THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 158/2011

In the matter between:

MJONGI GUSHA **Appellant**

and

THE ROAD ACCIDENT FUND **Respondent**

Neutral citation: *Gusha v The Road Accident Fund* (158/2011) [2011] ZASCA 242 (1 December 2011)

Coram: Cloete, Cachalia and Leach JJA

Heard: 21 November 2011

Delivered: 1 December 2011

Summary: Claim for damages based on negligence ─ RAF agreeing to concede the merits of the claim and accepting liability for the plaintiff's damages still to be proven ─ RAF precluded from later seeking to prove that the plaintiff's damages should be reduced by way of an apportionment of negligence.

O R D E R

On appeal from: North Gauteng High Court, Pretoria (Legodi J sitting as court of first instance):

1 The appeal succeeds with costs, such costs to include the costs of two counsel.

2 Paras 1 and 2 of the order of the court a quo of 24 March 2010 are set aside, and replaced with the following:

'1.(a) It is declared that on a proper construction of the agreement between the parties referred to in paras 4.4 and 4.5 of the particulars of claim, the defendant is liable to the plaintiff for all of the damages suffered by the plaintiff as a result of the bodily injuries he sustained in the motor vehicle accident giving rise to the claim and is precluded from seeking to plead or rely upon any apportionment of such damages.

(b) The issues relating to the quantum of the plaintiff's damages are postponed sine die.

2. The defendant shall pay the plaintiff's costs of suit to date, such costs to include the costs of two counsel where employed.'

J U D G M E N T

LEACH JA (CLOETE AND CACHALIA JJA CONCURRING)

[1] On 14 February 2006 the appellant was a passenger in a motor vehicle travelling between Hluleka and Ntlaza in the Eastern Cape when it swerved off the road to avoid an oncoming unidentified motor vehicle being driven on the incorrect side of the road. The vehicle capsized and the appellant alleges that in the process he sustained severe injuries which have left him paralysed. In due course the appellant sued the respondent for damages under the provisions of the Road Accident Fund Act 56 of 1996, alleging that the accident had been due to the negligence of the driver of the unidentified motor vehicle and claiming that the

respondent was accordingly liable to him for damages in a sum in excess of R6,7 million.

[2] When the matter came to trial in the Gauteng North High Court in March 2010, the court was asked to decide whether, on a proper construction of the terms of an agreement concluded between the parties before the issue of summons, the respondent had accepted liability for all the damages suffered by the appellant in consequence of the injures he had sustained in the accident or whether it was still open to the respondent to apply to amend its pleadings to allege that there should be an apportionment due to the appellant's contributory negligence in regard to his injuries by not wearing a seatbelt at the relevant time.

[3] The parties agreed to separate this issue for adjudication before any of the remaining issues, and an order under Uniform rule 33(4) was made in that respect. No evidence was led, the parties having contented themselves with argument relating to the terms of the agreement which by that stage had become common cause. After hearing the parties, the high court concluded that the terms of the agreement did not prohibit the respondent from seeking to rely on the appellant's contributory negligence and constituted no obstacle to an application by the respondent to amend its plea to seek an apportionment of the appellant's damages. Although the high court went on to refuse an application for leave to appeal, the appellant now appeals to this court with its leave.

[4] It is necessary to deal briefly with the pleadings. In paragraph 3 of the appellant's particulars of claim, averments as to the time and place of the accident are made. In paragraph 4 it is alleged that the respondent is liable to the appellant for damages suffered as a result of bodily injuries sustained in the accident due to the facts alleged in paragraphs 4.1 to 4.5 of the claim. Paragraph 4.1 contains an allegation that the accident was due to negligence on the part of the driver of the unidentified motor vehicle, whose negligence is particularised. Paragraph 4.2 contains details of the manner in which the appellant complied with the provisions of s 24 of Act 56 of 1996, while in paragraph 4.3 it is alleged the respondent's Cape Town office had acknowledged receipt of the prescribed claim form and had thereafter handled the matter. Then in paragraphs 4.4 and 4.5 the appellant alleged:

‘4.4 On 20 March 2008, and in a telephone conversation between Mr Martin Skovgaard-Petersen (an attorney duly authorized by the Plaintiff to lodge and prosecute his claim, who was then acting in such capacity) and Mr Craig Mngaze (a claims handler employed by the Defendant at its Cape Town regional office, who was then handling the Plaintiff’s claim on Defendant’s behalf and was acting within the course and scope of his employment), the Defendant conceded the merits of the Plaintiff’s claim and accepted liability for the damages, still to be proven, which the Plaintiff has suffered as a result of the bodily injuries he sustained in the accident.

