

SOUTH AFRICA / JUDGMENT

Sinthumule v Road Accident Fund (2021/7032) [2024] ZAGPJHC 1234 (28 November 2024)

[2024] ZAGPJHC 1234

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

2021/7032

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2021/7032

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

SIGNATURE 28

November 2024

In

the matter between
between:

LUSUNZI
SINTHUMULE
Plaintiff
and
ROAD
ACCIDENT FUND
Defendant

JUDGMENT

NOKO, J

Introduction

- [1] The plaintiff, Lusunzi Sinthumule, instituted civil action against the Road Accident Fund (Fund) which is predicated on the Road Accident Fund Act 56 of 1996 (RAF Act). The plaintiff is claiming compensation for damages arising out of a motor vehicle accident (“accident”) which occurred on 22 October 2019. The amount claimed for the damages is a total sum of R4 050 000.00 being the sum total for general damages, loss of income, loss of earning capacity and future medical expenses.
- [2] The Fund has appointed the Office of the State Attorney to defend the action and has in addition to its plea raised three special pleas, including a special plea of prescription[1]. The special plea of prescription was introduced through a notice to amend the plea which was served on the plaintiff on 3 September 2024 being the date on which the matter was set down for trial. Though the trial was set down for 3 September 2024 the parties agreed that the trial should commence on 4 September 2024.
- [3] The parties conveyed on 4 September 2024 prior to the commencement of the trial that the plaintiff has consented to the delivery of amended pages without having to await 10 days as contemplated in terms of Rule 28 of the Uniform Rules of Court.

Background.

- [4] The plaintiff was a driver of a motor vehicle, to wit, a white Toyota Quantum, with registration letters and numbers ZKP 918 GP (“the vehicle”) driving in the southerly direction along Sagewood street, Braamfisher, Soweto. The plaintiff averred in his particulars of claim that the accident was caused by the sole negligent driving of the insured vehicle with unknown registration numbers and letters. Further that the unknown/unidentified motor vehicle which caused the collision was driven negligently by the insured driver who failed to stop after the accident.
- [5] The plaintiff proceeded to lodge a claim for damages against the defendant on 17 October 2020 and subsequently sued out summons as the defendant failed to settle the claim within a period of 120 days.

- [6] The plaintiff has consulted medical experts[2] and submitted several medico legal reports in support of the claim for the compensation of the amounts referred to in paragraph 1 above. The plaintiff has also submitted for the purposes of trial affidavits deposed to by the said experts in terms of rule 38 of the Uniform Rules of Court.

Special plea

Prescription

- [7] The defendant contended that the plaintiff failed to include the Accident Report and section 19(f)(i) affidavit as required in RAF Act at the time of lodgement. The defendant then dispatched a letter to the plaintiff on 14 September 2020 rejecting the claim based on non-compliance with the requirements set out in terms of the RAF Act.
- [8] In view the foregoing the defendant avers that the plaintiff's claim is therefore invalid for non-compliance with statutory requirements and the non-compliance should have been remedied within a period three years from the date of accident. The plaintiff only delivered the Accident Report and the section 19(f) Affidavit to the respondent on 13 December 2022. The defendant averred that the said documents were ignored as it construed the claim as having prescribed after 3 years from the date of the accident being 21 October 2022 calculated from 22 October 2019.
- [9] The defendant contended that the claim was in terms of section 23(1) of the Act and not 17(1)(a) and as such the plaintiff had a period of three years to submit a compliant claim[3]. Further that since the collision occurred on 21 October 2019 a valid claim should have been lodged at least on 21 October
2021. Since the plaintiff submitted the accident report 2 months after the 21 October 2021, his claimed has therefore prescribed.
- [10] In retort, the plaintiff contended that there are several judgments which dealt with a question of substantial compliance. In this case the details of the accident were outlined in the RAF 1 form from which the defendant could have investigated the veracity of the claim. The plaintiff's counsel referred to Khomo[4] where the court held that the completion of RAF 1 form by the medical practitioner who did not treat the claimant cannot be construed ipso facto as non-compliance leading to the rejection of the claim. The court held that there was substantial compliance and the rejection of the claim was dismissed. As such the information on the accident, little as it may have been, was furnished in the RAF 1 form and plaintiff has therefore substantially complied with the RAF Act.
- [11] In addition, counsel for the plaintiff contended, that it has long been held that RAF Act is a social legislation and the court should not find itself being a prisoner of formalism and should apply its provisions with a measure of flexibility[5].

