

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1 REPORTABLE: **NO**
) OF INTEREST TO OTHER
(2 JUDGES: **NO**
) REVISED: **NO**
(3
)

CASE NO: 2018/34145

DATE

SIGNATURE

CASE NO: 34145/2018

In the matter between:

P[...] M[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

BLOCK AJ: -

INTRODUCTION

1. The plaintiff in this action sues the defendant for damages that he allegedly suffered as a result of a motor vehicle collision which occurred on 16 June 2017 along the N12, Golden Highway, Eldorado Park, Johannesburg.
2. The collision is alleged to have occurred at 21h30 whilst the plaintiff was driving a silver Toyota Tazz motor vehicle with licence plate number RKB [...] GP (*“the Tazz”*) and which collided with an unknown vehicle (*“the unidentified vehicle”*).
3. To this end it is alleged in the plaintiff's particulars of claim that the unidentified vehicle *“came speeding and bumped into the side wheel of the Plaintiff's motor vehicle causing it to lose control”*.
4. The plaintiff further alleges that the injuries that he suffered were as a result of the sole negligence of the driver of the unidentified vehicle who:
 - 4.1. failed to keep a proper and /or adequate look-out;
 - 4.2. failed to properly observe the rights of other road users, especially that of the plaintiff;

- 4.3. failed to apply the brakes of the motor vehicle timeously or at all to avoid the accident;
- 4.4. failed to avoid the accident or at least minimize the impact of the accident when by the exercise of reasonable care; he should and/or could have done so;
- 4.5. failed to drive with due skill, diligence caution and or circumspection despite the fact that road signs, road markings and the weather condition were clear and visible;
- 4.6. allowed his motor vehicle to encroach into the incorrect lane(s).
5. The defendant was duly served with the summons in this action and proceeded to defend the matter. It served notice of its intention to defend and thereafter delivered its plea which incorporated a special plea.
6. Notwithstanding the fact that the action was defended, the defendant seems to have lost interest in the litigation. In this regard on 16 March 2022, seemingly as a result of non-compliance with the rules, this Court granted an order striking out the defendant's plea and special plea and referred the action to the registrar to allocate a date for a default judgment hearing.
7. The action accordingly came before me on the Default Judgment roll on 21 February 2024 for determination. It was accompanied by an application to separate the issue of the defendant's liability from the action in terms of rule 33(4) and to determine this question first.

8. In this matter, Mr Motubatse appeared for the plaintiff whilst Mr Mtshemla appeared on behalf of the defendant.
9. It was contended on behalf of the plaintiff that he wished to provide *viva voce* evidence in support of his contention that the defendant was liable to compensate him, and the defendant's counsel specifically told the Court that he intended to cross-examine the plaintiff and his witnesses.
10. Mr Mtshemla was also at pains to stress in argument that notwithstanding the fact that the defendant's defence to the action had been struck out, the defendant was still entitled to be heard.
11. Mr Mtshemla specifically referred to the judgment of Twala J in *Stevens and Another v Road Accident Fund* where it was held that:¹

"[11] ...It has been held in a number of decisions that the rules are for the court and not the court for the rules. Moreover, in casu, the striking out of the defence of the defendant does not in itself bar the defendant from participating in these proceedings. The defendant is entitled to participate in these proceedings but his participation is restricted in the sense that it cannot raise the defence that had been struck out by an order of Court. It is therefore not correct to say the defendant was not entitled to cross examine the plaintiffs after giving evidence. Furthermore, the cross examination was on the evidence tendered by the plaintiffs and the defendant did not attempt to introduce its own case during the cross examination.

[12] Furthermore, there is no merit in the argument that the plaintiffs have been ambushed by the sudden appearance of the defendant whose defence has been struck out since they were only prepared to advance their case on the papers. Legal practitioners are always expected to be fully prepared and must familiarise themselves with the case they are to present in Court. Litigants and their legal practitioners should not assume that if they do not have opponents then it means they will obtain the relief they seek. Litigants should always prepare to prove their case on a balance of probability and satisfy the Court on the evidence they present. I hold the view therefore that the contention of the plaintiffs that the defendant was 'red carded' (language used by counsel for the plaintiffs) and should not have been allowed to cross examine is a misconception of the Rules of Court".

