

SOUTH AFRICA / JUDGMENT

Alberts v Road Accident Fund (13304/19) [2023] ZAWCHC 177 (17 February 2023)

[2023] ZAWCHC 177

COURT

Western Cape High Court, Cape Town

BEFORE

Fortuin

CASE / FILE NUMBER

13304/19

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OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 13304/19

CHRISTIAAN JOHANN ALBERTS Plaintiff v ROAD ACCIDENT FUND Defendant

JUDGMENT DELIVERED ON THIS 17th DAY OF FEBRUARY 2023

FORTUIN, J:

A.

INTRODUCTION

- [1] This is an action instituted by the 28-year old plaintiff, Mr. Christiaan Alberts, against the defendant, the Road Accident Fund, in terms of section 17 of the Road Accident Fund Act, No 56 of 1996 (“the RAF Act”), for injuries sustained in a motorcycle accident.
- [2] On 17 June 2018, at or near Bergplaas Road, Franschhoek, (“the Franschhoek Pass”) a black Honda motorcycle driven at the time by the plaintiff was involved in an accident, trying to avoid a collision with an unidentified motor vehicle driven by an unidentified driver. The particulars of the motor vehicle, and owner of the vehicle are also unknown to the plaintiff.

[3] This accident rendered the plaintiff permanently disabled. The claim is brought against the RAF based on the negligence of the unidentified driver. The following heads of damages are claimed:

- a. General damages;
- b. past hospital and medical expenses;
- c. past and future loss of earnings; and
- d. future hospital and medical expenses.

B. CASE FOR THE PLAINTIFF

a. The plaintiff

[4] The plaintiff's evidence can be summarized as follows: he testified that he was driving his motorcycle at a speed of between 50 and 60 km/h. A friend of his, Mr. Quentin Bosman, followed him on his own motorcycle for a morning ride. The accident occurred approximately 10 km into the said pass.

[5] He further testified that, in this pass, it is impossible to travel at a speed faster than 60 km/h. According to him this is so since, on that road, the straights are short and the bends are sharp. Approximately 80m to 100m before one approaches the 90° turn where the accident occurred, there is a similar 90° bend.

[6] He was riding in front at approximately 40 to 50 km/h and cleared the first turn in third gear. Mr. Bosman was approximately 10m behind him at the time. After clearing the portion of straight road, the turn in which the accident occurred was to his right and at a 90° angle.

[7] According to the witness it is impossible to see around the corner since there is a vertical piece of the mountain in the way. Oncoming traffic is only visible once you are in the corner. As he was preparing to take the turn, he veered off slightly to his left and then leaned into his right in order to take the corner in as straight a line as was possible.

[8] Immediately after performing this manoeuvre, he saw a car right in front of him in his lane of travel. According to him, there was no time to decide what to do, and he acted instinctively by pulling the motorcycle up and veering off to the left to create an opening so as to avoid a collision.

[9] The witness has no recollection as to how he missed the oncoming car. He only recalls running out of tarmac as he tried to avoid the vehicle and that his motorcycle sideswiped from underneath him. He was catapulted forward and skidded into the barriers with his back. This he knew because that was where his jacket was caught. He skidded for plus minus 20 meters before he stopped, as he was wedged under the roadside barrier. It was this action that caused his back to fracture. According to the witness he never lost consciousness but immediately knew that he had no sensation in his legs.

[10] When the witness was cross-examined and asked what he could have done to avoid the accident, his answer was: “ek moes nooit uit die bed opgestaan het daardie oggend nie.” It was his evidence that there was nothing he could do to avoid the accident, save for being involved in a head-on collision with the oncoming vehicle which would probably have cost him his life. He was uncertain whether there were one or two vehicles, because he only had sight of one car which was immediately in front of him and in his lane of travel.

[11] The witness was adamant that the turn to the right is a blind turn and that it is impossible to see around the corner. Moreover, that he did not apply his brakes at any time, as suggested.

