IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MTHATHA

Case No: 474/2022

In the matter between:

SINTU THIMNA NONTSELE Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

SAMBUDLA,AJ:

[1] Sintu Thimna Nontsele, (plaintiff) seeks to recover from the Road Accident Fund (defendant) damages arising from a motor vehicle collision that occurred on 19 February 2019 on N2 National Road, near Sibangweni, Mthatha.

[2] On 12 April 2023, by agreement between the parties, merits were separated from quantum. A formal order to that effect was made in terms of Rule 33(4).

[3] The court was required to determine the issue of negligence and contributory negligence, as the defendant conceded liability during the trial.

[4] Plaintiff was the only factual witness called to testify and the defendant failed to call any witness.

[5] The following facts are common cause and/or at least not in dispute:

At about 14H30 whilst driving on the N2 National Road on a clear, sunny day and dry tarred road surface;

1. Plaintiff was travelling on dual carriage way road for vehicles en-route to Mthatha from Qumbu direction;
2. Plaintiff overtook an unknown vehicle, driven by an unknown driver (**first driver**)[1] en-route to Mthatha, which had occupied the left slow lane of a dual carriage way;
3. Plaintiff moved his vehicle to the fast lane on his right-hand side, still reserved for vehicle enroute to Mthatha;
4. The road is divided by a barrier line from oncoming vehicles, that is, from Mthatha to Qumbu direction;

[1] Such description has been necessitated by the number of vehicles that were involved in the collision, even though, the plaintiff had not fashioned his cause of action against the first driver.

5. The road was curvy and sloppy;

6. To overtake a slow-moving vehicle on left lane, the plaintiff moved his Isuzu Bakkie with registration numbers **111 TLF EC** to the fast lane; and

7. Plaintiff did not have to cross the barrier line and traverse the path of the oncoming traffic when overtaking the slow moving vehicle on the slow lane.

[6] Suddenly, according to plaintiff, an unknown insured driver (**second driver**)[2] left his correct lane of travel, whilst overtaking a truck going towards the Qumbu direction.

6.1 On the oncoming traffic side, the second driver, overtook a truck, whilst it was inopportune to do so and therefore traversed the plaintiff's lane of travel;

6.2 To avoid a head-on collision, the plaintiff swerved his vehicle to the path of the vehicle driven by the first driver;

6.3 First driver was still occupying the slow lane, enroute to Mthatha;

6.4 To avoid a head-on collision with the second driver/vehicle, that was overtaking the truck, plaintiff swerved his vehicle to the left-hand side; and

6.5 Plaintiff drove straight into the path of the first driver/vehicle on the slow lane.

[2] Plaintiff seeks to recover damages against the defendant for negligence premised on the second driver.

[7] Plaintiff testified that, he swerved his vehicle into a gap between his car and the first driver/vehicle. Plaintiff testified that, the gap was small and the incident took place quickly and suddenly.

[8] The first driver/vehicle then collided with the plaintiff's motor vehicle from behind. This caused the plaintiff to lose control of the vehicle, which veered off the road and rolled.

[9] Plaintiff lost consciousness which he only regained some five days after the collision.

[10] When plaintiff went to report the collision at the Libode Police Station after his discharge from hospital he was the only driver to attend the scene with the police.

[11] When the sketch plan was drawn and Accident Report (AOR) compiled by the Libode SAPS member/s, it was the plaintiff who narrated the collision to the police.

[12] In this regard, the plaintiff only recalls advising SAPS member how the collision occurred and this enabled the SAPS member to complete the AOR and Sketch Plan of the collision scene.

[13] The defendant led no factual witnesses in relation to the collision.

[14] The defendant's counsel was content only to cross-examine the plaintiff regarding contributory negligence.

[15] In *SAR & H v SA Stevedores Services Co Ltd* 1983(1) SA 1066 (A) at 1089, it was held that, contributory negligence cannot be raised as a defence to an action.