¹ (26017/2016) [2022] ZAGPJHC 864 (31 October 2022) at [11] and [12]

12. I agree with these sentiments however there was some debate in court as to whether or not the plaintiff would rely on affidavit evidence pursuant to rule 38(2).
13. I advised the parties that this would be impermissible as rule 38(2) expressly provides that the acceptance of evidence on affidavit in trial proceedings is subject to the proviso that *"...where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit"*.
14. In light of the above I advised the parties that as the defendant had insisted on cross-examining the plaintiff and his witness and as they were both available, the intended evidence on the question of the defendant's liability could not be determined on affidavit.
15. The matter was then to proceed with the hearing of oral evidence however, as the plaintiff had failed to instruct a necessary Sotho interpreter, the matter was stood down further to 27 February 2024 being a date upon which I could accommodate the parties with a virtual hearing over Microsoft Teams.
16. At the outset of this hearing the plaintiff proceeded to move for its order separating the issue of liability from the matter and the defendant offered no objection. I, accordingly, after satisfying myself that a case had been made out, granted an order separating the issue of liability from the remaining issues and I proceeded to hear the oral evidence presented by the plaintiff.

17. Before I assess the evidence given on behalf of the plaintiff, regard must be had to an issue that arose during the trial. During the course of cross-examination, the defendant sought to make reference to a sketch plan that was part of the Accident Report that had been discovered. I provisionally allowed the sketch plan into evidence subject to argument on the admissibility thereof.

18. I find that the sketch plan is inadmissible as neither party called a witness to authenticate the document² and there was no agreement between the parties as to the admissibility of this document. Additionally, no notice had been given under rule 36(10) to introduce the sketch plan. It was merely included as part of the discovered Accident Report prepared by the Police.

THE PLAINTIFF'S EVIDENCE

19. In support of his case the plaintiff personally gave evidence. He also relied upon the evidence given by his partner Ms Irene M[...] (“M[...]”). She was a passenger in the Tazz at the time of the collision.

20. The plaintiff testified that he is a single 43-year-old man who has 4 children. During his evidence, the plaintiff could not recall the date of the collision but told the Court that he was travelling in the Tazz with his grandfather to Orange Farm, Johannesburg, to visit his uncle who resides there.

21. He testified that he was travelling on the Golden Highway that evening and stated that the road is a two-lane road with a further two lanes going in the opposite

² *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 (T) at 940 E - G

direction. He testified that before the collision occurred, he was travelling in the right-hand lane which he called the fast lane.

22. The plaintiff further testified that he and his grandfather were not the only people in the Tazz. He was travelling with his partner, M[...], two of his children and his grandfather's friend. The children were 2 years and 4 years old respectively. In total there were 6 people in the vehicle.

23. The plaintiff explained that he was the driver, M[...] was the front seat passenger whilst the children, his grandfather and his grandfather's friend all sat in the back passenger seat of the Tazz.

24. The plaintiff went on to testify that prior to the collision another car (the unidentified vehicle) came up from behind him and the driver "*put the lights on too bright*" and was flicking his lights. The plaintiff then tried to avoid the unidentified vehicle and he moved into the neighbouring lane (the left lane) but the unidentified vehicle "*bumped me from behind*".

25. The plaintiff continued by testifying that after the collision he lost control of the Tazz and it rolled and then stopped by the rocks and street poles on the outside of the road.

26. He testified that there was nothing that he could have done to avoid the collision and the unidentified vehicle failed to stop and simply drove away. The plaintiff further testified that he sustained a head injury as a result of the collision as well as a "*broken shoulder*" and hand. He was taken to hospital and also noted that

the doctor who treated him said that he (the plaintiff) was suffering from internal bleeding.

