



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case

No:

00863/2022

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED: NO

Date 19 October 2023

Signature

In the matter between:

HAROLD FRADSEN FRANK

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on case-lines electronic platform. The date for hand-down is deemed to be 19 October 2023.

Summary: Claim for damages under the Road Accident Fund Act. The plaintiff claiming that the injury he sustained in the accident was caused by the negligent driving of the driver insured by the defendant. The plaintiff discovered the accident report which indicated that the cause of the accident was due to the plaintiff having lost control of his motor bike. Conflicting versions as to the cause of the accident. The principles governing the resolution of conflicting versions restated. Held that the most probable cause of the accident was due to the plaintiff losing control of his motor bike and hitting the road barriers.

JUDGMENT

Molahlehi J

Introduction

[1] The plaintiff, Mr Frandsen instituted these action proceedings against the defendant, the Road Accident Fund (RAF) following the injuries he sustained in an accident involving his motorcycle on 29 January 2017. There is no dispute that the injuries sustained by the plaintiff in the accident are of an extremely serious nature, involving, amongst others amputation of the plaintiff's left leg, serious muscle wastage of the right upper thigh and a complete amputation of the entire left arm.

[2] The plaintiff, at the time of the accident, was a self-employed motor vehicle dealer and owned a Harley-Davidson dealership.

[3] After the accident, the plaintiff lodged a claim for compensation with the defendant. The claim was made in accordance with form RAF1 wherein the plaintiff attached, amongst others, documents relating to the hospital records and medical records including the accident report by the police.

[4] It is apparent that, after assessing the submission made by the plaintiff, the defendant repudiated the claim based on the contents of the accident report handwritten by a retired police officer. The handwritten narration in the report stated the following:

"The driver of the motor bike was driving from the West to the East at N4 high way. The driver of the motor bike lost control and hit the barrier and fell on ground and was taken to Unitas hospital in Pretoria."

[5] The matter served before this Court on 2 March 2023. The matter was on that day postponed at the instance of the defendant because it wanted to conduct an

investigation into whether the plaintiff's claim was not fraudulent. The defendant suspected that the claim was fraudulent because the plaintiff sought to distance himself from the accident report after discovering it.

The issues

[6] The issues raised concern the determination of both liability and quantum of damages. In relation to liability, the issue concerns whether the cause of the accident was due to the negligent driving of the unknown insured driver or the plaintiff losing control of his motorbike and hitting the road barriers. In other words, there is a dispute of fact as to the course of the accident.

[7] The other issue that arose from the testimony of the plaintiff concerns the admissibility of the evidence relating to what he was told by the people at the tollgate regarding the criminal syndicate that is alleged to operate in that area.

The plaintiff's case

[8] The plaintiff was the only witness who testified in support of his claim that the sole cause of the accident was the negligent driving by the unknown driver insured by the defendant. He further contended that the defendant was consequently liable for the injuries he sustained as a result of the alleged negligent driving by the unknown insured driver.

[9] He testified that, during the day prior to the accident, he attended a charity event with other motor bikers in Krugersdorp. He travelled back after the event to Pretoria on 29 January 2017 on his motorcycle. As he was approaching the tollgate on the N4 Magalies highway, he came across a white VW Golf, travelling in the same direction.

[10] The occupants of the VW Golf are alleged to have gestured in a friendly manner with their hands to the plaintiff signalling that his back tyre was flat. He responded, also with a hand signal that it was fine.

[11] The plaintiff testified, further that, after signalling back to them that the tyre of his motorbike was fine, the occupants of the motor vehicle became aggressive. They pointed out to him that he should pull over. He accelerated his motorbike but was unsuccessful in seeking to escape his attackers. He was knocked unconscious by the motor vehicle on the right-hand side of the motorbike and thus crashed into the concrete barrier.

[12] He was transported to the Netcare Unitas Hospital in Pretoria after the intubation and ventilation at the scene. The injuries sustained by the plaintiff consequent to the accident are set out in detail in the medical report of Prof. Fryer, an orthopaedic surgeon. As indicated earlier, he lost his left leg and total function of his left arm. He also suffered a head injury with the loss of consciousness of GSC 14/15 in the hospital.

