

SOUTH AFRICA / JUDGMENT

Willemse v Road Accident Fund (3214 / 2019) [2022] ZAMPMBHC 17 (4 April 2022)

[2022] ZAMPMBHC 17

COURT

Mbombela High Court, Mpumalanga

BEFORE

Ratshibvumo

CASE / FILE NUMBER

3214 / 2019

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA MAIN SEAT

CASE

NO: 3214 / 2019

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED.

04 April 2022

In

the matter between:

ADAM
JOHANNES
WILLEMSE
PLAINTIFF
and
ROAD
ACCIDENT
FUND
DEFENDANT

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 04 April 2022.

JUDGMENT**RATSHIBVUMO J**

- [1] This is a claim for general damages, medical expenses and loss of earnings totalling R3 500 000.00 by the Plaintiff, against the Road Accident Fund (the Fund). Court ordered the separation of the quantum from the merits in accordance with Rule 33(4), at the request by both parties. The trial proceeded in respect of the merits only. Issue pertaining to quantum was postponed sine die.
- [2] Merits of the case included a question on whether it was permissible for the Defendant to withdraw an offer after it was accepted by the Plaintiff. As it appears from the pleadings that were handed in for trial purposes, the Defendant made a tender in terms of Rule 34(1) in which merits were conceded on 50% liability in favour of the Plaintiff. The offer was dated 11 October 2021 and was served on the Plaintiff on 20 October 2021. The Plaintiff served his signed notice of acceptance via email on 08 November 2021 at 09h18. On the same date and at 10h13, the Defendant responded alerting the Plaintiff that the offer was withdrawn.
- [3] The Plaintiff submitted from the onset that the Defendant was not entitled to withdraw an offer after it was accepted. It was submitted that the court can only allow a withdrawal of an accepted offer in exceptional circumstances. Counsel for the Defendant submitted that there were exceptional circumstances that will be proved through evidence, that the claim was fraudulent as it involved a single motor vehicle – a motorbike that the Plaintiff was riding; yet his claim suggested that the accident involved two motor vehicles. For this reason, the court gave a directive for trial to proceed as envisaged as it would be in a better position to decide on this aspect after hearing the evidence on merits which shall include the evidence on the alleged fraud.
- [4] A total of three witnesses were called in this trial; one for the Plaintiff and two for the Defendant. The pleadings, photos from the scene of the accident and the offer of settlement together with the acceptance letter by the Plaintiff were handed in as exhibits by agreement between the parties.
- [5] Samuel Rachoshi was the Plaintiff's only witness. He testified that on 05 August 2018, he was standing on the side of the Nelspruit/Lydenburg Road together with his colleague named Brenda where they usually hike for lifts to Lydenburg. When he looked to Lydenburg direction, he saw some 200 meters away, a motorbike coming down the hill overtaking a white sedan motor vehicle. The white motor vehicle then bumped the motorbike which fell down.

- [6] In an attempt to clarify the words “the white motor vehicle bumped into a motor bike” he then used the words, “they bumped into each other.” When asked to clarify further, he then said the motorbike bumped into a white motor vehicle. The point of impact was on the left side of the road when driving down the hill, meaning it was on the proper side of the white motor vehicle and the motor bike. He went on to say he could not say as to who was at fault between the biker and the driver of the white

motor vehicle. The white motor vehicle did not stop. He could not see its registration numbers as it was driven at a high speed. He also testified that there is no way the accident could have been avoided and that the accident took place because of the motorbike overtaking the white motor vehicle.

- [7] He did not tell the police as to what he saw. He was questioned on a document which is part of the pleadings which up until then, was thought to be an affidavit. It was the court that brought it to the attention of the legal practitioners that on the face value of the document, when the deponent was asked if he has an objection in taking the oath, the answer written manually using a pen was “yes”. It does not look like the deponent took an affirmation now that he voiced an objection in taking the oath. The document was thereafter referred to as just “a statement.” While he admitted that the signature in the statement was his, he did not know what he was signing it for, as the contents were not read back to him. Although on the face value, the commissioner of oath is reflected as a police officer, the witness disputed having signed the statement at a police station or in front of a police officer.

