

SOUTH AFRICA / JUDGMENT

Abinero v Road Accident Fund (95211/15) [2019] ZAGPPHC 462 (19 August 2019)

[2019] ZAGPPHC 462

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane

CASE / FILE NUMBER

95211/15

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

CASE

NO: 95211/15

19/8/2019

In

the matter between:

BOANE

ADMIRO

ABINEIRO

PLAINTIFF

and

ROAD

ACCIDENT FUND

DEFENDANT

JUDGMENT

PHAHLANE, AJ

INTRODUCTION

- [1] This is an action for damages in which the plaintiff seek recourse against the defendant as a result of the accident which occurred between a motor vehicle with registration numbers and letters[.....], driven by the plaintiff and a motor vehicle with registration numbers and letters[.....], driven by Mr Lusenga (Insured driver) on the Van Oyksdrift road, Middleburg, Mpumalanga on the 12th of March 2013.
- [2] At the commencement of the trial, the parties could not agree on separating any of the issues and as such, Advocate Manganye on behalf of the plaintiff informed the court that the trial should proceed only on the merits.
- [3] Counsel also informed me that there is no dispute to the fact that there was some negligence on the part of the plaintiff in causing the accident.
- [4] The dispute between the parties is predominantly premised on the question, whether or not the insured driver negligently contributed to the cause of the accident, and on the apportionment that should be applied in the event I find that the defendant was negligent.
- [5] Counsel also informed me that the plaintiff Mr Abineiro Admire Boane will present the viva voce evidence in support of his case. The defendant also called two witnesses.
- [6] The Plaintiff in his particulars of claim and more specifically to paragraphs 5 thereof, the following averments were made:

"5 The aforesaid collision was caused by the sole and exclusive negligence of the insured driver who was negligent in one or more of the following respects:

5.1 He/she travelled at a high speed in the prevailing circumstances;

5.2 He/she failed to keep a proper lookout and had no regard for the other users of the road and particularly the plaintiff;

5.3 He/she failed to have applied brakes timeously or at all;

5.4 He/she failed to have sufficient regard for the rules of the road;

5.5 He failed to take adequate steps to avoid the accident when by more or reasonable and diligent care he could have done so.

5.6 He/she failed to exercise the care a reasonable person would have exercised under the prevailing circumstances.

[5] The Defendant in its plea to the plaintiffs particulars of claim and more specifically to paragraph 5 of the plaintiff's particulars of claim averred that:

5.1 The Defendant denies each and every allegation contained in this paragraph and accordingly put the Plaintiff to the proof thereof

5.2 In the alternative to paragraph 5.1 above and in the event of the above honourable court finding that a collision occurred as alleged by the plaintiff, then and in that event the defendant denies that such insured driver was negligent as alleged or at all

5.3 In the alternative to subparagraph 5.1 and 5.2 above and in the event of the above honourable court finding that a collision occurred as alleged by the plaintiff and that the insured driver was negligent, all of which is still denied, then in that event the defendant denies that such negligence caused or contributed to the collision as aforesaid.

5.4 In the alternative to subparagraphs 5.1; 5.2 and 5.3 above and in the event of the above honourable court finding that the insured driver was negligent, this being denied, the defendant pleads that the collision was caused by the plaintiff Boane Admire Abineiro in that:

5.4.1 He failed to keep a proper lookout

5.4.2 He failed to avoid a collision by exercising reasonable care; he could and should have done so

5.4.3 He failed to have due regard to the rights of other road users, in particular those of the insured driver of the insured vehicle.

5.5 In the alternative and in the event of the above Honourable Court finding that a collision between the plaintiff and the insured motor vehicle did occur, and that the plaintiff was a driver as alleged and that the insured driver was negligent, as alleged or at all, and that such negligence contributed to the collision, all of which are still denied, then and in that event the defendant pleads that the plaintiff was also contributory negligent in relation to the aforesaid collision in one or more of the respects as set out in paragraph 5.4 and request the above honourable court to apportion the plaintiffs damages in accordance with the provisions of Apportionment of Damages Act 34 of 1956. as amended.