4.5 On 20 March 2008 the Plaintiff’s said attorney caused a letter, a copy of which is Annexure “A” hereto, to be delivered by hand to the Defendant’s aforesaid Cape Town Regional office in which he confirmed the Defendant’s said concession of the merits of the Plaintiff’s claim and acceptance of liability for the Plaintiff’s still to be proven damages.’

[5] In its plea the respondent denied that the accident had happened as alleged in paragraph 3 of the claim. It therefore denied the contents of paragraph 4.1 of the claim although, in a belt and braces approach, it went on to allege that if the court found that the accident had occurred, that the driver of the unidentified vehicle had not been negligent or his negligence had not caused the accident. The respondent went on further to deny ‘each and every allegation’ contained in paragraphs 4.2, 4.3, 4.4 and 4.5 of the claim – including that the letter of 20 March 2008 had been sent to it, this despite the copy of the letter, annexure A to the summons, having borne the date stamp of the respondent’s Cape Town office which had been affixed as proof of service. The respondent also denied the appellant’s allegations in regard to the nature and severity of his injuries and the quantum of his damages.

[6] Uniform rule 18(4) requires a pleader to set out ‘a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading . . . with sufficient particularity to enable the opposite party to reply thereto’. Uniform rule 18(5) provides that a pleader who denies an allegation of fact in the opposing party’s previous pleading ‘shall not do so evasively but shall answer the point of substance’. In addition, Uniform rule 22(2) provides:

‘The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.’

Finally, it must be mentioned that Uniform rule 22(3) provides that '(i)f any explanation or qualification of any denial is necessary, it shall be stated in the plea'.

[7] The purpose of pleadings is to define the issues between the parties, not to obfuscate them. However the respondent in its plea sought to evade rather than define the matters in issue. Although it was ultimately common cause that the parties had reached the agreement referred to in para 4.4 of the claim, and that the respondent had received the letter confirming such agreement as alleged in para 4.5 of the claim, the respondent specifically denied these allegations. Its plea in that regard must be deprecated. This is not a case where the respondent lacked knowledge of the facts. The agreement had been concluded with its claim handler responsible for the appellant's claim, and the pleader was duty bound to ascertain what the respondent's defence was to the allegations made against it. One is left with the distinct impression that the respondent's plea was unethical as it deliberately failed to admit what it knew was true (I must immediately record that counsel who represented the respondent was not the author of the plea which was drawn by an attorney).

[8] Be that as it may, the parties proceeded to trial with the appellant facing the respondent's denials of his allegations set out in para 4 of the claim. However, the parties entered into negotiations during which the respondent found itself having to admit not only that the accident had occurred but also the contents of paragraphs 4.4 and 4.5 of the appellant's claim. This is reflected in a statement of agreed facts which the parties filed of record in this court in order to avoid filing a 108 page transcript of the proceedings which occurred in the high court on 19 and 23 March 2010.[1] This statement goes on to record that the parties were in agreement:

'That the only issues for the court a quo to determine were those in respect of paras 4.4 and 4.5 of the particulars of claim, in which regard the court a quo was requested to determine whether or not, on a proper construction of the agreement between the parties, respondent is liable for all the damages suffered by appellant as a result of the bodily injuries he sustained in the accident and is, accordingly, precluded from seeking to plead or rely upon any alleged apportionment of such damages.'

[1] This was a commendable course of action and one which this court has previously remarked should be followed more often – see *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA) para 3.

[9] It is also recorded in the statement of agreed facts that counsel for the respondent informed the court of the respondent's intention to apply to amend its plea 'in time for the quantum hearing, to plead contributory negligence on the part of (the appellant) for allegedly failing to wear a seatbelt'. Up until then, there is no indication on the record of the respondent having given any indication of its intention to allege that the appellant had been guilty of contributory negligence.

[10] In the light of the admissions already mentioned in regard to para 4 of the claim, the only issue which the court a quo was called upon to decide was whether the agreement that the respondent 'concedes the merits of this claim and accepts liability for the damages (the amount of which is yet to be proven) suffered by the claimant as a result of the injuries he sustained in the accident' is an unqualified acceptance of liability for the damages the appellant suffered due to his injuries. If it is, it precludes the respondent from contending that his damages should be reduced due to his own negligence.

[11] It was argued on behalf of the respondent that the concession of 'the merits of this claim' meant no more than an acceptance by the respondent that the accident had been due to negligence on the part of the driver of the unidentified motor vehicle. The phrase 'the merits' is somewhat controversial – see the judgment of this court in *Harford*[2] in which it was pointed out that a statement that the claim succeeded on the merits made no sense as there was a claim for payment of damages, not a claim in respect of the merits.[3] Nevertheless both parties accepted that the concession of 'the merits' meant no more than that the driver of the unidentified motor vehicle had been negligent and that this alone did not absolve the appellant from having to prove that he had been injured in the accident as well as the nature and extent of his injuries and the compensation which he should be awarded.