- [12] I had regard to the RAF form 1 in paragraph 5 and noted that the information provided by the plaintiff about the accident was only the street name where the collision occurred. No further details were furnished of the insured motor vehicle including the vehicle which was driven by the plaintiff. There is virtually no information which could have assisted the defendant to do any investigation. In the premises I find that the contention that this was a condonable non-compliance or substantial compliance is devoid of any merits and the assertion by the plaintiff that there was substantial compliance has been mentioned to be rejected. Therefore, I conclude that the special plea of prescription has merit and it is therefore upheld.
- [13] Without derogating from my finding on prescription above and in the event, it is found to be wanting, the assessment of the merits is dealt with below but the conclusion is still unpalatable to the plaintiff.

Merits

Plaintiff's evidence

- [14] The plaintiff testified that he is South African adult male resident at 1[...] B[...] phase [...], Soweto. He is married and has three children, aged 7, 5 and 2 years old. The plaintiff is residing with one child together with his wife and the other two are residing with their respective mothers.
- [15] At all material times relevant hereto he was employed as a taxi driver for a period of 5 years, prior the accident, by Mulaudzi Namadzabovho, and he was earning R5000,00 per month. On the day of the accident, he was driving the vehicle along Braamfisher road after off-loading the passengers. He was driving at a speed of about 60 kilometers per hour in an 80km/h zone. Suddenly another vehicle ("insured vehicle") came approaching from the opposite direction at a high speed. The insured driver was driving on the plaintiff's lane and the plaintiff's attempt to swiftly swerve to avoid a head-on collision could not be achieved and the insured vehicle collided with the vehicle on his right side of the vehicle. Subsequently the plaintiff lost the control of the vehicle, swerved on the left side of the road and collided with a nearby wall. The plaintiff fainted and when he regained consciousness, he was already at Helen Joseph hospital.
- [16] He testified further that he suffered dislocation of the right shoulder and fracture of the clavicle and was kept at the hospital for a period of 2 months. He was operated and screws were inserted in his shoulder. After his discharge from the hospital, he relocated to his homestead in Limpopo as he was not coping with the usual demands of city life. He came back after a period of 4 months.

- [17] He has not been able to find any job and this is mainly attributed to his shoulder which remained painful. He now depends on his wife who occasionally finds some odd jobs. He studied until grade 12 and had to drop out of school before completing same. He subsequently attended a course to be security guard and received a certificate on completion. He has nonetheless been unable to secure any security jobs as the said certificate expired.
- [18] The plaintiff was referred, under cross examination, to the section 19(f) affidavit and he acknowledged that the affidavit was deposed to by him and the signature appended thereon was his. It was then pointed to him by the defence counsel that his version as stated in his evidence in chief is not consistent with what it stated in the affidavit wherein, he stated that the insured vehicle came from behind and overtook him. The insured driver then suddenly stopped, and he tried to avoid the accident, but it was too late hence he collided with the insured vehicle. Despite acknowledging the discrepancy, the plaintiff persisted that the correct version is as stated during his evidence in chief.
- [19] The defence counsel further referred the plaintiff to the hospital records which were discovered by the plaintiff's attorneys. The said record reflects that the plaintiff came into the hospital walking by himself after sustaining injuries after he was hit by a vehicle as a pedestrian whilst crossing the road. Further that the injuries suffered were on the right leg and right ankle. Though he confirmed that he communicated with the nursing staff he denies that the said information was provided by him. The plaintiff was also aware of the contradiction with the section 19(f) wherein he stated that he became unconscious and do not know who took him to the hospital.
- [20] There was also contradiction noted by the defence during cross examination as the plaintiff stated in evidence -in-chief that there was contact between his vehicle and the insured vehicle whereas in the section 19(f) affidavit the vehicles did not come into contact with each other. The plaintiff averred that the accident occurred as he stated in these proceedings and not as set out in the affidavit or hospital records.
- [21] In closing the plaintiff's legal representative submitted that it is clear that there is contradiction between the testimony given by the plaintiff in relation to what is contained in the section 19(f) affidavit. Further that what was given during the testimony is consistent with what was stated in the accident report. The court should therefore discard the contents of what is contained in the section 19(f) read with the misstatements in the hospital records.
- [22] The plaintiff's attorneys further summarised the evidence set out in the reports of the experts which were supported by the respective experts' report submitted in terms of rule 38 of the uniform rules of court. The relevant experts were the Occupational therapist, Industrial Psychologist and Orthopaedic Surgeon. In view of the conclusion set out below on the merits it became unnecessary to make assessment of the quantum based on the experts' reports.