THE EVIDENCE

- [7] The plaintiff is Portuguese speaking and is originally from Maputo. He testified that he was the driver of the truck which collided with the bus on 12th March 2013. He obtained his driver's license in Maputo in the year 1996 and it allows him to drive and deliver goods in the SADC countries. His driver's licence was supposed to expire in 2014.
- [8] On the day of the accident, he was driving an lno truck coming from the Pretoria/Tshwane Market and going to Maputo, carrying fruits and vegetables. He left Tshwane Market around 10h00 or 11h00 and the accident occurred around 14h00. He testified that it was cloudy and raining on this day, and there were road constructions on the road. He explained that the road was slippery and he was driving at 70 kilometres per hour.

- [9] The plaintiff testified that he was driving on a slope going downhill and he was not able to see what was in front of him because of the rainy conditions. The only thing he saw a red tape on the left side of the road as well as the pothole. He said the road was a two-way traffic because there were motor vehicles driving from the opposite direction.
- [10] When the accident occurred, he was driving behind a bus. He noticed that the bus was applying brakes and he also applied his brakes. As a result of the slippery road, he tried to swerve to the right side of the road and he could not because there were oncoming vehicles. He lost control of his vehicle and hit the bus at the back. He said the distance between his truck and the bus in front of him could have allowed one normal size vehicle to fit in. He explained that after the collision, he had difficulty breathing and was in pain. He unfastened his seat belt and he lost consciousness. He does not know what happened thereafter because he only woke up at the hospital.
- [11] Under cross-examination, he confirmed that he only made his statement (ie. the section 19(f) affidavit) explaining the circumstances of the accident on the 10th of April 2019. He explained that he was in Mapulo where he stays and was waiting to be called to come and make a statement. The plaintiff testified that on the day of the accident, he did not notice any road signs, save for the road construction equipment on the side of the road and the red tape. According to him, the road he was traveling in was just a normal road where one cannot expect to see a road sign. He denied that there was a road sign warning the motorists of a 'Stop and Go ahead' because he did not see it.
- [12] He testified that as he was driving, he did not see other motor vehicles save for the bus that was in front of him and he also did not know what was happening in front of the bus because of its height. It was put to him that as a responsible driver, he should have exercised caution and care when he realised that it was raining. In his response, he said he exercised caution by reducing the speed to between 50-60 km/h as he was driving at 70 km/h before it started raining. He said the regulated speed limit on that road was 80 km/h. He confirmed that a responsible driver should exercise care when he realizes that it is raining. He confirmed what he said in chief, that he was driving downhill on a slippery road due to rainfall. Further that when he saw the brake lights of the bus in front of him, he also applied his brakes.
- [13] It was further put to him that the insured driver's version is that there were warning signs on the road alerting all the motorists that there is a 'stop and go ahead'; and that as a compliant driver, he (the insured bus driver) adhered to the warning signs by gradually applying the brakes in anticipation of the 'Stop and Go ahead' of him. In his response, he still maintained that he did not see the sign but only the bus in front of him. The plaintiff said he did not see any traffic officer who was in control of the traffic on the road, and he further denied that the road surface was flat as indicated or described by the traffic officer in

the accident report.