[12] However, the respondent also accepted 'liability for the damages, still to be proven, which the Plaintiff has suffered'. Counsel for the respondent argued that the respondent had thereby clearly intended to do no more than to accept liability for the damage caused by the negligence of the driver of the unidentified motor vehicle and,

---

[2] *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A).
[3] At 792B-D.

consequently, if the appellant had not been wearing a seatbelt and his failure to do so contributed to his injuries, the respondent had not undertaken to be held liable for that harm. In these circumstances it was argued the respondent's acceptance of 'liability' had been limited.

[13] In my view, this argument cannot be accepted. In interpreting the agreement, counsel for the respondent submitted, correctly in my view, that the correct approach in accordance with the so-called 'golden rule of interpretation' is to have regard to the normal grammatical meaning of the relevant words, the context in which they were used, including the nature and purpose of the agreement, and the background circumstances which might explain the purpose of the agreement and the matters properly present to the minds of the parties when they concluded it. In this regard, the remark of Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 ALL ER 433 (HL) at 447*a* that 'in law context is everything' is apposite. This approach has regularly been affirmed by this court when called upon to construe the language used in a document such as a statute to a contract although, as Harms DP pointed out in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*,[4] 'to the extent that evidence may be admissible to contextualise the document . . . to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Company Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C).'

[14] In interpreting the agreement, it is significant that at the time the respondent was facing a claim for damages brought by the appellant as a passenger who had been injured when the motor vehicle in which he had been travelling had been forced off a road by the unidentified motor vehicle. This the respondent had accepted. It had also accepted that the driver of the unidentified motor vehicle had been negligent. Importantly, as was correctly conceded by its counsel, the respondent clearly gave no thought at the time to the possibility of any contributory negligence on the part of the appellant (as is borne out by its failure at any stage to raise the issue thereafter, even after the admission of liability was specifically pleaded as part of the appellant's cause of action).The issue of any such negligence was thus never a live issue. In these circumstances the respondent, by conceding the 'merits' and accepting 'liability for the damages still to be proven, which the

[4] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

(appellant) has suffered as a result of the bodily injuries he sustained in the accident' accepted liability without qualification for whatever damages the appellant had suffered as a result of his injuries, subject of course to proof of those injuries and the damages that ought to be awarded. There is in my view no room for the respondent's argument that its acceptance of liability was limited and did not relate to the full extent of the appellant's loss. There can also be no question of the appellant having sought to limit its liability by reserving the right to raise an apportionment which it had not considered and on which it did not intend to rely.

[15] The respondent's unqualified concession of liability renders it both impermissible and opportunistic for it now to attempt to introduce the appellant's alleged contributory negligence in order to seek a reduction in the extent of its liability. The court a quo therefore erred in reaching the contrary conclusion and in granting the relief set out in paras 1 and 2 of its order of 24 March 2010 (in which it postponed the issue of the appellant's alleged contributory negligence – which was in fact never an issue on the pleadings – to be heard 'together with the hearing of this matter on quantum' and directed the appellant to pay the costs of the hearing). There is no reason to interfere with para 3 of the court a quo's order relating to the wasted costs of 19 March 2010.

[16] In the light of the importance of the matter to the appellant, I am of the view that costs of two counsel should be allowed and, indeed, it was not suggested otherwise by the respondent.

[17] It is ordered:

1 The appeal succeeds with costs, such costs to include the costs of two counsel.

2 Paras 1 and 2 of the order of the court a quo of 24 March 2010 are set aside, and replaced with the following:

'1.(a) It is declared that on a proper construction of the agreement between the parties referred to in paras 4.4 and 4.5 of the particulars of claim, the defendant is liable to the plaintiff for all of the damages suffered by the plaintiff as a result of the bodily injuries he sustained in the motor vehicle accident giving rise to the claim and

is precluded from seeking to plead or rely upon any apportionment of such damages.

(b) The issues relating to the quantum of the plaintiff's damages are postponed sine die.

2. The defendant shall pay the plaintiff's costs of suit to date, such costs to include the costs of two counsel where employed.'

_____

L E Leach

Judge of Appeal

'

APPEARANCES:

For Appellant:	M A Crowe SC (with him (I S Ferreira) Instructed by: Lowe & Petersen, c/o E W Serfontein Inc, Pretoria Honey Attorneys, Bloemfontein
For Respondent:	M M Lingenfelder Instructed by: Dyason Attorneys, Pretoria McIntyre & Van der Post, Bloemfontein