IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 26 OCTOBER 2023

SIGNATURE

CASE NO: 85900/2019

In the matter between:

MOROLONG, CLARA FLORA Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MOGOTSI, AJ

Introduction

[1] This is a claim for damages arising from a motor vehicle accident that occurred on 29 November 2017, along the R512 Road, Broederstroom, Haartebees.

[2] The court ordered that the determination of the merits be separated from the determination of quantum. The matter proceeded to trial on the question of merits only.

[3] The plaintiff alleges the cause of the accident was the sole and exclusive negligence of the other driver.

[4] The defendant's plea amounts to a bare denial, alternatively, contributory negligence on the part of the plaintiff.

Issues for determination

[5] The parties identified, *inter alia*, the following issues about the determination of the merits: the cause of the accident; the plaintiff's degree of negligence; whether the other driver had been negligent; and whether the defendant was liable for compensation to be paid to the plaintiff.

Legal framework

[6] In terms of section 17(1) of the Road Accident Fund Act[1], the defendant is obliged to compensate a person for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. The defendant's liability is conditional, however, upon the injury having resulted from the negligence or wrongful act of the driver. This means that a person such as the plaintiff is required to prove such negligence.

[1] 56 of 1996

[7] The loss or damage can be reduced by the degree of any contributory negligence on the part of the accident victim. This arises from the provisions of section 1 of the Apportionment of Damages[2] ('the Act'), which states as follows:

> "*(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.*"

[8] In *National Employers' General Insurance Co Ltd v Jagers*[3] , where Eksteen AJP, for a full bench, held as follows, at 624-5:

> "*…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 in a criminal case, but 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*

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[2] Act 34 of 1956
[3] [1984] 4 All SA 622 (E)

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 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."

Plaintiff's case

[9] Morolong Clara Flora, the plaintiff, testified that on 29 November 2017 around 9h00, she was driving alone from Leloko Estate, Haartebees. At the stop sign, she turned right into R512 Road and continued driving on the left lane at a speed of around 100 kilometres per hour. She could not remember what transpired whilst driving. At the hospital she was advised that she was involved in a motor vehicle accident. She was briefly cross-examined by counsel for the defendant and nothing worth noting emanated from the cross-examination.

[10] The plaintiff closed his case without introducing any further witnesses. The defendant led no evidence.

Analysis

[11] The plaintiff had difficulty in responding to questions posed by her counsel during evidence-in-chief, for example, she had difficulties in explaining how many lanes were on the surface of the road. However, she was an honest and reliable witness. She stuck to her version that she could not remember what transpired shortly before the accident despite numerous questions in this regard by her counsel. She emphasised the fact that she was informed at the hospital that she was involved in an accident.

[12] In *Shishonga v Minister of Justice and Constitutional Development and another*[4] it was held as follows:

> "*Failure of a party to call a witness is excusable in certain circumstances, such when the opposition fails to make out a prime facie case*."

[13] It was manifest at the end of the testimony of the plaintiff that her evidence was insufficient to sustain the allegations of negligence on the part of the defendant, however, counsel for the plaintiff failed to call other witnesses to close the lacuna. The submission of counsel for the plaintiff that the latter has established a prima facie case and failure by the defendant to lead evidence renders the plaintiff's case conclusive is not persuasive and falls to be rejected.

[14] *Elgin Fireclays Limited v Webb*[5] the court held as follows:

> "*With regard to this request, it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. See Wigmore (secs. 285 and 286).) But the*

[4] 2007 (4) SA 135 (LC)
[5] 1947 (4) SA 744 (A)

inference is only a proper one if the evidence is available and if it would elucidate the facts."

[15] In my view, counsel for the plaintiff elected not to call other witnesses, for example, the police officer who drafted the sketch plan of the scene, because there was a likelihood that the latter might expose facts unfavourable to the plaintiff's case.

[16] In the premises, I find that the evidence of the plaintiff is insufficient to sustain a claim of negligence on the part of the defendant.

[17] It is trite law that the costs should follow the results, however, having observed the clinical condition of the plaintiff I am of the view that this is not an appropriate matter to make a cost order.

ORDER

1. The plaintiff's claim for damages is dismissed.

2. Each party is ordered to pay its costs.

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P. J. M MOGOTSI
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 23 October 2023

Judgment delivered: 26 October 2023

APPEARANCES:

For the Plaintiff:	Adv K S Mashaba
Attorney for the Plaintiff:	Mphela & Associates Attorneys, Pretoria
For the Defendant:	Adv M C Shokane
Attorney for the Defendant:	The State Attorneys, Pretoria