[16] To the extent that, the defendant pleaded contributory negligence, in my mind, the latter sought only to reduce its liability and no more.

[17] Suffices to say, the plaintiff appeared as a credible witness, who maintained the simplicity of his version regarding how the collision occurred.

[18] Perhaps, to bolster what would later be argued, it was put to the plaintiff that, on the 19 February 2019, he was able to avoid the collision with the first driver/vehicle by taking precautionary and or preventative measures, in that;

18.1 He could have applied his brakes;

18.2 He could have accelerated his vehicle to prevent and/or avoid colliding with the first driver/ vehicle; and

18.3 Because of his failure to take precautionary measures, plaintiff contributed the collision.

[19] Plaintiff refuted the above assertions maintaining that, he found himself in a sudden emergency.

[20] Regard being heard to the second driver, it was put to the plaintiff that, since it was during the day and the road curvy, there was no impediment preventing plaintiff from being able to see the second driver at a distance.

[21] This suggestion was once more refuted by the plaintiff and his response to it that, the second driver/vehicle appeared suddenly behind the truck, traversed his path of travel and left him with little room wherein to manoeuvre.

[22] Surprisingly, during course of the trial, liability was conceded on behalf of the defendant and only the apportionment was left for determination.

[23] It is therefore unnecessary to decide on liability. I therefore hold the defendant liable for the plaintiffs' proven damages, save for the contributory negligence

[24] In the following paragraphs I traverse whether there is any fault attributable to the plaintiff in the form of contributory negligence and the extent of apportionment of damages, if any.

*Test f*or *Negligence*

[25] The test for negligence was aptly stated in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G**,** and I need not repeat herein.

[26] The plaintiff took a gap where none existed and this resulted in the first driver colliding with the plaintiff from the back. Plaintiff caused a sudden

emergency to the first driver in that, the plaintiff changed lanes when it was not opportune for him to do so.

[27] A person cannot be held liable if he has not caused any damaged, see m*Cubed International (Pty) Ltd and Another v Singer and Others NNo.*[3] *It is important to note that causal nexus is a question of fact and which must* always be answered in the light of the available evidence and relevant probabilities, see *Ocean Accident and Guarantee Corporation Ltd v Koch*.[3]

Apportionment of Damages

[28] Apportionment of damages is a misnomer as it is the fault that is apportioned in the damages which are concomitantly reduced.

[29] Section 1 of the Apportionment of Damages Act 34 of 1956, reads as follows –

> "**Apportionment of liability in case of contributory negligence**
>
> 1 (*a*) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.
>
> (*b*) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

[3] 2009 (4) SA 471(SCA) at 479

[4] 1963(4) SA 147(A)

(2) Where in any primary effect of the Apportionment of Damages Act, is now the plaintiff may only recover damage not caused by his own fault but by the fault of the wrongdoer. Should plaintiff be at fault in relation to the causation of his/her damage, his damages are reduced proportionally to the fault he heard in the causation of such damage".

[30] What section 1(*a*) of the Act implies is that the court exercises its discretion in the determination of the extent of the apportionment. That is if the court holds that, there is some fault, which can be attributed to the plaintiff. With regards to the interpretation of statutes, see *Cool Ideas 1186 v Hubbard and Another* 2014 (4) SA 474 (CC) at 484E-F and 492A-B and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603D-604D and 608E-F.

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[31] To be able to find that plaintiff's claim falls to be reduced by the application of the Apportionment of Damages Act. I need first find that the plaintiff in the prevailing circumstances of this case was negligent.

[32] The test for negligence as aptly stated in *Kruger v Coetzee*, (*supra*).

[33] Fault is the basis on which damages are reduced relative to the degree of the fault of the plaintiff and the defendant.

[34] For a party to rely on contributory negligence this must be specifically pleaded and appropriate relief in the form of apportionment of damages must be sought. The defendant must prove that the plaintiff was negligent and that his

negligence was causally connected to the loss suffered by the plaintiff in this regard; see *South British Insurance co Ltd v Smit* 1962 (3) All SA 548 (A) at page 835H.