- [8] This evidence concluded case for the Plaintiff.

- [9] The Defendant called Brenda Mdhluli as the first witness. She testified that on the date of the incident, between 16h45 and 16h55, she was standing on their usual hiking spot on the side of the road. She was in the company of her colleague, Samuel (Mr. Rachoshi). They were hiking for a lift from cars driving from East (Nelspruit direction) to West (Lydenburg direction). As she was looking to the East, she heard noise (like a falling motorbike) from the Western side. She turned to look and saw a motor bike having fallen on the road. It was at a distance of about 150 meters away from her. She immediately alerted Samuel to also look and see what she was observing. When she looked, the motorbike was slightly behind a white motor vehicle. The white motor vehicle drove past them. She ran to inform her employer of what she just saw.

- [10] She was later approached by a certain Mr. Nkosi who introduced himself as a lawyer and he wanted to know how the accident occurred and she told him. She also told him that she did not see the actual accident but she heard some noise and when she looked, the motor bike had already fallen to the ground. Later, she was made to sign a document by Mr. Nkosi. The said document was not read to her. It was untrue that she saw the accident. When she observed and saw a motor bike falling, it was about 150 meters away which is a long distance for her to see. At that time of the day, the sun was also setting making it difficult for one to see anything at the direction of the sun.

- [11] She disputed having said that “it is my submission that the motor vehicle touched the motor cycle, causing the rider to lose control over the motor cycle.” Remarkably, the same sentence was written in a statement attributed to Mr. Rachoshi. Like the statement attributed to Mr. Rachoshi, this statement also fails to be an affidavit for exactly the same reasons. She also testified that she asked Mr. Nkosi as to what was in for her, and he promised to give her something when the case is finished.
- [12] She also testified on how she on 05 November 2021, met the officials from the Fund who asked her to tell what happened and she told them what she told the court, like she told Mr. Nkosi. These officials also took a statement from her which was read back to her before causing her to sign it. When the version by Mr. Rachoshi was put to her, she could not dispute it saying, if that is what he saw, it was different to what she saw.
- [13] Samuel Dalane also testified. He worked for the Fund in the Forensic Department and had been working there for the past 25 years. It was he and Itumeleng who approached Ms. Mdhluli and obtained a statement from her. She also took them to the scene of the incident where she showed where she was standing when she saw the motor bike falling. It was a distance of about 200 meters and at that distance she could not even see well.
- [14] With this evidence, case for the Defendant was closed.
- [15] In *Ngwalangwala v Auto Protection Insurance Co Ltd (in Liquidation)*[1], the Appellate Division in dealing with a predecessor rule to Rule 34(1) said the following,

“[N]o indication is given in the Rule as to any basis upon which the Court, which is approached for an order under sub-para. 11 thereof, should decide whether either party should obtain the relief in question; but it was accepted in the Frenkel, Wise and Company[2], that it is in each case a matter for the discretion of the Court to be exercised according to the particular relevant circumstances.

That clearly must be the position. In the present matter it has become unnecessary to consider exactly in what circumstances the

Court should allow a plaintiff to accept and to obtain money paid into Court which he has previously refused or neglected timeously to accept; the appellant has on appeal not persisted in his claim for an order for the payment out to him of the money paid in. In regard to the position of a defendant who has paid in money under the Rule, some of the considerations which may weigh with the Court in allowing him to retract and to claim back such money have been indicated in the judgment in *Frenkel's* case mentioned above. In view of the fact that the Rule requires that such a payment be pleaded, any application by a defendant for repayment will usually involve an amendment of the plea to withdraw that part of his plea which refers to and sets up the payment. For this purpose a defendant would also have to show good reason why he should be allowed to amend his pleadings. If he can aver, for instance, that the payment into Court was made and pleaded under a mistake of fact or was induced by fraud or that no legal basis exists for any claims at all by the plaintiff against him, the Court may be induced to allow him to withdraw his plea of payment into Court and authorise a repayment to him by the

Registrar. But, in the absence of some such reason, a mere change of mind by a defendant or a reconsideration of the tactics he desires to employ in the action against him would be no basis for requesting a Court to exercise its discretion in his favour by allowing him to resile from the position he had solemnly taken up previously.”