Hearsay evidence

[13] The plaintiff presented no evidence to corroborate his version that the sole cause of the accident was due to the negligence of the insured driver. He sought to support his version however by testifying that a year after the incident, he went back to the tollgate and spoke to some employees about what happened to him near the tollgate. According to him, the people that he spoke to, informed him that there was a criminal syndicate that operates in the area which robs motorists of their belongings in a similar manner to that which he described.

[14] The evidence is clearly hearsay. The question that then arises is whether it is admissible. The defendant objected to its admission. Admissibility of hearsay evidence in both criminal and civil proceedings is governed by the Law of Evidence Amendment Act 45 of 1988 which defines hearsay in section 3(4) as “evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence”. Section 3 (1) of the Law of Evidence Amendment Act provides that hearsay evidence shall not be admitted as evidence in criminal or civil proceedings unless:

- “(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends,

- himself testifies at such proceedings; or
- (c) the court, having regard to –
- (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

[15] In the present matter, the evidence about what the people at the tollgate told the plaintiff stands to be rejected as hearsay. The plaintiff failed to call any of the people that he alleges he spoke to at the tollgate to testify. Furthermore, he did not provide any reason why those people could not be called to testify about the robberies committed by the alleged criminal syndicate in the area. In my view, admission of such evidence would be prejudicial to the defendant.

The case of the defendant.

[16] In opposing the claim, the defendant contends that the version of the plaintiff, that the accident was caused by the VW Golf knocking him down, is implausible. In this respect, the defendant avers that the version of the plaintiff is unreliable because it is based on two contradictory versions. The first version as indicated earlier, is based on the police accident report, which states that the plaintiff lost control of the motorcycle and bumped into the road barriers. The second version is that the plaintiff was bumped off the road by the VW Golf.

[17] Before dealing with the approach to mutually destructive versions, I pause to deal first with the issue of the status of the papers that serve before the court in particular in RAF matters and specifically with regard to the present matter the

accident report.

[18] In general, documents are placed before the court either to advance the plaintiff's claim or the defendant's defence. Documents are generally placed before the court through a discovery process provided under Rule 35 of the Uniform Rules of the Court (Rules). Often documents that serve before the court in RAF matters for consideration as part of the evidence would be documents such as hospital records, expert reports and accident reports. These documents can however only serve properly before the court by either agreement between the parties or by calling the author of a particular document to identify the document and confirm the contents thereof, otherwise the contents of such documents may amount to hearsay evidence.

[19] It is important in the present matter to note that in the pre-trial minutes, the parties agreed that the discovered documents, including the accident report, would without further proof, serve as evidence for what they purported to be. There was however no agreement with regard to the admissibility of the contents of the documents. Accordingly, the defendant had to prove the relevance, originality and authenticity of the accident report. Failure to satisfy the admissibility requirements would have rendered the contents of the accident report hearsay evidence.¹

[20] In seeking admissibility of the accident report in the present matter, the defendant presented the oral evidence of Mr Moshupja, the retired police officer who, as stated earlier, has extensive experience in dealing with accident reports. His evidence which was presented virtually from his home in Limpopo was intended to show that the most probable cause of the plaintiff's accident was because the plaintiff lost control of his motorbike.

[21] Although Mr Moshupja could not recall the incident out of the many that he had been involved in over the years of his employment as a police officer, he confirmed that the contents of the report were his handwriting. He insisted that the report was based on what the plaintiff told him. He further insisted that it could not have been the plaintiff's son who reported the accident as suggested by the plaintiff because, in his experience, accident reports are taken only from the people who

¹ See *Rautini v Passenger Rail Agency of South Africa* [2021] ZASCA 158 (8 November 2021).

were involved in the accident.

[22] His evidence, which in my view was clear, consistent and credible, confirmed that he was the author of the accident report. Accordingly, the accident report satisfies the admissibility requirements.