27. In this regard the plaintiff told the Court that he lost consciousness at the scene and woke up in a hospital bed. He did not know what had happened. Whilst in hospital he spoke to a police officer who informed him that two people had died in the collision, his grandfather and his grandfather's friend, but the police officer never took a statement from him.

28. In cross-examination the defendant put the pleaded version to the plaintiff, namely that the unidentified vehicle collided with the side wheel of the vehicle. The plaintiff could not tell the court if the collision occurred at the left or right wheel but insisted that the collision occurred from behind.

29. The plaintiff also conceded that he did not check his speed but was likely travelling between 60 to 80 kilometres per hour with the speed limit being 100 kilometres per hour. He also stated that when he saw the unidentified vehicle approaching from behind him, he could not tell the distance between the vehicles but that he was "*not that close to me*". He stated that the unidentified vehicle was travelling at a high speed.

30. When asked if he checked his blind spot, the plaintiff confirmed that he did so and that he checked his mirror as well before moving into the left lane. He also indicated the change of lanes and did not apply his brakes as he was already driving at a low speed. After the collision the plaintiff tried to control his vehicle to remain on the road, but he lost control.

31. He also testified under cross-examination that he did not think of applying his brakes at this stage as he was trying to keep his vehicle on the road. He agreed with the contention that if he applied his brakes, he could have slowed down but disagreed with the notion that by applying the brakes he could have stopped the vehicle from rolling. This stance was reaffirmed by him in re-examination.
32. The plaintiff was further asked about the police officer who saw him in hospital, and he confirmed that this was a JMPD officer. The plaintiff clarified that he reported the collision to the SAPS after the incident and this was most likely during the following week. He testified that he had never seen the Accident Report that had been prepared by the Police.

M[...]'S EVIDENCE

33. M[...] told the Court that she is an unemployed 43-year-old woman and was a passenger in the Tazz.
34. She testified that the Tazz was travelling in the right-hand lane which she also termed the "*fast lane*". She stated that as the plaintiff was driving, the unidentified vehicle came up from behind at a high speed and "*bumped*" the Tazz from behind. She stated that the plaintiff tried to avoid this collision by moving into the left lane.
35. After the impact she testified that she does not know what happened as she lost consciousness and, just like the plaintiff, woke up in hospital. She stated that she suffered multiple injuries to her head, knee, thigh and chest.

36. Under cross-examination, M[...] testified that she did not observe the unidentified vehicle from a distance, and she was further cross-examined on the existence of the statement that she made to the Police.
37. It was further put to her that if she did not see the unidentified vehicle, how could she have known it was speeding? In response, M[...] stated that she did not observe the colour or make of the unidentified vehicle but knew it was travelling at a high speed with bright lights. She said she knew this as she heard the sound of the unidentified vehicle and further stated that she heard the plaintiff apply the Tazz's brakes.
38. M[...]’s evidence differed in cross-examination when she later told the Court that the impact occurred in the middle of the road whilst the Tazz was moving from the right-hand lane to the left-hand lane. She also stated that by changing lanes, the plaintiff had sought to avoid the collision.
39. It was further put to M[...] that the plaintiff was “*rushing*” to get to orange farm, she however answered that the plaintiff was travelling at a “*normal speed*” and that he was not speeding. She however conceded that she did not know what speed the Tazz was travelling.
40. At the end of her testimony during cross-examination, M[...] reiterated the point stating that even a 2-year-old could hear that the unidentified vehicle was speeding.

ASSESSING THE EVIDENCE

41. Pursuant to section 17 of the Road Accident Fund Act 56 of 1996 (“*the Act*”) the defendant is liable to compensate the plaintiff for the damages suffered by him as a result of the bodily injuries he sustained in the motor vehicle collision.

42. There was no dispute between the parties that the plaintiff is a third party as envisaged by the Act and that he suffered injuries in a motor vehicle collision.

