

SOUTH AFRICA / JUDGMENT

## Fibreworx CC v Wilkinson (A3120/2016) [2017] ZAGPJHC 367 (7 December 2017)

[2017] ZAGPJHC 367

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, S Yacoob

CASE / FILE NUMBER

A3120/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A3120/2016

Not reportable

Not of interest to other judges

Revised.

7 December 2017

In the matter between

FIBREWORX CC APPELLANT

and

LESINDA WILKINSON RESPONDENT

Negligence

- Motor vehicle collision - Claim in convention and claim in reconvention - Mutually opposing versions in regard to collision - both drivers testified that the other driver encroached onto their lane - exact location of the point of impact the pivotal and

determinative issue - Held: in the absence of probabilities favouring any particular version both parties failed to discharge the

respective onus resting on them - correct order in these circumstances granting of absolution from the instance on both the claim in convention and the claim in reconvention - Appeal upheld with no order as to costs.

## JUDGMENT

THE COURT (VAN OOSTEN J ET YACOOB AJ):

### Introduction

1. This is an appeal against a judgment of the Magistrate's Court for the District of Johannesburg Central, granted on 5 August 2015.
2. The court a quo was called upon to determine the issue of negligence arising from a motor vehicle collision which it was common cause, occurred on Columbine Avenue, Winchester Hills, Johannesburg. In a nutshell, each party contended that the other's negligence was the sole cause of the collision, in that the other party had encroached upon its side of the road. The appellant instituted an action against the respondent and the respondent, in turn, counterclaimed against the appellant. The merits were separated from the quantum, and the court was called upon to determine only the factual issue of negligence.
3. The court a quo, having found that the driver of the motor vehicle owned by the appellant, Mr De Freitas, was the sole cause of the collision, and that the appellant was '100 percent liable for the collision', dismissed the appellant's claim and postponed the issue of quantum sine die.
4. The appeal is directed against both the dismissal of the appellant's claim and the finding in respect of negligence.
5. At the hearing before this court, the appellant sought an amendment to its particulars of claim to include a specific allegation that the respondent had encroached upon De Freitas' path of travel. In light of the view we take of the matter, the amendment does not make any material difference. Nevertheless, it was granted.
6. As a result of the splitting of the merits and the quantum in respect of the claims in convention and reconvention, the trial court was called upon to decide the question of negligence. However, it must be emphasised that negligence cannot be decided in a vacuum. As far as the claim in convention is concerned, the question for determination was whether the appellant had proved the defendant's negligence on a balance of probabilities. As for the claim in reconvention, the question was whether the respondent had proved the plaintiff's negligence on a balance of probabilities.

7. The issue which seems to have been overlooked by the court a quo, therefore, is not one of negligence in absolute terms but in respect of each claim, a determination whether that claimant had discharged the onus which it bore. Put differently, if the appellant had not discharged its onus, this did not automatically mean that the respondent had discharged her onus.
8. Even if the court was to determine negligence without consideration of the onus, a finding that the respondent was not negligent does not automatically result in a finding that the appellant was negligent and vice versa.

## Facts

9. The parties were driving along Columbine Avenue, Winchester Hills, Johannesburg, on 29 November
2013. It was a Friday night, at approximately 22h10. The plaintiff's vehicle, a 2008 Land Rover Discovery 3. The driver, as we have mentioned, was De Freitas. He was on his way home having visited friends, and he testified that his wife was with him. Mrs De Freitas also testified, although her presence on the scene was hotly disputed.
10. Ms Wilkinson, the respondent, drove her vehicle, a Volkswagen Golf. She had been working, and was on her way from her employer's house to her home. Ms Wilkinson testified that she was being followed by a security guard, one Sam Mbete, who was driving behind her in a Land Rover to ensure her safety, but this was disputed.
11. The plaintiff's vehicle was travelling west. The road for De Freitas was downhill and slightly curving to the right. The road for the defendant, who was travelling in the opposite direction, was uphill, and curved to the left.
12. The road consisted of two lanes in each direction, divided by a solid barrier line in the middle. The speed limit was 60km/h. Each vehicle was in its respective fast (right) lane, and both drivers testified that there was someone in the slow lane so that they could not have moved to the left to avoid the collision.
13. Both drivers testified that the other driver encroached onto their lane, and, in the end, the exact location of the point of impact became the pivotal and determinative issue.
14. De Freitas testified that he saw the respondent's vehicle approaching, and that she was not 'taking the corner', presumably meaning that she was not navigating the bend within the barrier line. He could not move to the left lane because there was another vehicle in that lane, and the defendant's vehicle struck the right rear wheel of his vehicle. His vehicle then went into a spin and came to a standstill some 10 to 12 metres away. He testified that the point of impact was on his side of the road which he added was confirmed in that there was some damage to the tar road surface on his side of the barrier line. His evidence on this score was not corroborated either by the photographs that were presented to the court or by any other witness. Nor, so it

must be inferred, did De Freitas take any steps to have photographs taken of the damage on the road surface, upon re-visiting the scene. He further testified that about 80% of the debris was on his side of the road while about 10% was on the defendant's side. Again, no corroboration exists for his evidence on this aspect.