- [14] To the question whether as a Portuguese speaking, he was able to interpret English road signs, the plaintiff responded by saying the signs are the same and there is no difference between the English and Portuguese signs. It was put to him that he was driving at an excessive speed before the accident and he refuted that.
- [15] The plaintiff was referred to his section 19(f) affidavit which appears on page 108 of the bundle that he did not allege that the bus driver applied sudden brakes, or that he suddenly stopped. The plaintiff responded by saying that he informed the person who was taking down his statement/affidavit about this aspect and allege that there was a communication breakdown as this person was conversing with him in another language while he spoke in Portuguese. He could not remember the language spoken by this person.
- [16] It had appeared that there were four vehicles including the bus, which were involved In the collision, It was put to him that the three vehicles that were in front of him managed to come to a standstill or stop without any accident and he responded by saying that he did not see any vehicles. It was further put to him that he did not keep a proper lookout expected of a reasonable man driving on the road and that when colliding with the bus, the bus had already stopped. The plaintiff confirmed that the bus was already stationery when he collided with It. It was also put to him that the fact that the other two vehicles and the bus stopped

at the 'stop and go' sign without an incident, meant that the plaintiff did not follow precautionary signs on the road. Plaintiff

responded that he was not at fault because he was following the rules of the road.

This concluded the evidence of the plaintiff and he closed his case.

- [17] The first witness for the defendant was Mr Abraham Lusenga. He is the bus driver who got involved in a collision with the plaintiff on 12 March 2013. He testified that on the day of the accident, it was raining and there were road constructions ahead on the road. He explained that he noticed that there were road constructions because there were road signs on the side of the road where he was driving. The road signs indicated that the motorists should slow down. He said in front of him there was a bakkie and a twenty-two seater vehicle. He testified that the speed limit in that area was 60 km/h. He explained that the lane in which he was travelling in was closed and he and other motorists stopped and he applied his handbrakes. After a while he heard a big sound from the rear. His bus moved forward and collided with the bakkie in front of him and the bakkie collided with the twenty-two-seater which was in front of it.

- [18] Lusenga said he was stationery for about 5 minutes before the truck could collide with him. He said before he could come to a standstill, he had a gradual stop -meaning he did not stop suddenly. He explained that when he realized that there were road signs of a 'stop and go ahead', he reduced his speed until he came to a halt. He said he focused on the vehicles in front of him and there was nothing that he could have done to avoid the accident from happening.
- [19] Under cross-examination, he said on the day of the incident, he was driving a 71-seater bus carrying school children. He has been driving or transporting school children for a period of two year, but he started being a bus driver since 2009. He confirmed that he had been waiting for five minutes before the collision occurred. It was put to him that he did not keep a proper lookout on the road. He responded by saying that his focus was in front of him and on the vehicles that were in front of him, and not at the back. He stood by the point he made during evidence in chief that he came to a gradual stop, then

pulled his hand brake. It was put to him that it was improbable for him to collide with the vehicles in front of him if his handbrake was pulled up. He responded by saying, for him to collide with the vehicles in front of him even with his handbrake pulled up, that depended on the speed with which the vehicle coming from behind him was travelling. He did not know the speed with which the truck behind him was travelling. Lusenga confirmed that before the collision could occur, he was travelling at 60km/h. He disputed the plaintiff's evidence that he applied the brakes suddenly. He testified that he did not look at his back when he was stationery.

- [20] The next witness Lindinwe Anna Ntuli. She testified that she was the driver of one of the vehicles that were involved in a collision on 12 March 2013. She said that on the road where she was travelling on, there were constructions and there were also road signs indicating that there is a 'stop and go ahead'. From the entrance going to the Middleburg mine, she drove for about 400-500 kilometres before she was stopped. She said she stopped behind a kombi for a while and someone entered into her motor vehicle trying to hijack her. She explained that her vehicle was stationery and while waiting for the traffic controller to allow her to drive through, she heard a bang from her back. She buried her head on the steering wheel thinking that she was being shot at. She only raised her head at a later stage when the police came and explained to her that she was in an accident and she should go to the ambulance. Ntuli testified that before she could hear the bang from her back, she saw the bus behind her. This bus came from the Alendale school carrying school children and it followed her from the time she drove passed the Doover mine up until they came to standstill when being stopped by the traffic controller. She said after she stopped, the bus behind her also stopped and so did the kombi in front of her. She testified that they were already stationery for quite some time before the bus hit her from behind. She could see the bus stationery through her mirror, Under cross-examination, she confirmed that when she heard the bang/sound from her back she buried her head on the steering wheel and that she did not see the accident happening. The defendant then closed its case.

