

SOUTH AFRICA / JUDGMENT

Avenant v Els (235/2011) [2012] ZAECPEHC 62 (6 September 2012)

[2012] ZAECPEHC 62

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J.D. Pickering

CASE / FILE NUMBER

235/2011

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IN THE

HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE, PORT ELIZABETH)

Case no:

235/2011

Date

heard: 30 August 2012

Date

delivered: 6 September 2012

In the

matter between

A.P.

AVENANT

.....Plaintiff

vs

SHEILA

ELS

.....Defendant

JUDGMENT**PICKERING J:**

This is an action for damages arising out of a collision which occurred on 12 May 2010 on the Main Road, Despatch, between plaintiff's Chevrolet Lumina SS Ute ("the Lumina") bearing the ironically apt nickname of "Moeilikheid" emblazoned on its rear and which at the time was being driven by plaintiff's wife, Mrs. Avenant, and a Volkswagen Polo which at the time was being driven by the defendant. Alleging that the collision was due solely to the negligence of the defendant the plaintiff claimed damages in the sum of R305 000,00 being the pre-accident market value of the Lumina which was damaged beyond repair in consequence of the collision.

At the commencement of the trial the parties were agreed that the quantum of plaintiff's claim was indeed R305 000,00, the only issue therefore being that of the respective degrees of negligence, if any, of Mrs. Avenant and the defendant. The parties

were further agreed, in the light of the fact of the Lumina having been driven by Mrs. Avenant, that in order to succeed in his claim plaintiff needed to establish no more than that defendant was to some extent contributorily negligent in relation to the collision.

Main Road, Despatch, runs approximately from west to east. It is divided into four lanes, two for traffic proceeding in an easterly

direction and two for traffic proceeding in a westerly direction. The east bound and west bound lanes are divided from each other by a solid white centre line. To the west of the point where the collision occurred there is a dip in the main road which thereby creates a blind rise for traffic proceeding from west to east. The crest of this blind rise is approximately 215 metres from the place where the collision occurred. A motorist east of the dip at the place where the collision occurred would therefore not be able to observe any motor vehicle approaching from behind until such time as that motor vehicle had crested the rise 215 metres away. From the crest of the rise the road is flat up until the point of the collision. It is common cause that the speed limit applicable to Main Road is 60 kilometres per hour.

Mrs. Avenant testified that the collision occurred at approximately 13h45. The day was clear and sunny and the road was dry. Visibility

was excellent. The Lumina was in good condition with its ABS brakes in perfect working order. It was a very powerful motor vehicle but she knew how it handled and knew that it was capable of stopping fast if required. She stated that she was travelling at the time at approximately 65 km per hour or slightly less. She knew this because, just before reaching the dip in the road, she had glanced at her speedometer. She had done so because she was concerned about the fact that accidents were known to occur on that stretch of road and also about the possible presence of traffic police. She stated that although she did at times travel in the Lumina at 160km per hour on the open road she tried not to exceed the speed limit in built up areas.

She stated further that when she came over the crest of the blind rise she saw defendant's Polo motor vehicle on the left hand side of the road at a distance which she estimated as being approximately 100 metres from her own motor vehicle. She conceded,

however, that that distance was in fact 200 metres. She stated that the Polo came out of the parking area on the left side of the road and entered the first lane of the east bound carriageway. She watched it as it drove ahead of her in that lane. When she was approximately 75 metres away from it, it looked, in her words, as though it was in the process of turning into the second lane in which she herself was travelling. As she put it, she saw the Polo looking to turn into her lane and thought it wanted to turn. At that point its indicators were not on nor was any other signal given to the effect that it intended to cross into her line of travel. She then said that she was in fact approximately 60 metres and not 75 metres from the Polo when this occurred. According to her she decided to overtake the Polo and she then drove the Lumina across the white centre line into the first west bound lane. As she did so, she, in her words, put her foot down, and increased speed in order to overtake the Polo. She stated that she could not overtake the Polo on the left because the Polo was at that stage straddling the two east bound lanes. At the time that she swerved into the first west bound lane it was empty. The Polo, however, kept turning and she was forced to move into the second west bound lane. Despite this, however, she was unable to avoid the collision which occurred in the second west bound lane. She stated that in effect the Polo drove into the Lumina and hit it just behind the left hand door. She lost control of the Lumina which veered towards the right hand parking area where its right front wheel struck the kerb. It then veered back across the road to the left hand side parking area where it collided with another vehicle and then hit a wall.

A police plan (Exhibit D) which indicated the point of impact as being close to the centre line on the defendant's correct side of the road was put to her under cross-examination by Mr. Cowley who appeared for the defendant. She stated that she had never told the police where the point of impact was but, with regard to the point of impact indicated on Exhibit D, she stated "dit kan wees of dit kan nie wees nie." Questioned further as to how that point could be the point of impact in the light of her previous evidence that the point of impact was in the fourth lane she stated that she was confused and that it was difficult for her to understand the plan.