[My emphasis].

[16] In *Road Accident Fund v Krawa*[3], the appellant sought and was granted leave to amend its plea so as to withdraw an offer it had made conceding merits of the case. The RAF sought to withdraw its offer which was already accepted by the respondent, for reason that the respondent (then the plaintiff) in his claim against the Fund, had made misrepresentations to the effect that he was dependant on the deceased for maintenance and that the deceased would have continued maintaining him had it not been for the death occasioned by the motor vehicle accident. Following an investigation conducted after an offer was made in terms of Rule 34(1), it came out that the plaintiff was long separated from the deceased at the time of her death and that he was not dependent on her. The court held on appeal that the concession of merits by the defendant did not mean an admission that the plaintiff was dependent on the deceased. Of relevance in that case is when the court said,

“The general rule for the amendment of pleadings is that leave to amend will not be refused unless the application has not been made in good faith or where it would cause an injustice to the other side which cannot be compensated by an award of costs.[4] To this extent the onus rests on the defendant to establish that the plaintiff will not be prejudiced by it.[5] An amendment will inter alia be allowed where, as in the present matter, a new ground of defence comes to a defendant’s knowledge for the first time after he or she has filed a plea.”[6]

[17] I now turn to consider the circumstances that make the Fund to want to resile from the offer or the compromise reached with the Plaintiff. It came up from the evidence led by both the Defendant and the Plaintiff that Ms. Mdhluli and Mr. Rachoshi were made to sign the statements the contents of which were not read to them. They did not know what was contained in the documents they signed. Contrary to what is stated in the statements, they were not made in front of a police officer and/or at a police station. When asked if they have objection in taking the oath, the statements reflect “yes” as the answer given by both witnesses. The witnesses however testified that they were not made to take oath. This in my view is misrepresentation that borders along fraud if it happened the way these witnesses testified. I do not have evidence by Mr. Nkosi who is said to be the one who made Ms. Mdhluli to sign her statement on what happened from his side or at least the alleged police officer who “commissioned” the statements. The version by the witnesses will have to be accepted as is.

[18] As there is no version by the Plaintiff himself on what happened on the date of the accident, the statements that were believed to be affidavits were the only source of information on how the accident took place, and indeed the only information upon which the offer was made by the Defendant. This means the Fund did not have affidavits by the eye witnesses by the time it made an offer, although it may have thought it had.

[19] The other cause of concern is that besides the feebleness in the statements, the evidence presented by the Plaintiff falls far short

of establishing negligence on the part of the insured driver. The onus to show whether the insured driver was negligent and to what extent, rests on the Plaintiff, who must show on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. Section 19(a) of the Road Accident Fund Act[7] provides that “the Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21...” As the court observed in Krawa[8], the effect of this provision is that the Act does not alter the basic requirements for delictual liability at common law.

[20] Negligence in section 17(1) is therefore the culpa of the common law and any defence available to a defendant at common law is also available to the Fund in terms of the Act. It also follows that the common law principles applicable to damages, its existence and the assessment or determination of the extent thereof must equally apply to a claim for compensation in terms of the Act, save where it is expressly stated otherwise. In *Evans v Shield Insurance Co. Ltd*, the Supreme Court of Appeal (the SCA) held,

“To a great extent the Act represents an embodiment of the common law actions relating to damages for bodily injury and loss of support where the bodily injury or death is caused by or arises out of the driving of a motor vehicle insured under the Act and is due to the negligence of the driver of the vehicle or its owner or his servant. Then in place of, and to the exclusion of, the common liability of such persons is substituted the statutory liability of the authorized insurer. Sections 21, 23 (a) and 27 indicate that the statutory liability of the authorized insurer is no wider than the common law liability of the driver or owner would have been but for the enactment of the Act (indeed in certain instances it is narrower – see ss 22 and 23 (b)) and that this statutory liability is dependent upon the existence of a state of affairs which would otherwise have given rise to such a common law liability (Workmen’s Compensation Commissioner v Santam Bpk 1949 (4) SA 732 (C) at 740; Rohloff v Ocean Accident and Guarantee Corporation Ltd 1960 (2) SA 291 (A) at 297 E-G). The negligence upon which liability under s21 hinges is the culpa of the common law and, save in certain specified instances, the compensation claimable under s21 is assessed in accordance with common law principles relating to the computation of damages.”

