version of how the accident occurred and find that he has failed to prove negligence on the part of any insured driver on a balance of probabilities.

13. As an aside, having regard to the fact that the Plaintiff in effect retracted the content of the medical reports that he relied upon for the damages he claims from the Fund, one wonders whether there is still a valid claim lodged with the Fund.

14. I therefore make the following order:

14.1. The Plaintiff's claim is dismissed with costs.

MH VAN TWISK

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA GAUTENG

DIVISION, PRETORIA

Heard on: 19 July 2019

Judgement

delivered: 31 July 2019

Appearances:

For the Plaintiff: ADV MPE

Instructed by:

For the Defendant: ADV ROOS

[1] See: Page 1, claim documents bundle

[2] See: Page 10, claim documents bundle

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- [3] See: Page 35, claim documents bundle
- [4] See: Page 29, claim documents bundle
- [5] See: Page 3, Notices Bundle
- [6] See: Pages 5 to 60, Notices Bundle
- [7] See: Page 90, Notice Bundle.
- [8] See: *Mbatha v Multi Lateral Motor Vehicle Accidents Fund* [1997] ZASCA 25; 1997 (3) SA 713 (SCA) at 718 H; *Bezuldenhout v The Road Accident Fund* 2003 (6) SA 61 (SCA) para 12 and *Road Accident Fund v Thuqwana* 2004 (3) SA 169 (SCA) para 13 and 4
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