

SOUTH AFRICA / JUDGMENT

Dhliwayo v Road Accident Fund (A598/17)

[2020] ZAGPPHC 544 (7 August 2020)

[2020] ZAGPPHC 544**COURT**

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI, S A M BAQWA, J J STRIJDOM

CASE / FILE NUMBER

A598/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

DATE:

07 AUGUST 2020

CASE

NO: A598/17

In

the matter between: DHLIWAYO
SHADRACK MAZANGWA
Appellant
(Plaintiff a quo)
and
ROAD ACCIDENT
FUND
Respondent
(Defendant a quo)

JUDGMENT

MNGQIBISA - THUSI, J

- [1] This is an appeal against the order and judgment of the court a quo (Makamu AJ) handed down on 06 June 2017, dismissing the appellant's claim for damages for loss suffered due to injuries sustained in a motor vehicle collision on 7 July
2014. A motor vehicle bearing registration number [...] driven by Ms Precious Thabethe ("the insured driver") collided with the appellant as he crossed Van Onselen Road in Meadowlands, between Zones 9 and 10.
- [2] The respondent, the Road Accident Fund ("RAF"), denied that it was liable to compensate the appellant as it alleged that the insured driver was not at all negligent. In the alternative, the RAF pleaded that the appellant's negligence was the sole cause of the collision. It is the RAF's contention that when the collision happened, the appellant was either intoxicated or under the influence of alcohol and had as a result, inter alia, failed to keep a proper lookout, had entered the road on the lane of travel of the insured vehicle when it was inopportune or dangerous to do so, or had failed to avoid the collision by exercising reasonable care.
- [3] The appeal is with the leave of the Supreme Court of Appeal.
- [4] For ease of reference the parties are referred to herein as in the court a quo.
- [5] With regard to the area where the collision happened it was common cause that Van Onselen Road is a dual carriageway travelling from east to west, with two lanes in each direction separated by a double barrier line. Further, it was common cause that there were street lights along the road which were lit at the time of the collision.
- [6] The appellant's evidence was as follows. On the day in question, between 19h00 and 20h00 he was returning from work and alighted from a taxi along Van Onselen Road, Meadowlands. Before crossing the road, he checked the traffic light situated at a nearby intersection and found it green in his favour. As he crossed the road from south to north he was hit by the insured motor vehicle when he reached the barrier line separating the lanes travelling to the east and to the west. The plaintiff further testified that after the insured vehicle hit him, he fell to the ground and immediately stood up and started to run as he was

confused. He testified that although he had looked at the robot where the insured driver alleges she had stopped; he did not see any oncoming traffic hence he started crossing the road as the robot was green in his favour.

- [7] During cross examination the plaintiff admitted that where he was crossing, there was no pedestrian crossing. He denied that at the time of the collision he was under the influence of alcohol as he did not drink.
- [8] The insured driver's evidence is that she had stopped at a traffic light as it had turned red against her. When the traffic light turned green she pulled away travelling at a speed of approximately 30 km per hour. She testified that she heard her husband, who was a passenger in her vehicle, scream her name and she heard a sound like a bang against the left side of her vehicle and she applied her brakes. She saw the plaintiff on her windscreen. The insured driver confirmed that after the plaintiff fell on the ground, he stood up and ran away. The insured driver further testified that before the collision, she did not see the plaintiff as he appeared from nowhere and that the plaintiff appeared to be drunk. Further that she was told by a friend of the plaintiff that before the collision, the plaintiff had run onto the road. According to the insured driver, the plaintiff collided with the left side mirror of her vehicle and landed on the windscreen as she applied her brakes. Further that the road was clear without any obstruction.
- [9] Under cross examination the insured driver conceded that, although in her evidence in chief she had testified that the plaintiff was running when he collided with her vehicle, she did not see the plaintiff before colliding with him. The insured driver further surmised that she did not see the plaintiff as he came from her blind spot. The insured driver further denied that she had told the police officer who took her statement that there was a bar (tavern) near where the collision happened. Furthermore, the insured driver conceded that she did not take any action to avoid the collision.
- [10] There is no agreement as to where the collision happened in relation to a nearby intersection. The plaintiff testified that the point of impact was 3 metres away from the intersection whereas the insured driver estimated the distance at 12 metres. However, there is no dispute that the collision occurred next to the barrier lines separating the lanes travelling in opposite directions.
- [11] In dismissing the plaintiff's claim and after concluding that the insured driver did not contribute to the cause of the collision the court a quo held that:

"[18] Road users must always pay attention to use the road responsibly and when it is safe to do so, whether it is a pedestrian or a driver of vehicle. The Plaintiff did not see the vehicle before it collided with him and there is no explanation why he did not see the Insured vehicle.