43. The defendant’s liability to compensate the plaintiff accordingly turns on the question whether the driver of the unidentified vehicle was negligent and whether such negligence, if proven, caused the damage suffered by the plaintiff. If so, the defendant is statutorily liable to compensate the plaintiff for his proven or agreed damages. The slightest degree of negligence on the part of the insured driver is sufficient to satisfy the requirements of section 17 (1) of the Act.³

44. The onus to prove this rests on the plaintiff on a balance of probabilities but to the extent that contributory negligence is alleged, to avoid liability, the defendant must produce evidence to disprove the inference that the collision was caused by the insured driver’s negligence. Failing which, the defendant will be liable for the plaintiff’s damages.⁴

45. This position was summed up by Spoelstra AJ in *Vitoria v Union National South British Insurance Co Ltd* as follows:⁵

³ *Goode v SA Mutual and Fire Insurance* 1979 (4) SA 301 (W)

⁴ *Fox v RAF* (A548/16) [2018] ZAGPPHC 285 (26 April 2018) at [12]

⁵ 1980 (4) SA 406 T at 413 A - F

“...In our law, as I understand it, a defendant who alleges contributory negligence on the part of a plaintiff in a motor collision case, must prove that, having regard to all the surrounding circumstances and to the prevailing traffic conditions in particular, a reasonable man in the position of the plaintiff would have recognised the possibility of a collision as a real one. A mere distant, notional or theoretical possibility does not suffice. The potential of harm arising from the dangerous situation must be so actual that it would be unreasonable not to guard against it.

Motor collisions do occur. That much is common knowledge. It is also well known that they occur when least expected and even to people whose driving has conformed at all material times with that of the reasonable man. However, more often than not, they are caused by the careless and inconsiderate manner in which the motor cars involved are driven. Driving in accordance with the high standard set by the reasonable man does not remove all risk. It is still possible that some day, along some road, some grossly negligent driver may spring a trap from which even the reasonable man cannot escape. That is a chance the reasonable man takes. By applying his mind to his driving and by taking such precautions as the occasion demands, a reasonable man will expect little else than the enjoyment of a long and happy driving career”.

46. In this matter, the plaintiff's testimony was corroborated by M[...] that the unidentified vehicle was speeding and that whilst the Tazz was attempting to avoid the unidentified vehicle by changing lanes, the collision occurred from behind. From the evidence it is apparent that the Tazz was not driving at an excessive speed and that, if anything, it was travelling below the speed limit.

47. Mr Mtshemla submitted in his heads of argument that the plaintiff was contributorily negligent in that he failed to take evasive action to avoid the collision and to prevent the vehicle from leaving the road and rolling. In this regard it is argued that the plaintiff was negligent for not applying his brakes after the impact and that he failed to control the Tazz in this manner.

48. It will be recalled that under cross-examination the plaintiff agreed with the contention that if he applied his brakes, he could have slowed down but disagreed with the notion that by applying the brakes he could have stopped the vehicle from rolling had he done so.

49. The above concession does not disprove the inference that the collision was caused by the negligence of the unidentified driver. No evidence was produced to show that the plaintiff would not have suffered injuries, and would have controlled the vehicle, had he applied the brakes after the collision.⁶ At most, the defendant's contention is speculative in nature.

50. Moreover, the plaintiff provided a reasonable explanation for his failure to apply the brakes - he was already driving at a low speed and was attempting to keep the Tazz on the road.

51. In the premises, I am of the view that the defendant is wholly liable to the plaintiff for his proven or agreed damages.

52. I accordingly make the following order:

1. The defendant is 100% liable to the plaintiff for the plaintiff's proven or agreed damages;
2. The defendant is to pay the plaintiff's costs.

D BLOCK

Acting Judge of the High Court

⁶ Nor could the defendant adduce this evidence as its defense had been truck out.

DATE OF HEARING: 21 February 2024 & 27 February 2024

DATE OF JUDGMENT: 16 April 2024

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