- [21] The plaintiff in his section 19(f) affidavit which he made six (6) years after the collision (ie. on 10 April 2019) did not allege that the insured driver in front of him applied sudden brakes or that he suddenly stopped. Advocate Moukangwe on behalf of the defendant argued that the averments made in the plaintiff's particulars of claim in paragraph 5 thereof, differs from the evidence that was presented in court and that is the fact that the plaintiff's evidence before court relates to the allegation of a sudden stop/emergency by the insured bus driver which is not averred in the particulars of claim. He insists that this allegation cannot stand as the plaintiff blames the rainy conditions; darkness and the fact that he was carrying a heavy load that he could not avoid the accident.
- [22] I am inclined to agree with Advocate Moukangwe. 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'. The purpose of pleadings is to define the issues between the parties. not to obscure them. However, the plaintiff in his particulars of claim neglected to set out clearly the matters in issue. Even though the plaintiff in chief gave evidence which tended to indicate that it was as a result of the heavy load he was carrying; the rainy condition; the slippery road; the darkness; and the sudden stop by the insured driver in front of him, this was however not his case and in my view, failure by the plaintiff to aver these issues in his particulars of claim will prejudice the defendant.
- [23] It is trite that litigants are bound by the rules of court, specifically in regards to what should be averred and canvassed in the pleadings. A party is thus bound by what is addressed in the pleadings. Conversely, the defendant is entitled to be informed of what the plaintiff's case is. It cannot be expected of a defendant to deal in a plea or in evidence with unsubstantiated averments without specific facts on which they are based being stated. This amounts to a trial by ambush. Even though the plaintiff has in his evidence in chief gave evidence which tended to indicate it was as a result of the rainy conditions; the slippery road and the sudden stop/brake by the insured driver, this was however not his case and in my view that part of the evidence will be disregarded for purposes of determining this matter. Be that as it may, for the sake of completeness, I will deal with all the aspects before me.
- [24] It is generally accepted that every road-user owes a duty of care and consideration to other road-users. That duty requires of every driver to drive like a reasonable man, who would be able to reasonably foresee the possibility of unforeseen consequences and act in accordance with such appreciation.
- [25] The onus is on the plaintiff to prove on a balance of probabilities that:
- (a) a reasonable person (*diligens paterfamilias*) in the position of the defendant:
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and
 - (ii) would take reasonable steps to guard against such occurrence and

(b) The defendant failed to take such steps

[26] Failure to act in accordance to the above is tantamount in law to negligence. See *Kruger v Cotzee* 1966

(2) SA 428 (A); *Minister of Safety and Security V Van Dulvenboden*

(2002) 3 ALL SA 741 (SCA)

[27] The collision in this matter occurred around 14h00 on a rainy day. It is common cause that this was a rear-end collision where the plaintiff was the driver of the truck which collided with the bus driven by the insured driver in front of him. It is also common cause that there were road constructions and the traffic/road was controlled by a traffic control officer on the road where the accident occurred.

[28] In *Ninteretse v Road Accident Fund* (29586/13) {201BJ ZAGPPHC 439 (2 February 2018) at para 25 the court said:

"The driver who collides with another from the rear can escape prima facie liability for negligence by providing an explanation that shows that the collision occurred because of the negligence of the driver of the other vehicle or due to other intervening circumstances".

[29] The plaintiff testified that he was driving downhill on a slippery road at 70km/h. It is also his evidence that it was dark and cloudy, and he could not see anything that was happening in front of him.

[30] Advocate Manganye argued that it was as a result of the load the plaintiff was carrying and the road conditions, that the plaintiff could not avoid the accident from happening. She insists that defendant should be found to have contributed negligently to the cause of the accident because of the sudden brakes applied by the insured driver.