[35] Where the defendant has denied negligence and has made allegations pointing to the negligence of the plaintiff, the court may apply apportionment of damages in consequence of the Apportionment of Damages Act 34 of 1956, see, *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A); *Gibson v Berkowitz and Another* 1996(4) SA1029 (W).

[36] The issue of contributory negligence was raised in the defendant's plea suggesting that the plaintiff failed to avoid or take precautionary steps to avoid the collision.

[37] The plaintiff's evidence, at least not contradicted, alludes to him veering to the left slow lane of the road to avoid a head-on collision. In so doing, the plaintiff refutes that he was negligent and thus contributed to the damages, he ultimately sustained.

[38] Without controverting evidence being led by the defendant, the defendant suggests that plaintiff could have avoided the collision with the first and second drivers, if he had taken preventative measures namely, by applying brakes, and reducing the acceleration of his vehicle. As a result, plaintiff failed to act reasonable in circumstances.

[39] Plaintiff maintained that, he veered off to the left lane, in what he described as sudden emergency, to avoid a head-on collusion.

[40] Thus, the collision with the first driver is the catalyst, which ultimately caused the plaintiff to lose control of his vehicle and the resultant injuries.

[41] Mr Niekerk together with Mr Ntikinca who appeared for the plaintiff, invited the court to make no finding on the apportionment and this submission was based on the sudden emergency, which had befallen the plaintiff.

[42] Mr. Mzileni, who appeared for the defendant, held a contrary view, the upshot of which, was that, the plaintiff's damages should be apportioned by 30%.

[43] It is trite law that with a rear-end collision the driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he can give an explanation indicating he was not negligent.[5]

[44] Thus, in the absence of evidence to the contrary, it must follow that negligence of the first driver was the cause of the damages suffered by plaintiff. See *Union and South West Africa Insurance Co Ltd v Bezuidenhout* 1982(2) SA 957 (A) at 966A-B.

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[5]HB Klopper Law of Collision in South Africa 7 ed (2003) at p 78.

[45] The plaintiff's evidence that he was confronted by a sudden emergency created by the second insured driver/vehicle and thereafter had to take evasive manoeuvres, is not disputed.

[46] In *Cawood v R* 1944 GWLD 50 at 54, it was held that, "a man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger".

[47] For the submission that, no apportionment should apply Mr. Niekerk who appeared with Mr Ntikinca, placed reliance on *Hornton and Another v Fismer* 1928 AD 398 at 412, wherein it was held that, "in judging the action of the motorist or pedestrian faced with sudden emergency, due allowance must be made for the possible error of judgment."

[48] Plaintiff testified that, he had over-taken the first driver/vehicle on the left slow lane. The first driver collided with the rear-end of the plaintiff's vehicle and caused him to lose control.

[49] This evidence was neither gainsaid nor disputed by the defendant.

[50] That the second driver overtook the truck when it was not opportune to do so, in my mind created a sudden emergency for the plaintiff, who was driving on his correct and demarcated area.

[51] Surely, I accept, this would have required the plaintiff to take immediate action to avoid the imminent danger caused by the overtaking second driver without weighing up the consequences of his actions. See *Goode v SA Mutual Fire & General Insurance Co Ltd* 1979 (4) SA 301 (W) at 306G.

[52] There are two pieces of crucial evidence in the plaintiff's testimony which have not been gainsaid by the defendant, namely, an oncoming vehicle overtook a truck when it was not opportune to do so, and thus created a sudden emergency for the plaintiff and the first driver collided with the rear-end of the plaintiff's vehicle, thus causing him to lose control. In the event, I am unable to find the plaintiff was negligent in the collision, let alone any form of contributory negligence to the damages plaintiff sustained as a result of the collision on 19 February 2019.