[12] It is the plaintiff’s case that he did not contribute in any manner to the accident as there was nothing that he could do to avoid it. Accordingly, a finding of negligence of 100% against the insured driver was prayed for.

b. Mr Bosman

[13] The next witness was Mr. Quentin Bosman who is a motorcycle friend of the plaintiff. He testified that, on the day in question the two of them decided to take a mountain drive over the Franschhoek Pass to Villiersdorp and back.

[14] According to the witness Mr. Alberts entered the corner, turning to the right approximately 10 km into the pass after taking the first 90° turn. At this point Mr. Alberts was in front of him. At the next turn a motor vehicle appeared traveling with its wheels clearly on the incorrect side of the line. It was in Mr. Alberts’ line of travel and it appeared as if this vehicle was overtaking another vehicle. The witness saw Mr. Alberts fall. The two vehicles passed him without stopping. According to the witness he also had to do a slight correction to his left in order to avoid a collision.

[15] It was Bosman’s view that if he was driving in front, the same fate would have befallen him as there was nothing that Mr. Alberts could do to avoid the accident.

c. The plaintiff’s injuries

[16] The plaintiff was treated at four different medical institutions and spent time in hospital from 17 June 2018 until 14 December 2018. His injuries and sequale thereto are permanent. It is common cause that the plaintiff will never be able to walk again. He has a complete sensory loss at T5 distally in the spine, and a fracture dislocation at T6 and T7. His back is fused from T4 to T9. He is a paraplegic.

[17] In the accident he also sustained right and left leg fractures which are known to be extremely painful. His bladder was also perforated, which was only repaired three months after the accident when the condition was diagnosed through a MRI scan. In addition a sepsis ensued, and a complete loss of bladder volume occurred. This also led to severe spasms, the frequency of which are 3 to 4 per hour.

- [18] The intensity of the spasms have subsided after the insertion of a Baclofen pump. The frequency, however, remains the same. Prior to the insertion of the Baclofen pump the plaintiff had to be strapped to his wheelchair in an upright position to avoid him being ejected from his chair when the spasms occurred. It appears as if the Baclofen pump, together with a range of antispasmodic medicines, is helping him with the intensity of the spasms. These medicines, however, have severe side effects of nausea, vomiting, constipation, diarrhoea and headaches.
- [19] The plaintiff's bladder also becomes infected continuously, which results in bloody urine. According to his wife, he has to be taken to the emergency room occasionally to treat this bleeding bladder. He also suffers from pressure sores which requires him to occasionally lie on his stomach for two days to ensure that the sores heal. The plaintiff is completely incontinent and permanently catheterized. He suffers from regular urinary tract infections which occasionally causes a leakage caused by the catheter which leads to episodes of accidents.
- [20] As a result of this, he is unable to attend social gatherings. According to the plaintiff, if it was not for his wife who assisted him completely and on a daily basis, he would not have been able to function at all.

C. DAMAGES

a. Past Hospital and Medical expenses

- [21] It is common cause that an amount of R868 510,88 was claimed, and that a big portion of this amount was paid by the defendant. Moreover, is it common cause that an amount of R315 723,58 is still outstanding.

b. Future Medical Expenses

- [22] This head of damages is not in dispute, and the defendant is therefore to furnish the plaintiff with an undertaking in respect of future medical expenses in terms of section 17 (4) (A) of the RAF Act.

c. Employability

- [23] The following experts agree that the plaintiff is completely unemployable: Dr Faure (Urologist), Dr J de Beer (Industrial Psychologist), Dr Steyn (Orthopaedic Surgeon) and Rita van Biljon (Occupational Therapist). Ms M Joubert (occupational therapist) also agreed that he is currently unemployable. In addition, the plaintiff testified that his attempts to work since the accident, caused him to spend approximately two days in bed to recover every time. Moreover, an attempt by his wife to create a website to sell small metal objects, created made while he was in a seated position in his wheel chair was unsuccessful and was not sustainable.

- [24] The plaintiff, in addition, confirmed his previous evidence regarding the Baclofen pump, and in particular how it affects his employability.
- [25] The evidence by Mrs Maritz, on behalf of the defendant regarding the plaintiff's employability, is completely opposite to that of the other witnesses. In assessing her evidence, it was evident that she did not make a proper assessment of his actual physical position while he was trying to do some welding. I find that her evidence regarding the plaintiff's employability is unreliable and is accordingly rejected.