[23] The plaintiff disputed what is stated in the report as his identity number and the physical address alleged in the report to be his. This is, however, the same identity number he provided in his affidavit in terms of section 19F affidavit. He states the following under oath in his affidavit:

“I am a major male self-employed motor vehicle dealer and trader residing at 9 Anthony Close Morehill, Benoni, with identity number: 630 . . . 082. The content hereof is within my personal knowledge unless stated otherwise or appears otherwise from the context and is to the best of my belief both true and correct.”

[24] The personal details of the plaintiff relating to his residential address appearing in the section 19 affidavit are the same as appearing in the accident report. It is important to note that the plaintiff himself duly discovered the accident report through the discovery affidavit.

[25] In my view, the probabilities are that the contents of the accident report are a statement made to the police officer by the plaintiff regarding what happened on the particular day. There is no evidence to suggest that the police officer, in writing the report, was motivated by ulterior motives or any other reason not to write a trustful report.

Conflicting versions

[26] Having admitted the accident report, it is clear that this Court is faced with two conflicting versions which are mutually destructive.

[27] The approach to adopt when dealing with a dispute of facts, as set out in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell Et Cie SA and*

*Others*² (*Stellenbosch*), is as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion 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."

[28] The court in *Koster Ko-operatiewe Landboumaastskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens*³ referred to the following dictum of Wessels JA in *National Employers Mutual General Insurance Association v Gany*⁴, where it was said that:

"Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version..."

[29] In his reply in terms of Rule 35(14) of the Rules, the plaintiff discovered, amongst other documents, the copy of his identity document and the accident report. His identity number as reflected in the discovered document is 630 . . . 1087. In the accident report, the plaintiff's identity number is recorded as 630 . . . 1082.

[30] The plaintiff's physical address in the accident report is recorded as 9 Anthony Close More Hill, Benoni. His date of birth is recorded as 1963/08/18. The time of the accident is recorded as 02:30 at Magalies Toll Gate.

[31] The accident was reported at the SAPS Pretoria West and the date thereof is 25/03/2017 with the motorbike registration being BT 34 ZM GP.

[32] A different version appears in the affidavit by the plaintiff attached to the RAF claim form where he states, that he encountered a VW Golf which hit him on the right side. The parties agreed in the pre-trial minutes that discovered documents would, without further proof, serve as evidence of what they purport to be.

² [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5.

³ [1974] 2 All SA 420 (W), 1974 (4) SA 420 (W) at 425B-C.

⁴ 1931 AD 187 at 199.

Cause of action

[33] The main issue concerning the merits of the matter turns on whether the driving of the insured motor vehicle was the cause of the accident. There is, as indicated earlier, a dispute of fact concerning the involvement of the insured motor vehicle in the accident.

[34] In order to succeed, the plaintiff has to show that it was the negligence of the insured driver that caused the accident. It is generally assumed that wrongfulness exists once negligence on the part of the insured driver is proven.⁵ Accordingly, the obligation of the RAF to compensate a plaintiff for damages for bodily injury arises from the negligent driving by the insured driver.⁶

[35] In *Grove*, the court held:⁷

“There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.”

[36] The essence of what the court said above is that the plaintiff has to prove causation on the balance of probabilities. The issue of causation is determined on a two-stage inquiry. The first inquiry concerns the investigation into whether the plaintiff sustained the injuries as a result of the accident and the second is how the injuries affected the plaintiff. If successful in the two-stage inquiry, the plaintiff would be entitled to be compensated for the injuries sustained. In other words, the court would proceed to determine the quantum of damages once satisfied that the plaintiff has proven the cause of the collision and the consequent injuries sustained due to the accident.

[37] In *Sardi and Others v Standard and General Insurance Co Ltd*⁸, the Court held that:

“At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the *onus* of proof on the

⁵ See *MS v Road Accident Fund* [2019] 3 All SA 626 (GJ) at para 9.

⁶ See *Grove v Road Accident Fund* [2011] ZASCA 55 (31 March 2011).

⁷ *Ibid* at para 7.