It is very clear that he did not pay a proper look out before he could cross the road, as he was surprised by the vehicle when it hits him. This is very clear as he fled immediately after rising from the ground as he knew that he has done something that is not correct.

- [19] It is not true that he fled because he was confused. He also initially resisted to be taken to the clinic for fear of his actions.
- [20] There is nothing that the Insured driver could have done to avoid the accident as she could have managed to stop before the collision had she seen the Plaintiff since the vehicle was not yet fast from the intersection it was only travelling at approximately 30pkh and indeed when she heard the bang and her husband calling her name she managed to stop immediately".
- [12] The appellant is appealing against the judgment and order on the following grounds:
- 12.1 that the trial court erred in rejecting or ignoring the appellant's version on how the collision happened;
- 12.2 that the trial court misdirected itself in not applying the relevant principles of negligence vis a vis motor vehicle collisions;
- 12.3 that the trial court erred or misdirected itself in concluding that the collision was caused by the sole negligence of the appellant;
- 12.4 that the trial court erred in refusing to admit the report of the appellant's ophthalmologist in support of the appellant's allegation that he sustained a head injury; and
- 12.5 that the trial court erred in its application of the principles in Stellenbosch Farmers' Winery Group Ltd & Another v Martell Etcie & Others[1] in its finding on probabilities.
- [13] The issue to be decided is whether the insured driver's negligence was the cause of the collision and whether the plaintiff's negligence also contributed to the cause of the collision.
- [14] The standard for negligence was set out in Kruger v Coetzee[2] where the court held that liability for negligence arises if:
- (a) a 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'
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.
- [15] Counsel for the plaintiff argued that the court a quo misdirected itself in dismissing the plaintiff's claim and that the appeal should be upheld with costs. Counsel for the respondent argued that the court a quo did not misdirect itself in finding that the plaintiff's negligence was the sole cause of the collision. Counsel urged us to dismiss the appeal with costs.

- [16] At the outset I need to highlight that nothing turns on the fact that the appellant ran away from the scene of the collision after he was knocked down or that he was initially not willing to get medical assistance. The appellant has given a plausible explanation that after being knocked down, he was confused, hence he stood up and ran.
- [17] On probabilities it appears that the court a quo misdirected itself in finding in favour of the version of the insured driver with regard to the cause of the collision in light of its finding that the insured driver's evidence was to some extent contradictory. The insured driver's evidence that the plaintiff appeared from nowhere is improbable when one takes into account that her evidence that nothing obstructed her view of the road and that Van Onselen Road is a bus and taxi route and there is evidence that there is a bus stop near the scene of the collision. Further, the insured driver did not provide any evidence to support her assertion that the plaintiff was running and was drunk. She denied that there was a bar in the vicinity of where the collision occurred.
- [18] In general, there is a duty on all road users to keep a proper lookout on the road in order to avoid colliding with other road users. It is expected of a driver to exercise reasonable care and vigilance not only towards a pedestrian(s) he sees or ought reasonably to see on or near the road and that he is obliged to exercise the same reasonable care towards an unseen pedestrian whose presence he should reasonably foresee or anticipate[3]. On the other hand and in relation to a pedestrian, the court in *Swanepoel v Parity Insurance*[4] the court held that, in crossing a busy road, a pedestrian has a duty to make sure that he chooses an opportune moment to do so.
- [19] It is common cause that the plaintiff was crossing the road at a place not designated for pedestrian crossing.
- [20] It cannot be disputed that the plaintiff was negligent when crossing the road in that he failed to keep a proper look-out for vehicles approaching from the direction of the intersection. Had the plaintiff done so, in all probability he would have noticed the approach of the insured vehicle and taken steps to avoid colliding with it. It is inconceivable that the plaintiff could have reached the centre of a four lane road without noticing that a vehicle was approaching. Furthermore, had the plaintiff used the demarcated pedestrian crossing, he would have noticed when the robot gave way to vehicles which had stopped at the intersection. In this regard I am satisfied that the court a quo did not misdirect itself in its finding that the plaintiff was negligent.
- [21] However, there is on the other hand an obligation on a driver to keep a proper look-out not only on the road ahead but also on the sides of the road for obstructions or potential obstructions, particularly as he was driving on a route where there were potential pedestrians. In *Nogude v Union and South-West Africa Ins Co Ltd*[5] the court stated that:

"A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": cf. *Randalia Assurance Corporation of SA Ltd. v Page and Others*, 1975

(1) SA 708 (AD) at pp. 718H - 719B). It means - "more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well".(*Neuhaus, N.O. v Bastion Insurance Co. Ltd.*, 1968

(1) SA 398 (AD) at pp. 405H – 406A).

Driving with "virtually blinkers on" (*Randalia Assurance Corporation of SA Ltd. v Gonya*, 1973

(2) SA 550 (AD) at p. 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case."

[22] According to the evidence of the insured driver, there were no obstructions on the road and she did not see the plaintiff until after she heard the bang on her motor vehicle and saw the plaintiff on her windscreen . Her explanation that the plaintiff came running from the left side of her vehicle does not explain why she did not see him when he was already on the road. Her evidence is not that the plaintiff was running parallel to her vehicle. Under cross examination, the insured driver only surmised that plaintiff could have come from her blind spot. Had the insured driver been vigilant of her surroundings as she proceeded from the street light, she would have seen the plaintiff on the road and taken evasive action to avoid colliding with him.

[23] I am of the view that the insured driver was to some extent negligent in failing to keep a proper look out and that the court a quo misdirected itself in not making a finding that the plaintiff and the insured driver were to some degree negligent in causing the collision and should have apportioned negligence.

[24] Therefore, the issue to be determined is the degree of negligence of the plaintiff and the insured driver on the basis of the extent to which each party deviated from the standard of a reasonable man.

Taking into account that neither the plaintiff nor the insured driver conducted themselves in accordance with the standard of a reasonable man by keeping a proper lookout of other road users, I am of the view that both parties were equally to blame for the collision. the plaintiff contributed more to the negligence causing the collision and that the vigilant of her surroundings as she proceeded from the street light, she would have seen the plaintiff on the road and taken evasive action to avoid colliding with him.

[23] I am of the view that the insured driver was to some extent negligent in failing to keep a proper look out and that the court a quo misdirected itself in not making a finding that the plaintiff and the insured driver were to some degree negligent in causing the collision and should have apportioned negligence.

[24] Therefore, the issue to be determined is the degree of negligence of the plaintiff and the insured driver on the basis of the extent to which each party deviated from the standard of a reasonable man.

Taking into account that neither the plaintiff nor the insured driver conducted themselves in accordance with the standard of a reasonable man by keeping a proper lookout of other road users, I am of the view that both parties were equally to blame for the collision. the plaintiff contributed more to the negligence causing the collision and that the plaintiff should bear 50% of the

loss he sustained as a result of the collision.

[25] In the result the following order is made:

1. The appeal is upheld.
2. The order made on 6 June 2017 is substituted by the following:
 1. The RAF is liable for 50% of the plaintiff's agreed or proven damages.
 2. The RAF is not pay 50% of the costs of the action in line with its liability.

NP MNGQIBISA-THUSI

Judge of the High Court

S A M BAQWA

J J STRIJDOM

Acting Judge of the High Court

Appearances

For Plaintiff: Adv (Instructed by)

Or Defendant: Adv (Instructed by)

[1] 2003 (1) SA 11 (SCA).

[2] 1966 (2) SA 266 (A).

[3] See Olivier v Randalia 1979 (3) SA 20 (A).

[4] 1963 (3)) SA 736 (WLD).

[5] 1975 (3) SA 685 (A) at 688A-C.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2020/544.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dhliwayo-v-road-unknown-topic-agpphc-2020>

Prepared on 12 October 2026 · Esheria