

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 379994/17

6/2/2019

In the matter between:

PAULUS ISAAC MASEKO

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

ANDREWS, AJ

1. This action concerns a claim for compensation under the Road Accident Fund Act 56 of 1996 (the Act) for personal injury arising out of the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established. The claim therefore falls under section 17(1)(b) of the Act
2. Plaintiff's particulars of claim state that on March 12th 2016, he was a pedestrian and that he was injured in a collision along the R557 between Willas Farm and Thulamtwana, Gauteng Province by an unknown insured motor vehicle with unknown registration.
3. The plaintiff pleaded that the sole cause of the said collision was the negligence of the unidentified insured driver of the unidentified vehicle who

was negligent in the following respects:

- a. He drove the vehicle at a very high speed under the circumstances;
 - b. He lost control of the vehicle and recklessly drove off the road inconsiderate of the people who were walking alongside the road;
 - c. He failed to keep a proper and/or adequate lookout;
 - e. He failed to apply brakes of the insured vehicle at all or timeously;
 - f. He failed to avoid a collision when by taking reasonable and proper care (including but not limited to travelling slowly, swerving) he both could and should
 - g. He failed to avoid a collision when by taking reasonable and proper care (including but not limited to travelling slowly, swerving) he both could and should have done so.
4. The plaintiff pleaded further that as a result of the collision he sustained severe bodily injuries including fractures to the tibia and fibula, a knee injury, lacerations of the anterior distal left leg, a knee injury and other multiple injuries.
 5. The defendant opposed the action and in its plea denied that the collision took place as alleged in the particulars of claim. At the trial counsel for the defendant indicated that it no longer disputed that the collision had taken place.
 6. At the hearing of the matter the only issue for determination was whether the defendant is liable for plaintiff's loss or damage suffered as a result of any bodily injury to himself caused by or arising from the driving of the said vehicle on 12th March 2016.
 7. The question of liability turns on whether the driver of the vehicle was negligent and whether such negligence caused the damage suffered by the plaintiff. If so, the defendant will be liable to compensate the plaintiff or the loss or damages suffered as a result of any bodily injury to him caused or arising from the said negligent driving. The quantum of damages and compensation will thereafter have to still be determined.
 8. The plaintiff was the only witness led in order to determine liability of the

defendant. He testified that during that afternoon that he attended a soccer function and left the soccer field to return home. Just before he crossed the street he saw a vehicle in the distance moving towards him at high speed. It was still far away from him. He had already crossed the road when the vehicle hit him. The road was tarred with gravel verges where the pedestrians walk and he was on the gravel when the vehicle hit him from behind. The vehicle did not stop after hitting him and he never found out who was driving it.

9. From the impact he concluded it was going at high speed. It was not very dark. He was assisted by strangers who took him to the Baragwanath Hospital. He was hospitalised for five to six days and thereafter was using crutches.
10. The plaintiff's evidence is consistent with the statement given to the police some six months after the collision. He explained the delay in making the statement that he was on crutches and only went to the police once he had made a recovery.

Argument

11. Counsel for the plaintiff argued that the plaintiff's evidence had established that the driver had collided with the plaintiff at a point that was on the pedestrian part of the road and for this reason his conduct was negligent.
12. Counsel for the defendant suggested that the witness contradicted himself as he did not testify that the driver lost control of the vehicle and recklessly drove off the road as pleaded. He argued further that there was contributory negligence on the part of the plaintiff as he had seen the vehicle coming at speed and as a result had a duty to safeguard himself by taking reasonable steps to ensure that the vehicle did not hit him. There was no absolute right of way of anyone in a public road.
13. Counsel for the plaintiff rejected this argument stating that no evidence of contributory negligence had been led. Moreover there could be no contributory negligence when the point of impact was on the gravel

pedestrian part of the road.

Analysis

14. The plaintiff's evidence was not challenged to any meaningful degree and was generally credible that he had seen the vehicle approaching at speed and was thereafter hit from behind while on the pedestrian side walk. His evidence was also generally consistent with statements made to the police and as recorded on the RAF claim form, as well as the case pleaded. He did not however testify that the driver had lost control of the vehicle as pleaded. The fact that this pleaded ground of negligence was not established by him does not make him a contradictory witness. The basis of his claim was negligence in *one or more* of the named respects, including loss of control of the vehicle. His evidence is also consistent with the driver having lost control of the vehicle.
15. On the balance of probabilities his evidence establishes that he was hit by a vehicle travelling at speed while he was walking on the gravel sidewalk. The vehicle did not stop. The fact that the point of impact was on the pedestrian side walk is sufficient to make a finding of negligence in respect of the conduct of this driver. In the result the defendant is liable for the loss or damages suffered by him as a result of the collision, in terms of section 17(1)(b) of the Act.
16. The defendant's pleading concerning contributory negligence was not confirmed by any evidence, nor was the contention put to the plaintiff in cross examination that he could have contributed to the negligence. The proposition that a pedestrian should not only be off the road but should take further steps to avoid a speeding vehicle is not a valid basis for an apportionment for contributory negligence in these circumstances.
17. Accordingly the driver of the vehicle was negligent in one or more of the respects pleaded in paragraph 5 in the plaintiff's particulars of claim. As a result the defendant is one hundred percent liable for the plaintiff's proven damages arising as a result of the collision.

I make the following order

- a) The defendant is liable in terms of section 17(1)(b) of the Road Accident Fund Act 57 of 1996 for my proven loss or damage suffered as a result of any bodily injury to himself caused by or arising from the driving of the insured vehicle on 12th March 2016 on the R557 road, Gauteng Province;
- b) Costs are reserved until the final determination of the quantum of damages herein.

A ANDREWS

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE HEARD	:	30 JANUARY 2019
DATE DELIVERED	:	6 FEBRUARY 2019
FOR THE PLAINTIFF	:	ADV M MAPHUTHA
INSTRUCTED BY	:	MAMOGOBO ATTORNEYS
FOR THE DEFENDANT	:	ADV L MOHLAPAMASWI
INSTRUCTED BY	:	MARIVATE ATTORNEYS