

SOUTH AFRICA / JUDGMENT

Fenn v Mellet (A303/2016) [2016] ZAGPPHC 1172 (11 November 2016) [2016] ZAGPPHC 1172

COURT

North Gauteng High Court, Pretoria

BEFORE

P H Malungana, A C Basson

CASE / FILE NUMBER

A303/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

11/11/16

CASE

NO: A303/2016

In

the matter between:

MICHELLE

FENN

Appellant

And

LEON

MELLET

Respondent

JUDGMENT

MALUNGANA AJ:

[1] The appellant (Ms Michelle Fenn) appeals against the judgment of the Magistrate's

Court, District of Pretoria in which it was held by the trial court that a collision between two motor vehicles on the 28th March 2012 was caused by her negligent driving.

[2] The court a quo upheld the respondent's counterclaim and dismissed the appellant's claim on the issue of negligence.

[3] The following were the common cause facts in this case:

[3.1] The collision occurred on the day in question at the entrance to 68 Air School, Trichardt Road, Lyttelton, Centurion.

[3.2] The collision occurred at approximately 06h00 between a Mercedes Benz driven by the appellant and a Tata 4x4 Bakkie driven by the respondent;

[3.3] The intersection at the Air School has two entrances on opposite sides of Trichardt road and is controlled by a set of robots which is manually operated by a gate attendant;

[3.4] Motor vehicles travelling along Trichardt road should stop at the designated line when encountering a red light.

[4] At the commencement of the trial the parties agreed to the separation of issues and only dealt with the issue of liability. The matter now before us is against the finding by the court a quo in favour of the respondent's counter claim.

[5] The issues in dispute are encompassed in the appellant's head of argument and in particular in dispute is whether the trial court was correct in coming to the conclusion that the appellant was the sole cause of the collision in question.

[6] In this regard the appellant pleaded specifically that the sole cause of the collision was as a result of the negligence of the respondent.

[7] The grounds of negligence on which the appellant relied were the following

' He failed to keep a proper look out;

He drove at an excessive speed under the circumstances; He failed to apply his brakes timeously or at all;

He failed to avoid the collision whilst with the exercise of reasonable care he could have and should have done so, "

He failed to keep his vehicle under proper control."

- [8] The court a quo was required to determine whether the respondent entered the intersection after the traffic light had already turned red.
- [9] The version of the appellant briefly was that she was driving towards her workplace located down Trichardt Street from the direction of N14 towards the Sasol garage. She turned left into the entrance of 68 Air School. Realizing that she forgot her diary, she then made a U-turn inside the gate. The guard pressed the button on the left hand side of the gate whereafter she proceeded to cross the road on the zebra crossing. She testified that she could not see the traffic lights because there were no traffic lights for her. When asked about the colour of the traffic lights, she replied that the traffic lights regulating the traffic up and down the said road were red. She testified that she had used the said road for about thirteen years. Her vehicle was damaged in the front right hand side ("the nose side"). She further testified that on impact she stopped her car in the intersection and that the respondent's bakkie moved swiftly away for about a hundred metres before it came to a standstill against a fence. There was nothing she could do because she was in the middle of the road and it happened very fast. After the collision she got out of the car in a state of trauma and exchanged particulars with the respondent for insurance purposes.
- [10] Under cross-examination the appellant admitted that it was still dark and that visibility was not good at that time of the morning. She confirmed that her lights were on. She could not recall whether there were street lights on the street. The appellant further told the court that when she made a U-turn the guard had already pressed the button for the traffic lights to turn red because she had already told the guard of her intention to turn around.
- [11] During cross-examination she also testified that she knew the time frame of the traffic light. She testified that the guard at the gate signaled to her that she could go. She conceded that she did not look down Trichardt Road to establish if it was indeed safe for her to proceed. She further testified that she did not see the respondent's vehicle because and saw no reason to establish whether it was safe or not when there is a traffic light.
- [12] In cross-examination she conceded that the traffic lights there were intended for pedestrian crossing. The appellant further conceded under cross-examination that she had to make certain decisions based on other information to establish whether it was safe to proceed other than merely looking at the sign that does not relate to her directly.
- [13] The appellant further testified that she knew that the intersection in question was known for accidents which occur on a weekly basis. Given the statistics, she conceded that she should have had a better lookout to see if the traffic lights were safe for her but that she did not do so. She conceded that had she done so, she could have seen the respondent approaching.
- [14] It is worth noting that at the end of the cross-examination the appellant replied "yes" to the following question put to her:

‘.this accident was caused due to the fact that you did not take a proper notice of the oncoming traffic , and that you relied on certain assumptions about the traffic lights , and taking the instructions from the guard , and that this accident would have been avoided if you , even if, and it is obviously not the version of the defendant , even if the defendant would have gone over a red light you know, you would have noticed it, and combined with his avoiding tactics, the accident would have been avoided.

[15] The appellant called as her witness, Ms Motsepe, the security guard who was on duty at the time of the collision. Ms Motsepe testified that it was a Wednesday and that they had inspection on the day. The appellant arrived early to inspect the rooms. The appellant decided that she wanted to park her car by the lecture rooms where she has her office on the other side of Trichardt Road. She therefore needed to cross the road. According to the witness there were no vehicles on Trichardt Road and the traffic light was green. She pressed the button so that the traffic light could turn red in order for the appellant to safely proceed to the other side. She checked and noticed that there was a car approaching from afar. She then pressed the button which immediately turned orange and then red. She testified that the car was coming at a high speed. She testified that the respondent's vehicle tried to move to the right facing oncoming traffic only to find that the appellant's vehicle was going in that direction. Under cross examination she confirmed that when she presses the button it takes about two seconds to change to red and it stays red unless the button is pressed again. She confirmed that the appellant asked her if she could go and that she said "yes warrant". At that moment she was done looking at the robots and she stood at the gate as the appellant's vehicle entered the road. She agreed that the traffic light at Trichardt Road is far back and not actually at the intersection.

[16] I now proceed to deal with the respondent's version (Mr. Leon Mellet). He testified that he was on his way to the gym. He saw the appellant's vehicle and that it went out of his view when it turned into the base. He is familiar with the intersection in question as he was based there before. As he travelled down Trichardt Road and upon approaching the line, the traffic light turned amber. He assessed that even if he were to apply his brakes he could not do so before he reaches the line where the traffic light was. As he entered the intersection he saw the appellant's vehicle from the left. He tried to avoid the accident by driving onto the right hand side but the appellant struck his vehicle on the passenger door causing his vehicle to spin. He testified that he was driving at a speed of 60 km/h. He concluded by stating that there was nothing he could have done to avoid the collision.

[17] I must pause to point out that the court a quo had an advantage of an inspection in loco. In this respect the parties were in agreement that the intersection in question was a unique one. The court a quo was therefore placed in a better position to evaluate the evidence of the parties having been exposed to the actual scene of the collision. It was established during the inspection in loco that the traffic light on Louis Trichardt Road turns amber when one presses the button and that it will remain so for about two seconds before turning red allowing the pedestrians crossing the road or the vehicles exiting the premises of the 68 Air

School to do so safely.

[18] In the present case I am satisfied that the collision occurred in the manner as testified by the respondent. He gave his evidence in a clear and satisfactory manner and did not try to exaggerate. He was prepared to make concessions where necessary. He gave probable reasons why he could not have avoided the accident. Accordingly I am satisfied that he acted reasonable in the circumstances. I am further of the view that the respondent was a truthful witness and that the court a quo had no reason to reject his version regarding the occurrence of the collision.

