IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

Case no: 84696/2015

20/4/2018

In the matter between:

MAPULA SUZEN KEKANA **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

MOULTRIE AJ

Introduction

[1] The plaintiff claims damages from the defendant in respect of injuries allegedly suffered as a result of a motor vehicle accident that occurred on Tuesday, 16 February 2016 while the plaintiff was driving alone in her vehicle in a southerly direction on the N11 between Roedtan and Marble Hall, Limpopo. The matter was enrolled for trial before me on the question of the merits only, i.e. whether the defendant was liable to pay such damages as the plaintiff might prove.

[2] Having heard the opening address for the plaintiff's counsel, and in seeking to more accurately delimit the scope of the dispute prior to the leading of any evidence, I enquired from the defendant's counsel whether compliance by the plaintiff with the procedural pre-requisites for a claim under the Road Accident Fund Act, 56 of 1996 **("the RAF Act')** remained in dispute, as was apparent from the pleadings. I also enquired whether the defendant would be seeking to argue that the accident had been wholly or partly caused by fault on the part of the plaintiff and, if the latter, whether it would be seeking an apportionment in terms of the Apportionment of Damages Act 34 of 1956 **("the Apportionment Act").**[1] Counsel for the defendant advised that compliance with the procedural requirements was not in dispute and further that the defendant would indeed seek to rely on the contributory negligence of the plaintiff.

[3] These enquiries prompted an application from the bar for the amendment of the defendant's plea, alleging *inter alia* that the plaintiff had negligently contributed to the *" collision".*[2] The application was not opposed by the plaintiff and I accordingly granted the defendant leave to amend its plea. A "notice of amendment" reflecting the defendant's plea as amended was handed up and placed in the court file.[3]

[4] Since it was not disputed during the trial that the accident occurred and that the plaintiff suffered injuries as a consequence, the sole issues for determination were:

a. whether the accident and the plaintiff's consequent injuries were solely or partially caused by the negligent driving of the driver of an unidentified oncoming vehicle which the plaintiff alleges turned without warning into her path of travel, leaving her with no option to

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[1] Although it has been held that a defence of contributory negligence must be pleaded and appropriate relief of apportionment must be sought in the plea (see *South British Insurance Co Ltd v Smit* 1962 (3) SA 8 6 (A}), where the plaintiffs fault is put in issue, the court is entitled to apply the provisions of the Apportionment Act even though it has not been expressly pleaded *(AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) at 55D-E).

[2] Given that it is common cause that there was in fact no "collision", I assume that this was a reference to the accident and the plaintiff's consequent damages.

[3] Although I accept that the amendment has been effected, I expect that the defendant will in due course deliver the amended pages of the plea in accordance with Rule28.

avoid a collision other than to swerve to the left onto the gravel verge of the road, following which the plaintiff's vehicle skidded and rolled a number of times before coming to a standstill; and, if so,

b. whether any negligence of the plaintiff herself was a contributory cause.

The evidence

[5] The parties each called one witness: the plaintiff testified herself and the defendant called Sergeant PJ Tlhotse.

[6] The plaintiff resides in Polokwane and works there as an agent for the South African Revenue Service. She obtained her drivers' licence in 2008, some eight years prior to the accident.

[7] On the day of the accident, the plaintiff left Polokwane at approximately 09h00 with the intention of visiting her son who was studying at a training centre in Witbank. At Potgietersrus, she turned off the N1 onto the N11. She was familiar with the route as it was the second time that she had travelled it in the space of about a month, the first having been when she transported her son to the training centre during January 2016.

[8] As the plaintiff approached Marble Hall at around 12h20, the road comprised a single lane in each direction. It was straight without any curves, was in a good condition and was not busy. Visibility was good. The plaintiff recalled having seen that the speed limit was 120 km/h and was travelling at approximately 100km / .h She had not taken any drugs or medication or consumed any alcohol.

[9] The plaintiff testified that the accident occurred because an unidentified vehicle travelling on the same road in the opposite direction unexpectedly and without any warning (she used the word *"instantly")* swerved into her lane. The plaintiff swerved to the left. A collision was thus avoided, but as the le ft side of the plaintiff's vehicle came into contact with the gravel verge, she lost control of it and it started to skid. She tried to steer the vehicle back to the road and removed her feet from accelerator and brake.

When the vehicle came into contact with a *"hole"* in the gravel verge, it started to capsize and rolled three or four times (she could not be sure) before coming to a halt.