She reiterated that she was travelling at no more than 65 km per hour and denied that she had been travelling at an excessive speed. She was questioned under cross examination as to why, if she was indeed travelling at a speed of only 65km per hour, she had not braked in order to avoid the collision. Her answer was "ek kon seker maar het nie." It was put to her that at a speed of 65 km per hour she could have brought her motor vehicle to a stop within 28 metres. She could not deny this. It was further put to her that even taking into account a reaction time of one second she could still have stopped her motor vehicle within 45 metres. Whilst she conceded that this was so she averred that she would in any event have

collided with the Polo, albeit that, on her version, the Polo was at least 60 if not 75 metres ahead of her. It was again put to her that the collision occurred because she was travelling too fast to which she replied that she "did not know". She stated that it had appeared logical to her in the

circumstances, given that she was driving a powerful motor vehicle, to overtake the Polo. She then stated that she had not thought at all of stopping. She conceded that she had had ample opportunity over the distance of 200 metres to observe the Polo and to regulate her driving accordingly but she again reiterated that she had not thought of braking and that she had felt that her best option was to overtake the Polo. It was put to her by Mr. Cowley that she could have avoided the collision simply by applying the brakes of the motor vehicle to which she stated “dan is dit seker so.” She then stated that she did not have a lot of time to think; she wasn’t aware of how much distance was required for her to stop the Lumina; and she was not certain that if she had applied her brakes she would have avoided the collision. That then was the evidence for plaintiff.

The defendant, Mrs. Els, testified that she is a 69 year old widow. On the day in question she was the driver of the Polo. She had visited a friend in Despatch and wanted to return to Uitenhage where she was staying. From her friend’s house she had entered Main Road in an east bound direction which was the opposite direction to that in which she wished to travel. Because of the solid centre line in Main Road she was somewhat confused as to how she could get into the west bound lanes of Main Road. She accordingly pulled into a parking area to the left of the road. She sat there and observed what other motorists were doing. She noticed that some motorists performed u-turns across the solid centre line or crossed the line in order to enter their driveways on either side of the road. She then decided to perform a u-turn herself so as to enter the west bound lanes of the road. She put on the indicator of the Polo to indicate her intention to turn to the right. When she saw that the road was clear of traffic both in front of and behind her vehicle she entered the road and crossed slowly from the first lane into the second lane. In the second lane she looked in her rear view mirror and checked to see if the road was still clear which it was. She was in the process of commencing a slow turn to the right and was slightly over the centre line or slightly on her correct side thereof when she suddenly felt what she described as being a bump. After that she recalled nothing until she found herself gripping the steering wheel of her vehicle which was facing at right angles across the road. She stated that prior to the collision she had not seen the Lumina at all.

Mr. Van Wyk, a resident of Despatch, testified that on the day in question he was proceeding in his bakkie from the hardware shop in an easterly direction along Main Road. He was travelling in the left hand lane at a speed of between 60 – 65 km per hour. At some point, before he reached the dip in the road, he was overtaken by the Lumina which was travelling at a very high speed, so much so that he thought to himself that the driver must be crazy. He estimated the speed of the Lumina as being at least 120 km per hour. It disappeared from his sight. He continued on for a distance of approximately 800 metres where he came upon the scene of the accident. He did not know either driver.

Mr. Pretorius, a director of a company known as Crash, Data, Forensics (Pty) Ltd, and who is a specialist in traffic accident reconstruction, testified that the damage occasioned to defendant’s Polo motor vehicle, as depicted on the various photographs handed into Court, indicated that the Polo was not struck while it was perpendicular to the Lumina but was rather facing the same

general direction as the Lumina, this being consistent with the evidence of the defendant to the effect that she had just commenced turning right when the collision occurred. After the collision the Lumina travelled 69 metres to its final resting place. According to Mr. Pretorius' calculations, which were not challenged under cross examination, the Lumina was travelling at a speed of at least 102km per hour at the time of impact. He stated further that his calculations were based on the assumption that the point of impact occurred at or near the centre line. Even if the point of impact were to be moved to the position indicated by Mrs. Avenant there would be a negligible difference.

He stated that had Mrs. Avenant been travelling at a speed of 65 km per hour she would have required 28 metres to bring her vehicle to a stop. At 102km per hour she would have required 65 metres to stop. If a reaction time of one second were to be factored in then, at a speed of 65km per hour, a distance of 45 metres would have been needed to stop and, at a speed of 102km per hour, a distance of 94,7 metres. In these circumstances, had Mrs. Avenant decided to brake whilst travelling at a speed of 65km per hour, there would have clearly been sufficient time and distance for her to bring her vehicle safely to a stop.

Mrs. Avenant was, in my view, an extremely poor witness. Apart from being deliberately dishonest in one respect, an aspect to which I will return hereunder, her evidence was on material aspects evasive, contradictory and improbable. Mrs. Els, on the other hand, made a very favourable impression upon me as an entirely honest witness. I am satisfied that her evidence to the effect that she had indicated her intention to turn to the right on entering Main Road can be accepted. Apart from being a patently honest witness she was also, as appears from her evidence, a careful driver, so much so that she was concerned as to whether she could cross the solid centre line and only decided to do so after observing other motorists executing u-turns or crossing the line in order to enter their drive ways on the opposite side of the road. Her evidence in this regard was not challenged at all. It is quite improbable that so cautious a driver would not have put on her motor vehicle's indicator and I reject the evidence of Mrs. Avenant to the contrary.