[21] In applying the law to the facts, it means the Plaintiff should prove negligence on the part of the insured driver before the Fund could be liable. There is doubt in the mind of the court if Mr. Rachoshi actually saw the impact between the motorbike and the white motor vehicle. The reason for this is his failure to tell which of the two motor vehicle knocked the other, to the extent that he says they knocked or bumped each other or that he could not say which of the two was at fault. Without apportioning any

blame on him, this is a far cry from what was inserted in a statement attributed to him where he is alleged to have made a “submission

that the white motor vehicle touched the motorbike causing its rider to lose control.” Even if it was to be accepted that he saw a collision, whatever he saw cannot be said to be negligence on the part of the white motor vehicle driver. Given how the motorbike is said to have overtaken the said vehicle by Mr. Rachoshi, and that the “bumping” took place on the proper lane in which it was traveling, the closest that one can glean from that evidence is that it was the motorbike rider who was negligent, not the other way round.

[22] The facts above should be seen in light of the decision by the SCA in *P M obo T M v Road Accident Fund*. [9] In this matter, the appellant argument was that the court had no right to order the trial to proceed on merits irrespective of the

settlement agreement reached between the parties, merely because from the pleadings, the court could not see any negligence on the part of the insured driver. The appeal was dismissed with the SCA holding that the court could reject a settlement where it makes no sense in its view on why there was any settlement in the first place. This in essence would entail that even without any withdrawal by the Defendant in casu, the court could still have questioned the affidavits which are no affidavits and even order the trial to proceed on merits for that reason.

[23] Although the withdrawal by the Defendant came up by way of trial as opposed to an application to amend the pleading, I do not see any prejudice on the part of the Plaintiff. This matter was set down for trial on merits and no one was taken aback by the decision to proceed on merits. The Plaintiff had the full opportunity to counter the evidence presented if he wanted to. Instead, the Plaintiff seemed to lay a foundation for the Defendant’s evidence in the evidence he presented through Mr. Rachoshi.

[24] It follows therefore that the Defendant stands to be allowed to withdraw the offer as it was based on documents believed to be affidavits while they were not and the said statements were a misrepresentation of facts not given by the witnesses, or at least, not confirmed by them. Moreover, there is no evidence led showing negligence on the part of the insured driver. While I accept the argument advanced on why the Plaintiff could not give evidence in respect of the withdrawal of the offer, I do not have any submission on why he did not give evidence on merits of the case while it was known that the trial was on the merits and that the question of withdrawal of the offer was just one of the aspects to be decided in the trial. The court voiced the desire to hear the Plaintiff and this could not be done for reason that it was alleged that he could not remember the incident. No evidence was however led on his

loss of memory either by himself or by the medical experts.

[25] The claim stands to be dismissed for the reasons stated above. There is no reason why costs should not follow suit.

[26] The following order is therefore made:

[26.1] The claim is dismissed with costs.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF : ADV. L BOTHA

INSTRUCTED BY : DU TOIT-SMUTS ATTORNEYS

MBOMBELA

FOR THE DEFENDANT : MR. S SIBIYA

INSTRUCTED BY : STATE ATTORNEY

DATE HEARD

: 07, 09 & 10 MARCH 2022

JUDGMENT

DELIVERED : 04 APRIL 2022

[1] 1965

(3) SA 601 (A) at 608G-609B.

[2] 1947

(4) SA 715 (C)

[3] 2012

(2) SA 346 (ECG)

[4] Erasmus op cit at B1-178A.

[5] Erasmus op cit at B1-179.

[6] Krawa (supra) at para 48. See Erasmus op cit at B1-178A & 179. See also and Frenkel, Wise & Co Ltd v Cuthbert 1947 (4) SA 715 (C).

[7] See section 17(1) of the Road Accident Fund Act, 56 of 1996.

[8] Supra at para 21.

[9] 2019

(5) SA 407 (SCA).

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Prepared on 11 October 2026 · Esheria