D. CASE FOR THE DEFENDANT

- [26] The defendant called no witnesses in respect of liability. It is the defendant's case that, because of the injuries sustained by the plaintiff, the fact that he skidded for plus minus 20m over the road surface and was wedged underneath the barricade, it follows that the plaintiff was speeding under the prevailing circumstances. Moreover, that the plaintiff contributed to the accident due to creating a dangerous situation for himself and other road users by not taking a wider berth, slowing down and breaking before manoeuvring through the right hand corner.
- [27] It is further submitted by the defendant that the plaintiff failed to see the possibility that an approaching vehicle may encroach on his lane of travel due to the sharp nature of the bend in the road and the fact that it is a blind corner. As a result of these failures, he contributed to his own accident.
- [28] Accordingly, on their version, the plaintiff failed to prove on a balance of probabilities that the unidentified insured driver was the sole cause of the accident.
- [29] It is the defendant's submission that the plaintiff is not completely unemployable as he does possess over a limited residual earning capacity and ability to perform some form of work.

E. ISSUES IN DISPUTE

- [30] Most of the issues in casu are common cause. The only issue in dispute in respect of the merits is whether Mr Alberts was contributory negligent in that he could have avoided the accident by not speeding. In respect of the quantum, the only aspect in dispute is whether the plaintiff is completely unemployable.

F. RELEVANT LEGAL PRINCIPLES

- [31] The duties and rights of drivers on public roads can be explained as follows:

"Because a driver is under a duty to act reasonably, he is entitled to respect other road users to do the same. This principle translates into certain assumptions a driver of a motor vehicle is justified to make when his duties and driving skills are considered. These justified assumptions are inherent in the process of establishing whether a driver was negligent in not complying with the various duties imposed on a driver. However, the existence of justified assumptions does not relieve a driver from the duty to appreciate that other drivers may act unreasonably and to provide for such a contingency by taking all possible reasonable steps to avoid a collision occasioned by another driver's unreasonable behaviour. A

driver will be negligent if the unreasonable

conduct is generally foreseeable and he does not take reasonable preventative action to avoid a collision.”[1]

[32] In casu the law relating to uncontradicted evidence was raised. In this regards Yekiso, J held as follows:

“It does not however follow that because evidence is uncontradicted therefore it is true. The evidence may be so improbable in the light of all the evidence that it cannot be accepted.”[2]

[33] Whether the plaintiff in casu acted reasonable in the circumstances was also at issue in an SCA decision of 2007.

“When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent.

The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances.”[3]

G. DISCUSSION

[34] The court was presented with the evidence of two witnesses who were present on the day of the incident. The plaintiff testified about the circumstances present on the day, and he was corroborated in all material respects by Mr Bosman. The sum total of their evidence is that the plaintiff could not have been speeding under the prevailing circumstances, those circumstances being the traffic in the pass, the fact that it was windy, and the fact that it is a blind turn and that no driver would be able to see around the corner when approaching.

[35] The defendant, on the other hand, did not present any evidence to gainsay this. I am accordingly satisfied that the plaintiff could not avoid the accident and that it was not his speeding that caused it. He acted reasonably in the prevailing circumstances as he took “reasonable preventative action to avoid the collision”.

[36] In respect of the amount of damages, I am satisfied that the plaintiff is completely unemployable, even taking into account the improvement in his ability to transfer from his wheelchair to his bed and the toilet. I am not convinced that these improvements changed his employability in any significant way. I therefore accept the agreed expert reports that the plaintiff is unemployable.

[37] As stated earlier, I do not accept the report of Mrs Maritz as she places Dr Faure’s comments about the effects of the pump out of context. Moreover, her questioning of the patient was insufficient to reach her conclusion, and I accordingly reject her report.

H.