[10] The plaintiff could not say why the unidentified vehicle swerved into her lane. She could not see what the driver was doing at the time. Her evidence was that the first time that she saw the unidentified vehicle was *"at the moment"* when it swerved into her lane, from which I understood that she had not noticed it before that time. When asked how far away the unidentified vehicle was from her vehicle when she saw it swerving into her lane, she responded that she could not say exactly, but that was too close for her to do anything except swerve to the left to avoid a collision. The plaintiff did not see what became of the unidentified vehicle and the driver did not stop.

[11] The plaintiff could tell immediately that she was injured: she had a painful back, scratches on her face and had blood on her legs, though she could not tell where the blood had come from.

[12] A passer-by assisted the plaintiff to get out of her vehicle. She complained about the pain in her back and he encouraged her to sit on the ground. He enquired whether she was alone, which she confirmed. He asked her whether she had medical assistance and insurance. Two ambulance services were contacted. The plaintiff was dazed, but could follow what was happening. A small crowd of onlookers gathered. A woman offered the plaintiff water, but the original passer-by suggested that it would not be advisable for her to drink until medical assistance arrived.

[13] While waiting for an ambulance, a police official arrived. During her evidence in chief, the plaintiff testified that he approached her, but did not ask her any questions . He spoke only to the passer-by and others who had gathered at the scene, asking whether an ambulance had been called. The passer-by replied that two ambulance services had been contacted and that they were waiting to see which would arrive first. The plaintiff noticed that the police official was writing but she did not make any statement (I understood her to mean a sworn statement) to the police at

the scene. Under cross-examination, the plaintiff readily conceded that the police official did speak to her and that he asked her for her driver's licence, address and next-of-kin details, which he wrote down. She was, however, adamant that he did not ask her about the details of the accident. It was not put to her by the defendant's counsel that she was mistaken in this regard.

[14] When the ambulance arrived, the police official enquired about the plaintiff's belongings and removed them from her vehicle. Some of her possessions were put in the ambulance and the police official took the remainder.

[15] The plaintiff remained in hospital for 13 days. She was visited a few days after the accident by a police detective to whom she made a statement describing the unidentified vehicle swerving into her lane, and how she had swerved to left to avoid a collision but lost control of her vehicle.

[16] The plaintiff's counsel advised her that the defendant had indicated that a witness would testify that the cause of the accident was "*a tyre burst".* The plaintiff responded that her vehicle was swerving and skidding and that she was not aware of a tyre burst. She did not hear a sound consistent with a tyre burst during the accident. When her counsel said that the defendant denied that the accident had been caused by the unidentified vehicle swerving into her lane, she insisted that she "saw *it come to my side"* and that she *"would not have swerved if there was no vehicle".*

[17] It was not put to the plaintiff in cross-examination that no other vehicle had been involved in the accident, that the accident had been caused by a burst tyre, that she had told Sgt Tlhotse that this was the case, or that he recorded this information in writing.

[18] Sgt Tlhotse was a South African Police Service sergeant who was on duty at the Roedtan police station on the day of the accident. He received a call to attend at a motor vehicle accident that had occurred on the N11 near the graveyard. He arrived at approximately 11h50 to find a damaged vehicle on the side of the road, and a small crowd that had gathered. He asked who the driver of the vehicle was and was informed that it was a

person sitting on the ground.

[19] Sgt Tlhotse 's evidence was that he asked the driver how the accident occurred. She told him that she had been driving from Roedtan towards Marble Hall. She stated that she *"suspected that* a *tyre had burst and she lost control of the vehicle" .* He repeated this evidence in identical or similar words three times during his testimony. He testified that he wrote this down in an accident report form which he filled out on the scene.

[20] I pause to note that no accident report was adduced in evidence at the trial. I also note that no such document is referred to in the discovery affidavits delivered by either party. Despite this, the defendant's own legal representatives made it apparent to me at the trial that a copy of the accident report was in their possession, even to the extent that at one point during argument the defendant's counsel sought to read out a portion of the accident report that recorded the time of the accident.

[21] Sgt Tlhotse confirmed that an ambulance arrived and took the driver to the hospital. A breakdown service removed the vehicle. He took some of the driver's possessions to the police station where they were collected the following day by a family member whom Sgt Tlhotse contacted using contact details supplied by the driver.

[22] Sgt Tlhotse was cross-examined first about his evidence that he recorded the plaintiff's alleged reference to a tyre burst. He was shown an (undated) sworn statement[4] which he testified he had made *“at the scene of the accident” .* Paragraphs 3 and 4 of the statement reads as follows:

> *"3. On 2016-02-16 at about 12:00 I was officially on duty when I received* a *call that there is an accident on N11 road next to the graveyard. I went to the scene and found* a *gray Polo Vivo Reg [….] on the side of the road.*
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> *4. On my arrival I also found Ms M S Kekana who* was *the driver of the said vehicle. The vehicle was having multiple damages and she was complaining of back pain and she was unable to stand up. Ambulance was contacted and Life 24 ambulance took the*

[4] Page 3 of Bundle "C".

injured person to Limpopo Mediclinic. Towing services contacted and 24 Seven towed the vehicle. Accident report No 02/02/2016 was registered".