[31] I do not agree with counsel's submission because it is clear from the evidence of Lusenga that when the collision occurred, he was already stationary for about five minutes. Ntuli might not have seen the accident happening, but her evidence corroborates that of Lusenga when she explained that she had been stationary for quite a while and she noticed that the bus behind her was also stationary. It was long after they had been stopped that she heard a big bang from the back, which she later found out that it was an accident. It is also clear from the evidence of both Lusenga and Ntuli that despite the rainy conditions, there were visible road signs warning motorists of a 'stop and go ahead', which road signs are denied by the plaintiff.

[32] The plaintiff wants to escape liability based on sudden emergency when he testified and as submitted by his counsel that for the insured driver to have applied his brakes, that created a situation which made it impossible for the plaintiff to swerve and avoid the accident.

[33] It was incumbent upon the plaintiff to exercise the duty of care and keep a proper lookout of the road ahead by (1) maintaining a safe following distance between himself and the bus in front of him; and (2) reducing the speed when it became apparent to him that the road was slippery, given the fact that he was driving on a slope going downhill. By his own version, the plaintiff said he could not see anything save for the bus in front of him because it was dark. One would have expected the plaintiff to have been more cautious under such conditions and exercise the duty of care that was expected of him and to keep a proper lookout for any

danger or unexpected eventualities that might occur. This, coupled by the fact that when he realised that the insured driver was applying brakes, he tried to swerve to where there was even more danger, and that is to the right side, but there was oncoming traffic and he lost control of his truck and collided with the bus in front of him. This clearly shows that the plaintiff did not have due regard to other road users and did not exercise the duty of care which was expected of him.

[34] Counsel on behalf of the plaintiff submitted that there are no disputes to the fact that there was some negligence on the part of the plaintiff. However, she insists that the stop by the insured driver constitutes a sudden emergency. On the other hand, counsel for the defendant submitted, and rightly so, that the stop by the insured driver was justified as corroborated by Ntuli's evidence.

[35] The defendant further submitted that the plaintiff failed to point any fault on the part of the insured driver. Relying on the case of *Arthur v Bezuidenhoud & Mieny* 1962 (2) SA 566 (A) counsel argued that the plaintiff failed to prove that the insured driver was negligent.

[36] I am inclined to agree with the defendant's submission because the plaintiff failed to show and prove how the insured driver who was already stationary, contributed negligently to the cause of the collision.

[37] This court accepts the evidence of Lusenga that he was already stationary when the collision occurred. I already indicated that his evidence is corroborated by the evidence of Ntuli. I have also ruled that the issues which were not averred or canvassed in the plaintiff's particulars of claim will not be considered for the purposes determining this matter. The submission by the plaintiff's counsel that the insured driver applied sudden emergency brakes is therefore rejected.

[38] This court will reiterate on what the court said in *Ninteretse v Road Accident Fund* (supra) at para 24 that:

"The general approach to adopt when dealing with rear-end-collision is set out by HB Kloppers in *The Law of Collision in South Africa* (7th ED) page 78 as follows:

"A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent."

[39] In my view, no contributory negligence can be attributed to the defendant and I find that the plaintiff was the sole cause of the collision which occurred on 12th of March 2013.

In the circumstance, I make the following order:

1. The plaintiff is found to be the sole cause of the accident
2. No order as to costs is made.

P. D PHAHLANE

Acting Judge of the Gauteng Division, Pretoria

Heard on

: 26 July 2019

For the Plaintiff

: Adv M.S Manganye

Instructed by

: MMELA MTSWENI ATTORNEYS

For the Defendant

: Adv E. Moukangwe

Instructed by

: TSEBANE MOLABA INC.

Date of Judgment

: 19 August 2019

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Prepared on 10 October 2026 · Esheria