⁸ 1977 (3) SA 776 (A) at 780G-H.

pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt a piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b), deciding whether this has been rebutted by the defendant's explanation."

[38] As stated in *Chauke v Road Accident Fund*:⁹

"The preponderance of probabilities standard requires that the court be satisfied that an incident or event had happened if the court considers that, on all the evidence before it, the occurrence of the event is more likely than not. Thus for the appellant to succeed the court must be satisfied that it is more likely than not that the incident happened as recounted by him."

[39] As indicated above, the defendant in the present matter contends that the plaintiff's claim stands to fail because of the two mutually destructive versions. The first is based on the accident report made available to the court through the discovery process. As indicated earlier, the accident report was discovered by the plaintiff under oath. In brief, the version in this regard is that the accident was due to the plaintiff losing control of his motorbike. The second version is that the accident was caused by the negligent driving of the unknown insured driver of the VW Golf.

[40] The approach, when faced with two conflicting and mutually destructive versions, was formulated in *National Employers General Insurance v Jagers*¹⁰ as follows:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the

⁹ [2023] ZAFSHC 214 (31 May 2023).

¹⁰ 1984 (4) SA 437 (E) at 449D-G.

plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[41] In *Stellenbosch*¹¹, the court summarised the technique to resolve mutually distractive versions as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion 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."

[42] In my view, the most probable version between the two versions is that in the accident report. The discrepancy regarding the identity number of the plaintiff as recorded by the police officer is not material. As indicated earlier, the identity number in the report is the same as that in the plaintiff's section 19F affidavit. The other aspects of the personal details of the plaintiff are the same as reflected in the same affidavit.

[43] The challenge of the contents of the report by the plaintiff raises doubts on his credibility as a witness, particularly when regard is had to the fact that those particulars are confirmed by him under oath. Also of importance, is that for over five years he never challenged the report which he had placed on the record through his discovery affidavit. He only distanced himself from the report on the first day of the hearing without providing any satisfactory reason as to how he placed the report under oath, before the court. He provides two inconsistent explanations as to how the report may have come into existence. One explanation is that the report may have been made by his son. The other is that his son went to the police station to inquire about the case number for the purpose of submitting a claim to the insurance.

¹¹ *Stellenbosch supra* at para 5.

[44] The other difficulty with the plaintiff's version is that he does not provide any reason as to why it was not reasonably possible to call any of the people at the tollgate to corroborate his version regarding the VW Golf on the day of the incident.

[45] It seems also highly improbable that the plaintiff would have engaged with strangers in the middle of the night whilst he was driving between 90 and 110 km/h in speed.

[46] It appears on the plaintiff's version that, after knocking him down, the occupants of the VW Golf came out of their car and robbed him of certain items. This he did not report to the police neither did he mention them in his section 19F affidavit.

[47] In light of the above, I find that the version in the accident report is more probable than the one put forward by the plaintiff, being that the cause of the accident was the driver of the insured motor vehicle.

The costs

[48] The plaintiff contended that the defendant should be held liable for the costs of the postponement on the first day of the hearing. I do not agree with this proposition because the postponement was occasioned by the fact that the plaintiff, without any prior warning to the defendant, distanced himself from the accident report, which he had discovered many years before the hearing. There was good reason for the defendant to request a postponement in order to investigate the possibility of fraud on the part of the plaintiff in lodging his claim.

[49] As concerning the cost of the suit I see no reason why the cost should not follow the results.

[50] Given the view adopted at the end of this judgment, it is not necessary to adjudicate the issue of the quantum of damages.

Order

[51] The plaintiff's claim is dismissed with costs on a party and party scale.

E Molahlehi
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
GAUTENG DIVISION,
JOHANNESBURG

Representation:

For the applicant: Adv W Louw

Instructed by: Leon JJ Van Rensburg Attorneys

For the respondents: Ms. N Moyo

Instructed by: State Attorney

Heard on: 2 March 2023, 29 April 2023, 11 May 2023 and 27 July 2023.

Reserved: 27 July 2023,

Delivered: 19 October 2023.