[19] I am further in agreement with the court a quo with regards to the adverse inferences it drew in respect of the appellant's evidence. It was not in dispute that the appellant failed to observe the road to establish whether it was safe for her to enter the intersection. She therefore did not keep a proper look out before she entered the intersection of the road. She also conceded that had she taken a proper look out, the accident would not have occurred. She relied on the guard at the gate to make a decision as to whether it was safe for her to cross the road. In this regard I am of the view that in relying on the guard at the gate without ascertaining whether it was indeed safe for her to cross the road, she acted negligently. Taking into account that she told the court a quo that she had used the road for almost 13 years and the fact that the said intersection was notorious for accidents happening on a

weekly basis, one would have expected her to foresee that her conduct could lead to potential danger as it indeed did in this case. It was also her evidence that there was no reason for her to establish whether it was safe for her to proceed as there were traffic lights at that intersection.

[20] In *Robinson v Henderson* [1] it was held that the party entering a main thoroughfare from a side street should exercise great care. See also in this regard *R v Hauptit*[2] where Lourens, J stated:

"Having regard to the obligation which rests on any person entering a busy road from a side, I agree with the magistrate that anyone who comes into main road from a side road should exercise utmost care, but at the same time the users of the main roads are also under an obligation to exercise care when they pass side roads. People are as much entitled to use the side roads as main roads, and when person drives in main road past a side road at an excessive speed, he certainly run a risk and even if a person comes carefully into the main road, he may have a collision'.

[21] Turning to the facts of this case one has to have regard to the fact that one is dealing with a unique intersection as discussed in the preceding paragraphs. The traffic light is manually controlled by the guard who has to press the button and give signal to the motorist intending to exit the Air School. A great amount of care is expected of the persons operating this kind of entry and exit point. A distinction should therefore be drawn between an ordinary intersection and the intersection in question. It was equally expected of the appellant to have made certain that it was safe for her to enter the intersection and in not doing so she acted negligently.

- [22] I am of the view that the appellant failed to act as a reasonable person should have. A reasonable person, if placed in the shoes of the appellant, should have had regard to other road users and kept a proper lookout especially as she knew that the intersection was a high accident zone. A reasonable person would not have entered a traffic light controlled intersection had it been unsafe to do so. Had a reasonable person become aware of an immediate danger he or she would have taken the necessary steps to avoid it.
- [23] The test for negligence is well established. See in this regard *Kruger v Coetzee*[3] and further in *Minister of Safety and Security v Carmichelle*:[4]
- ' For the purposes of liability culpa arises if-
- A diligens paterfamilias in the position of the defendant -
- ..would foresee the reasonable possibility of his conduct injuring another and causing harmloss; and
- ...would take reasonable steps to guard against such occurrence; and
- ...the defendant failed to take such steps'.
- [24] The respondent testified that upon reaching the line the robot turned amber and that he could not apply his brakes to avoid the accident. The appellant on the other hand on her own accord failed to keep a proper lookout which inevitably resulted in the collision. Had the appellant acted as a reasonable person should have, she could have avoided the collision.
- [25] On the other hand I am of the opinion that the respondent acted as a reasonable person would have acted in the circumstances. Upon noticing the appellant in the intersection he swerved to the extreme right to avoid the collision. The appellant did absolutely nothing to avoid the collision.
- [26] Taking into consideration all relevant factors and in particular the concessions made by the appellant relating to her acts of negligence in the occurrence of the collision in question, I am of the view that the balance of probabilities are overwhelmingly in favour of the respondent. No negligence can be attributed to the respondent under the circumstances and the court a quo cannot be faulted in accepting the version of the respondent regarding the occurrence of the collision.
- [27] The appellant has therefore not made out a case for the relief sought, and I accordingly find, based on the evidence before this court that she was solely to blame for the occurrence of the collision in question.
- [28] In the result the following order is made:
- [28.1] The appeal is dismissed with costs.

P H MALUNGANA

ACTING JUDGE OF THE HIGH
COURT, PRETORIA

I agree.

A C BASSON

JUDGE OF THE HIGH COURT
PRETORIA

Appearances

For the Appellant: Adv. H J Snyman

Instructed by:

For the Respondent: Adv. H J C DuPlessis

Date heard:

1 November 2016

Date delivered:

[1] 1928 A. D at 141.

[2] 1931 C.P.D 267.

[3] 1966 (2) SA 428 (A).

[4] 2004 (3) SA para [45].

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