CONCLUSION

- [38] In the circumstances, I am satisfied that the plaintiff acted reasonably on the day. Moreover, that his evidence as corroborated by that of Mr Bosman, was probable in light of all the evidence. As stated by Wessels, CJ supra, it is the duty of every person to avoid an accident. In my view, the plaintiff did everything reasonably possible to avoid a collision.
- [39] Consequently, I find that the defendant is liable for 100% of the plaintiff's damages and no apportionment is ordered.
- [40] I make the following order:
1. The defendant is ordered to pay to the plaintiff the sum of R315 723.58, (three hundred and fifteen thousand, seven hundred and twenty three rand and fifty eight cents) in respect of the plaintiff's claim for past medical and hospital expenses.
 2. The defendant is ordered to furnish the plaintiff with an undertaking in respect of future medical costs and hospital treatment in terms of section 17(4)(A) of the RAF Act.
 3. The defendant is ordered to pay to the plaintiff the amount of past and future loss of earnings of R8 823 179 (eight million eight hundred and twenty-three thousand one hundred and seventy nine rand).
 4. The defendant is ordered to pay to the plaintiff the amount of general damages in the sum of R2 500 000.00 (two million five hundred thousand rand).
 5. The defendant is ordered to pay to the plaintiff the total amount of R11 638 902.58 (eleven million six hundred and thirty eight thousand nine hundred and two rand and fifty eight cents) (constituting the sum of the amounts payable in prayers 1, 3, and 4 above) plus interest at the prevailing rate of 7.25% p/a calculated from 14 days after judgement until date of payments.
 6. The total capital referred to in 5 hereinabove shall be paid to the plaintiff's attorneys of record by means of an electronic transfer of funds, which amount is to be paid within 180 (one hundred and eighty) calendar days from the date of the order into the following account:

NAME OF BANK: ABSA NAME OF BRANCH: GERMISTON NAME OF ACCOUNT: LEON JJ VAN RENSBURG TRUST ACC ACCOUNT NO: 2[...] BRANCH CODE: 334 542.
 7. The defendant is ordered to pay the plaintiff's cost of suit on the scale as between party and party, which costs will include the first and second day of trial, 23 and 24 August 2022 respectively, as well as a third day for argument, 5 September 2022, including costs of counsel and consultation with expert witnesses.

8. The payment of the legal costs referred to in 7 hereinabove shall be payable 180 (one hundred and eighty) calendar days following settlement or the taxing master's allocator in the event of taxing the bill of costs, whichever is applicable.
9. The defendant shall be liable for interest on the legal costs referred to in 8 above at the prescribed rate of interest from 14 (fourteen) court days following settlement of the costs or the taxing master's allocator, in the event of taxing the bill of costs, whichever is applicable.
10. The plaintiff shall not proceed with a warrant of execution in respect of the capital and costs prior to the expiry of the said 180 (one hundred and eighty) calendar days.
11. Such costs to include the reasonable traveling, flights and accommodation costs of the plaintiff's attorney and counsel.
12. The reasonable preparation/qualifying fees for both trial and the expert's reports and appearance in court, where applicable, of the following experts, Dr FJD Steyn (orthopaedic surgeon), Dr Jean J Faure (urologist), Rita van Biljon (occupational therapist), Dr J de Beer (industrial psychologist) and Gerard Jacobson Actuaries.
13. The defendant shall also pay the reasonable costs in relation to the correspondent attorney's costs on the proviso that no duplication costs shall be allowed.
14. Costs shall further include the reasonable costs of the traveling time spent, the inspections in loco at the Franschhoek Pass attended by the plaintiff's attorney, counsel, one witness and the plaintiff, at the current tariff recommended by the AA.

FORTUIN, J

Date of hearing: 22 – 23 August 2022; 5 September 2022

Date of

judgment:

17 February 2023

Counsel for plaintiff: Adv W Louw Instructed by: Leon JJ van Rensburg Attorneys (Johannesburg)

Counsel for respondent: Mr F Goosen Instructed by: State Attorney, Cape Town

[1] The Law of Collisions in South Africa (7ed) at 72.

[2] Denissove NO v Heyns Helicopters (Pty) Limited [2003] 4 All SA 74 (C) [also reported at [2003] JOL 11469 (C) – Ed].

[3] Road Accident Fund v Grobler 2007

(6) SA 230 (SCA).

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