- [23] The plaintiff closed its case. The defendant decided not to call any witness and also closed its case.
- [24] The defence's counsel in summation contended that the contradiction in the evidence is material and goes to the root of the plaintiff's claim. It is further improper that the plaintiff argued that the court should have regard to the AR which though discovered but has not been presented as part of evidence before the court. The plaintiff's argument that certain unfavourable evidence should be discarded by the court is unheard of and the contradiction goes deeper to the credibility of the plaintiff and reliability of the evidence he is presenting to the court. The evidence is also at variance with what is set out in the hospital records which were discovered by the plaintiff and also a deviation from what is set in the particulars of claim read together with the further particulars furnished by the plaintiff.

Issues.

- [25] The issue for determination is whether the plaintiff has discharged the onus on a preponderance of probabilities and adduced sufficient evidence to enable the court to assess if he has discharged the onus he is saddled with.

Legal principles and

analysis.

- [26] It is trite that the plaintiff in a delictual claim should, inter alia, prove causation. It was stated in *Gumede v Road Accident Fund*[6] that

"The plaintiff must allege and prove the causal connection between the negligent act relied upon and the damages suffered. The requirement

that there must be causal link between the conduct, the resulting injury or death and consequent damage is expressed by the phrase

"caused or arising from" as it is found in section 17 of the RAF Amendment Act."

- [27] In addition, section 16 of the Civil Proceedings Evidence Act[7] provides that "a judgment may be given in any civil proceedings on the evidence of any single competent and credible witness."

It therefore follows that for the plaintiff to succeed in his claim he must satisfy the Court that, on the probabilities, his evidence is credible.

- [28] The process of evaluation of evidence enjoins the presiding officer, in evaluating the evidence, to determine the credibility of the plaintiff and the probability or improbability of testimony presented. It was stated in *Selamolele*[8] that the approach to the question whether the onus has been discharged was dealt with as follows:

“... the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable.”[9]

- [29] Section 19(f) of the RAF Act provides, inter alia, that the Fund shall not be obliged to compensate any person in terms of section 17 for loss or damage 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 time thereafter and if he or she is in a position to do so an affidavit in which the particulars of the accident that gave rise to the claim concern 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. (underlining added).

- [30] The argument that the court should ignore section 19(f) of the RAF Act is motivated by the attempt to avoid the embarrassment caused by contradictions in the evidence presented. This argument does not assist the plaintiff because ignoring or without the section 19(f)(i) affidavit the plaintiff would not have complied with the statutory requirements for a claim in terms of the RAF Act. The evidence in the section 19(f)(i) affidavit should ordinarily record the memorial of events of what truly happened as it was still fresh to the plaintiff in contrast to evidence which is being presented more than 4 years later. This should also apply to the information in the hospital record as it was taken down immediately after the accident. It was stated in Pardon[10] where the oral testimony was also inconsistent with the contents of the section 19(f) affidavit that

“The contradiction raises serious doubt about the credibility of the Plaintiff as well as the reliability of his evidence. This is so particularly when one considers that the version in the particulars of claim, which is corroborated by the section 19(f) affidavit, was made by the Plaintiff when the incident was supposed to be fresh in his mind.”