[23] When it was put to Sgt Tlhotse that the plaintiff had testified that he had only asked for her personal details and those of her next-of-kin, his first response was to deny that he had asked her about her next-of-kin which he said was not information that he required to complete the accident report. He was then specifically asked to comment on the plaintiff's evidence that she had not been asked at the accident scene how the accident occurred, but he evaded the question, asking *" by whom?".* It was only when it was spelt out that she had denied that he asked this question that he repeated his evidence that *"she said she was coming from Roedtan to Marble Hall and suspected* a *tyre burst.*

[24] When the plaintiff's version (i.e. that an unidentified oncoming car had swerved into her lane, and that she lost control of vehicle while trying avoid a collision), was put to Sgt Tlhotse, he responded *"she did not tell me about any other vehicle".*

Was the accident caused by the negligent driving of the unidentified vehicle?

[25] In seeking damages from the defendant under the RAF Act in this matter, the plaintiff is required to prove on a balance of probabilities that her bodily injuries were caused by or arising from the negligence or other wrongful act of the driver of the unidentified vehicles.[5]

[26] Although it is not necessarily the case that driving a vehicle in an oncoming lane constitutes negligence or wrongful conduct *per se,* I take the view that if indeed it is correct that the unidentified vehicle swerved into the plaintiff's lane of travel without warning as she alleges, then that would have to be accepted as negligent conduct in the absence of evidence showing that the conduct was somehow not wrongful. No such evidence was led at the trial. To the contrary, the defendant's case was not that the

conduct of the driver was not negligent, but rather that there was no unidentified vehicle in the first place.

[27] The Supreme Court of Appeal has held that in order to come to a conclusion on disputed evidence, it is necessary to make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities.[6]

[28] The only witness that testified and who was in a position to give direct, first hand evidence as to the circumstances of the accident was the plaintiff. Although it is probably rare for an accident to occur in the manner that she described, it can by no means be described as inherently improbable. Furthermore, the plaintiff struck me as a forthright and confident but careful witness. The only inconsistency in her evidence (first that Sgt Tlhotse had not asked her any questions, and later that he had asked for her driver's licence, address and next-of-kin details) did not go directly to the heart of the matter in dispute (i.e. whether she had told him about a burst tyre) and was readily and openly conceded. At no point was it put to her during cross-examination that she was not telling the truth.

[29] The sole basis upon which the defendant sought to contradict the plaintiffs direct evidence regarding the accident, was by means of an inference that it claimed could be drawn from the plaintiffs alleged statement to Sgt Tlhotse at the scene of the accident that she suspected that a tyre of her vehicle had burst and that she lost control of the vehicle.

[30] Sgt Tlhotse was evasive and indirect in answering questions, for example, h is unnecessary request for clarity as to whom the plaintiff denied had asked about the details of the accident. His evidence was stilted and repetitive and demonstrably incorrect in a number of material respects, for example:

a. his denial that he had asked the plaintiff about her next-of-kin details , which was clearly wrong, in view of the fact that he contacted her family to collect her possessions from the Roedtan Police Station·,

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[5] RAF Act, s 17(1).
[6] *Stellenbosch Farmers' Wine y Group Ltd v Martell et Cie* 2003 (1) SA 11(SCA) at para 5.

b his inherently improbable evidence that his sworn statement was made at the scene of the accident; and

c. the contradiction between his sworn statement in which he alleges that he was called about the accident at 12h00 (and then made his way to the scene), and his oral evidence that he arrived on the scene at 11h50.

[31] Overall, although Sgt Tlhotse did not strike me as an intentionally dishonest witness, and he had no motive to mislead the court, I gained the impression that he did not have a detailed independent recollection of the events of the day. His evidence was generic and vague in most respects (for example, the number and identity of the people that were at the accident scene), but inexplicably specific with regards to the words allegedly used by the plaintiff.

[32] In my view Sgt Tlhotse's evidence cannot be accepted. My conclusion in this regard is cemented by three critical factors.

[33] Firstly, the correctness of this part of his evidence was not properly tested at the trial in view of the fact that it was never put to the plaintiff herself. This is a serious shortcoming in the defendant's case: the Constitutional Court held in *SARFU* that the rule that it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character is not merely one of professional practice but *" is essential to fair play and fair dealing with witnesses"* and that ...