[53] From the foregoing, I cannot find that, the plaintiff could have reasonable forseen the second driver overtaking the truck. Again and the extent that the plaintiff pleaded sudden emergency and I am unable to find any preventative measures or precaution that the plaintiff could have taken, other than swerving his vehicle to the left to avoid the head-on collision.

Costs

[54] The parties could not find each other regarding the costs of two counsel and the court was invited to decide that issue. As starting point, this is a matter which should not have seen the court's doors.[6]

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[6]Section 3 of the Road Accident Fund Act 56 of 1996 , provides for the object of the Fund and the latter section reads -
" The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."

[55] Liability was only conceded at the doors of the court. The interrogatories provided for in the Uniform Rules of Court, were considered and resorted to by the defendant. Instead, the matter was allowed to be certified trial ready without exercising the settlement roll option.

[56] Belatedly, the court is invited to determine the costs of two counsel. Surely, it has not escaped the parties that, the issue of costs falls within the courts judicial discretion.

[57] In *Internatio (Pty) Ltd v Lovemore Bros Transport CC*[4] it was held that, in considering whether to award costs of two counsel, it must first be determined whether this was a "wise and reasonable precaution".

[58] Whether it was wise and reasonable to employ two counsel is not the only test, the court will also have regard to the amount involved and the nature of the issues in dispute.

[59] In *De Naamloze Vennootschap Alintex v* Von *Gerlach*[5], it was held that the important factors to be considered in making an award for the costs of two counsel were the following, the length of the hearing or argument, the importance of the questions of principle of law involved and the number of legal authorities quoted.

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[4]7 2000(2) SA 408 (SE) at 4131.

[5]81958 (1) SA 13 (T) at 16E.

[60] In *Keokemoer v Parity Insurance Co Ltd & Another*[6], where Justice Coleman held that, relevant considerations pertinent to whether costs of two counsel should be awarded are—

(a) the volume of evidence (oral or written) dealt with by counsel or which he or they could reasonably have expected to be called upon to deal with;

(b) the complexity of the facts or the law relevant to the case;

(c) the presence or absence of scientific or technical problems, and their difficulty if they were present;

(d) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case;

(e) the importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by counsel.

[61] In *Nonkwali v Road Accident Fund*[7], this Court, per Justice Dawood has had the occasion to pronounce on the issue of costs occasioned by the engagement of two counsel.

[62] The parties joint practice note, confirms matter as having set down for the determination of liability and quantum. For purposes of preparation, consultations and trial, plaintiff took precautionary steps and engaged the services of two counsel.

[63] Only at the door steps of the trial court, was the plaintiff informed that:

63.1 The matter will only run on liability;

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[6]9 1964 (4) SA 138 (T) at 144H-145A.
[7]1° [2009] JOL 23620 (ECM).

63.2 The court would be invited to decide contributory negligence and the apportionment of damages.

[64] In the exercise of my judicial discretion, my considered view is that, the engagement of two counsel by the plaintiff was in the circumstances of this case wise and reasonable.

[65] It matters not that, the defendant belatedly conceded liability. It was unreasonable for the defendant to adopt a passive attitude and hope that the plaintiff would also adopt a supine approach and fail to prepare for the trial.

[66] In the result, the following order shall issue:

a) **The defendant is held liable for 100% of the plaintiff's proven damages as a consequence of the collision on the 19 February 2019;**

b) **The determination of the plaintiff's quantum of damages is postponed sine die.**

c) **The defendant shall pay plaintiff's costs of suit to date, on a party and party scale and such costs shall include the costs consequent upon the employment of two counsel.**

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L L SAMBUDLA

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	**:**	**Mr Niekerk with**
	:	**Mr Ntikinca**
INSTRUCTED BY	**:**	**Z. Mfiki Inc.**
COUNSEL FOR DEFENNDANT	**:**	**Mr Mzileni**
INSTRUCTED BY	**:**	**State Attorney**
HEARD ON	**:**	**12 APRIL 2023**
DELIVERED ON	**:**	**02 MAY 2023**