- [31] The versions presented by the plaintiff are diametrically opposed and mutually destructive. The conflicting versions must be weighed up against the inherent or general probabilities of the matter and a finding must be made. The court is enjoined to balance the probabilities and then also make a finding on the credibility of a party presenting the evidence.
- [32] The plaintiff's submission to consider the claim without section 19(f)(i) affidavit is self-destructive as the claim in terms of the RAF Act need to be accompanied by the affidavit setting out the accident.[11] That notwithstanding the court cannot at the whims of the plaintiff and devoid of any prudent explanation be instructed to ignore evidence just because it is unfavourable to the plaintiff.[12] To this end the unsolicited invitation by the plaintiff to disregard section 19(f) affidavit is rejected outrightly.

[33] In the end the claim is dismissed for failure to satisfy the requirements of the RAF Act, to submit section 19(f) affidavit, if the affidavit submitted is disregarded as plaintiff wishes. In the alternative due to the material contradictions the claim falls to be dismissed as the plaintiff failed to present any credible evidence on a balance of probabilities to demonstrate that the injuries sustained were as a result of the negligent driving of an insured driver.

Quantum

[34] In view of my finding on the merits it is unnecessary to traverse evidence which was presented in support of the claim against the defendant in respect of the quantum.

Costs

[35] The principles with regard to costs orders were settled in Biowatch[13] and Ferreira

[14] where it became clearer that a party who is out of pocket as a result of the losing party should be able to recoup from the losing party. There are no reasons advanced to persuade me that the principle foreshadowed in these cases should be unsettled.

[36] In the premises the following order is granted.

The plaintiff's claim is dismissed with costs.

M V NOKO

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG.

Dates:

Hearing: 4 September 2024

Judgment:

28 November 2024

Appearances:

For the Plaintiff: TN Dzivhani Instructed by R Malise Attorneys. For the Defendant: TH Ngomane Instructed by Office of the State Attorney.

[1] The other two special pleas were abandoned by the defendant.

[2] Occupational therapist, Industrial Psychologist and Orthopaedic Surgeon.

[3] This appears not to be the case as the only vehicle which was identified is the plaintiff's vehicle and as such the claim should be considered as falling within the provisions of section 17(1)(b) (so called hit and run cases) and the claim should have been lodged within two years. Strangely and curiously when asked by the court the plaintiff's counsel stated when asked by the court that this is not a hit-and-run as one vehicle was identified being the

vehicle driven by the plaintiff. This position finds no support in our jurisprudence and is found wanting and indeed creative.

- [4] Khomo v Road Accident Fund 2023 JDR 4419 (GJ).
- [5] See para 18 in Pithey.
- [6] Gumede v Road Accident Fund [2021] ZAGPPHC 568 (24 August 2021).
- [7] Civil Proceedings Evidence Act 25 of 1965.
- [8] Selamolele v Makhado 1988
- (2) SA 372 (V).
- [9] Id at para 374J – 375B.
- [10] Pardon v Road Accident Fund (689/21) [2024] ZAMPMHC 36 (10 June 2024)
- [11] Id at para 12
- [12] See para 26 of this judgment where it is stated that RAF can exclude liability where the claimant failed to submit an affidavit. See also See SCA in Pithey v Road Accident Fund (319/13) [2014] ZASCA 55 (16 April 2014) at para 17 where it was stated that “...s19 excludes liability in the event of failure to provide information in a particular form.” Further that “The affidavit and copies of statements and documents mentioned in s19(f) are required to provide details of how the accident rise to the claim arose. It is abundantly clear that the purpose of this provision is, inter alia, to furnish the Fund with sufficient information to enable it to investigate the claim and determine whether or not it is legitimate. It was stated in Gwizi v RAF (2048/2020) [2023] ZAGPJHC (5 May 2023) at para 16 that “In the present case if the version contained in the statutory affidavit is true the Plaintiff’s testimony in court is false and vice versa. They cannot both be true, although both may be false. If the version in the statutory affidavit is false, either the Plaintiff or his attorney or both conspired to submit an affidavit that is false in material respects. If so, the requirements of section 19(1)(f) have not been complied with and the Plaintiff’s case stands to be dismissed. If the version given in court is false, then it has to be rejected in which case the plaintiff has not discharged the onus resting on him.
- [13] Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) at para 1.
- [14] Ferreira v Levin NO and Others v Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC) (1996 (4) BCLR 441 [1995] ZACC 2).

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