Mr. Van Wyk was also an excellent witness who was entirely independent. Indeed, Mr. Moorhouse, who appeared for plaintiff, did

not seek to impugn his credibility in any way nor was there any basis upon which he could have done so. It is clear that he had no motive whatsoever to fabricate evidence concerning the incident.

The evidence of Mr. Pretorius was not seriously challenged under cross-examination and can safely be accepted. His evidence establishes that at the time of the collision plaintiff's motor vehicle was travelling at at least 102km per hour. Mr. Moorhouse submitted that this evidence was, however, entirely consistent with the evidence of Mrs. Avenant to the effect that she had accelerated in an attempt to overtake the Polo. Whilst that may be so it is equally consistent with the evidence of Mr. Van Wyk as to the excessive speed at which plaintiff's motor vehicle was travelling when it overtook him and disappeared from sight a mere 800 metres from the point of the collision. His evidence, which I accept, gives the lie to the evidence of Mrs. Avenant that she

was travelling

at no more than 65 km per hour prior to the collision and that she had accelerated in order to overtake the Polo when confronted with what was in effect a sudden emergency.

Apart from her evidence as to her speed being contradicted by the evidence of Mr. Van Wyk that evidence is, in my view, utterly

improbable. She was quite unable to furnish a rational explanation as to why, if she was only travelling at 65km per hour, she had been unable to avoid the collision by braking. At that speed she would have had ample opportunity to observe the Polo and to bring the Lumina safely to a stop. If she was indeed travelling at a speed of 65km per hour then her actions were inexplicable. She was eventually forced to concede that she had not even thought of braking. Her evidence as to the position of the point of impact is also quite improbable. The evidence of Mr. Pretorius established that at the time of the collision the Polo was facing the same general direction as the Lumina thus indicating that the Polo had just commenced its turn to the right as testified to by Mrs. Els. It is utterly improbable that Mrs. Els would have driven into the first of the west bound lanes whilst still proceeding in an easterly direction and would have only commenced her u-turn on reaching the second west bound lane.

Once the finding is made, as it has to be, that Mrs. Avenant was lying on the material issue of the speed of her motor vehicle then the entire edifice of her version comes tumbling down. Her version as to how the collision occurred can, in the circumstances, not be true. The probabilities, in my view, are overwhelmingly to the effect that because of the excessively high speed at which she was travelling in contravention of the speed limit of 60km per hour she was unable to stop the Lumina on being confronted by the Polo in her lane, close to or slightly over the middle line, and was accordingly obliged to take the only evasive action which she could, namely, to cross the middle line in an attempt to overtake the Polo on its right. In driving in this manner she was, in my view, grossly negligent if not reckless.

The only question which then remains is whether or not defendant was to any degree contributorily negligent. In my view she clearly was not. It is so, as was submitted by Mr. Moorhouse, that a motorist intending to execute an inherently dangerous manoeuvre such as a u-turn is obliged to keep a proper lookout for traffic proceeding in both directions and to execute the turn only at an opportune time. Mr. Moorhouse submitted that Mrs. Els had failed in this regard and that she had furnished no acceptable explanation as to why she had not seen the approach of the Lumina. I disagree.

It must be borne in mind that the collision did not occur on an open road or highway on which it could be expected that motor vehicles

would be travelling at high speeds. The collision occurred on a suburban road governed by a speed limit of 60km per hour and at a place where any motorist approaching from behind defendant's motor vehicle would have had ample time and opportunity to observe her motor vehicle and to regulate their conduct accordingly.

In my view defendant, who had satisfied herself that the road behind her was clear at the time that she entered the second lane of the east bound carriageway, did not have to anticipate the approach of a motor vehicle from the rear at a speed more than 40km per hour in excess of the speed limit and that that motor vehicle would then overtake her across the solid centre line despite the fact that she was indicating her own intention to turn to the right. In any event, even if she had seen the Lumina immediately prior to the collision it would in the prevailing circumstances have been too late for her to have taken any evasive action.

In my view therefore plaintiff has failed to establish any contributory negligence on the part of the defendant and the plaintiff's claim falls to be dismissed.

Mr. Moorhouse conceded that whatever the outcome of the action the plaintiff was liable for the wasted costs occasioned by the

postponement of the matter on the first day of the trial due to the failure of plaintiff to have arranged for the services of an

interpreter. As to the costs of the second day there is no reason why those costs should not follow the result.

Accordingly the plaintiff's claim is dismissed with costs.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. Moorhouse

Instructed by: Kuban Chetty Attorneys, Mr. Naidoo

Appearing on behalf of Defendant: Adv. Cowley

Instructed by: Heine Ungerer Attorneys, Mr. Ungerer

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