> "... *The precise nature of the imputation should be made to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged.*

This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain on which reliance is to be placed".[7]

[34] Secondly, there was no adequate explanation why Sgt Tlhotse's written statement contained a reference to the plaintiff's complaints about back pain but no reference to her alleged remarks regarding a tyre burst.

[35] Finally, there is the failure to adduce the accident report, which would either have corroborated or disposed of the disputed evidence.

[36] I consider that Sgt Tlhotse's evidence was the result of an assumption on his part regarding the cause of the accident, rather than a clear recollection of what was related to him by the plaintiff.

[37] In any event, although the two versions were presented as though they were mutually destructive, this is not necessarily the case: there could have been both a suddenly swerving unidentified vehicle and a tyre burst. In light of the plaintiff s direct evidence that her vehicle only swerved when she intentionally turned to avoid a collision, however, any such tyre burst (if indeed there was one, which I do not accept) would not mean that the driver of the unidentified vehicle was not negligent.

[38] In the circumstances, I conclude that the accident and the plaintiff's consequent injuries were caused by the negligent conduct of the driver of the unidentified vehicle.

Contributory Negligence

[39] The defendant did not specify in its amended plea in what respects the plaintiff was alleged to have been contributorily negligent.

[40] During argument, I enquired from the plaintiff's counsel what his submissions were in relation to the allegation of contributory negligence on the part of the plaintiff. This elicited the response that it appeared from the

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[7] *President of the Republic of* SA *v* SA *Rugby Football Union* 2000 (1) SA 1 (CC) at paras 61-63. See also *Absa Brokers (pty) Ltd v Moshoana NO & others* (2005) 26 *ILJ* 1652 (LAC) at paras 39 -

evidence that the plaintiff had not applied the brakes of her vehicle after she had lost control thereof, which might have mitigated the damages caused by the accident. Upon my enquiry whether this failure was nevertheless negligent and whether it was a contributory cause of the plaintiff's damages, the plaintiffs' counsel somewhat surprisingly suggested that *" the plaintiffs negligent conduct in failing to apply the brakes* was *a 10% cause of the accident.'* Despite this, I find myself unable to conclude that the plaintiff's failure to apply her brakes was a contributory cause of the accident. There simply was no evidence to support this suggestion. In those circumstances, the defendant's counsel specifically conceded in argument that if there was another vehicle which suddenly turned into the plaintiff's lane (as I have found), then it would have made no difference whether the plaintiff had braked or not.

[41] It was however contended by the defendant that the plaintiffs alleged contributory negligence comprised of a failure to keep a proper lookout and a failure to drive at a reasonable speed.

[42] While I accept that it has been established that the plaintiff failed to keep a proper lookout (had she done so, she would undoubtedly have noticed the oncoming vehicle long before the accident occurred,) I cannot conclude that this was a contributory cause of the accident, or any of her damages. Even if the plaintiff had noticed the oncoming vehicle before it swerved into her lane, there is no evidence that that would have assisted her in any way to have taken any measures that would have avoided the accident.[8] In view of my finding that the plaintiff in fact saw the oncoming vehicle swerve, there can be no suggestion that had she seen the oncoming vehicle earlier, she might have been able to take any measures other than those that she in fact took (i.e. to swerve to the left) that could have resulted in the accident being avoided.

[43] The basis of the submission regarding unreasonable speed was that the

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41 and Pretorius *Cross-examination in South African Law* (Butterworths, 1997) at 149-50

[8] cf . *Old Mutual Fire & General Insurance* Co *of Rhodesia (PVT) Ltd and Others v Britz and Another* 1976 (2) SA 650 (RA) at 656E.

plaintiff must have been travelling at a far greater speed than 100km/h in order for her vehicle to have rolled as she testified. Once again, however, there was simply no evidence to support this inference which in effect constituted nothing more than an attempt to give evidence from the bar.

[44] Finally, there was no evidence, nor was it suggested in argument that the alleged tyre burst was the result of any negligence on the part of the plaintiff, even if it could be regarded as a contributory cause of her injuries.

[45] In the circumstances, I conclude that the defendant has failed to establish that the injuries suffered by the plaintiff as a result of the accident were to any degree caused by her own contributory negligence.

Costs

[46] No reason exists to divert from the usual principle that the losing party should be ordered to pay the successful party's costs.

Order

[47] In the premises, I make the following order:

a. It is declared that the defendant is liable to compensate the plaintiff for 100% (one hundred percent) of such damages as she may prove, or as may be agreed, to have been caused to her by the accident which occurred on 16 February 2016.

b. The defendant is ordered to pay the plaintiff's party and party costs.

RJA Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

For the Plaintiff:	Adv J Matladi
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For the Defendant:	Adv M Mutlaneng
Instructed by:	Brian Ramaboa Inc, Pretoria