15. The plaintiff produced photographic evidence, which showed that the plaintiff's vehicle came to a stop somewhat more than 12 metres away from the alleged point of collision.
16. Ms Van Niekerk was called to testify for the appellant. She was in another vehicle, behind the De Freitas, travelling in the same direction. Her fiancé was travelling in convoy with her. She testified that the respondent's vehicle went over the barrier line and hit the plaintiff's vehicle, which caused the collision. She could not say which part of the respondent's vehicle collided with the appellant's vehicle.
17. Ms De Freitas testified that she was with her husband in the vehicle when the collision occurred. However, she did not see the collision. She testified nevertheless that the defendant's vehicle had come onto the plaintiff's side of the road resulting in the collision occurring.
18. The respondent testified herself and also called police constable Mabanga, who had been on the scene, to testify. Mabanga testified that he had marked the point of impact on the police plan which was before the court a quo, on the respondent's side of the road where he observed glass particles coming from the front light of the defendant's vehicle. He further stated that both drivers had in any event pointed out that point of impact: this, significantly, was not challenged in cross-examination. He testified that De Freitas had had no passengers in his vehicle which was confirmed by the information furnished to him by De Freitas and recorded as such in the narrative of the police plan. Mabanga also testified that there was debris everywhere near the point of impact, and not just on one side of the road.
19. Ms Wilkinson testified that as she approached the bend in the road, she noticed the plaintiff's vehicle and thought it was coming 'to her'. There were cars on her left so she could not swerve, but she applied brakes. Despite this, she could not avoid the collision. The collision occurred in her lane and if the plaintiff's vehicle had stayed in its lane, she said, the collision would not have occurred. She could not open the driver's door and had to be assisted by Sam Mbete to get out of the vehicle. Mbete, moreover, assisted in pushing her vehicle from the point of impact area to the side of the road, in the position as is depicted on the photographs. Sam Mbete, although he was present and referred to at one of the hearings, for some

undisclosed reason, was not called to testify. We will revert to the question, whether the respondent's failure to do so justifies a negative inference against her, later in the judgment.

The judgment of the court a quo

20. The court below correctly noted that it was faced with two irreconcilable versions as to the occurrence of the collision, and that it was accordingly required to examine and determine the credibility of the witnesses, their reliability and the probabilities.[1]
21. The court a quo further accepted the well-entrenched premise that, in determining negligence from two mutually destructive versions, a plaintiff can only succeed if the plaintiff satisfies the court that its version is reasonably possibly true on a balance of probabilities, or, if the probabilities are evenly balanced, that the defendant's version is false.[2]
22. In finding against the plaintiff, the court relied in part on the fact that plaintiff's particulars of claim did not mention any encroachment on De Freitas's path of travel by the defendant. This is the reason why the appellant sought to amend its pleadings. I do not think the omission is of any moment: the pleadings are for the court and not vice versa. The court was required to consider the evidence as a whole and then decide whether either party had discharged the onus resting upon it.
23. The court also found that De Freitas's evidence was not reliable because of his inability to explain the difference between his own description of where his vehicle had come to a stop, and that which was shown in the photographs the appellant has produced.
24. The court further relied on De Freitas's concession in cross-examination that a motorist going downhill on a curve is more likely to 'cut the corner'. It further found that De Freitas's evidence that his vehicle spun out of control is consistent with a vehicle that was travelling at high speed, and his being the larger of the two resulted in the likelihood that it initiated the impact.
25. The court found that both De Freitas and the other witnesses, who had testified for the appellant, were unclear and in certain respects unhelpful, and therefore unreliable. The aspects pointed out by the court a quo indeed raise matters for concern. We do however, not agree that the evidence of De Freitas and the appellant's witnesses was such that it warranted outright rejection. Due allowance must be made for the mere few seconds the witnesses were able to witness an unexpected collision at night where the difference in the location of the point of impact could not have been more than a few metres. The application of 'nice intellectual callipers' in evaluating evidence, with ease of hindsight, has often been cautioned against.
26. The court found that the respondent gave her evidence clearly and concisely and was clearly impressed by her as a witness. The court preferred her version, in part because it was 'more detailed' than that of De Freitas and the probabilities favoured her version to the exclusion of the appellant's.
27. A number of probabilities were found to be in favour of the respondent's version. An examination of one of these will suffice. The court a quo reasoned that 'the only explanation' for the respondent's vehicle not sustaining damages to its front 'can be explained by the probability that De Freitas was encroaching on her path of travel prior to the impact,

realised this at a late stage and attempted to swerve away from the defendant's vehicle but it was too late and thus the right rear of the plaintiff's vehicle right collided with the right front of the defendant's vehicle'. In the absence of expert evidence the findings of the court a quo on this point cannot transcend speculation.

## Discussion

28. We have already dealt in part with the reasoning of the court a quo. In our view the fundamental approach adopted by the learned Magistrate was wrong.
29. The correct approach to be adopted, in our view, having considered the evidence as a whole, is that both parties bore an onus in respect of their respective claims. The appellant's version, having regard to the defects referred to by the court a quo, does not necessarily warrant rejection as false, but is of such quality that it fails to discharge the onus resting on it. The court a quo's dismissal of the appellant's claim, accordingly, although for different reasons, was correct and cannot be interfered with on appeal.
30. This brings us to the respondent's case. The court a quo having found against the appellant held for the respondent. It erred in doing so. The respondent, in our view, likewise, has failed to prove her case. We have already dealt with the speculative findings of the court a quo which, if discounted, leave very little on which a finding in her favour can be made.
31. Two further considerations which are not referred to by the court a quo, need to be considered. The first is that the respondent was adamant that her vehicle, at the point of impact, there and then, came to an abrupt standstill. Her evidence in this regard is contradicted by the photographs showing that her vehicle must have travelled for quite some distance after it had collided with the appellant's vehicle.
32. Secondly, and perhaps decisively, we turn to deal with the respondent's failure to call Sam Mbete to testify on her behalf. During cross-examination of De Freitas, counsel for the respondent attacked the credibility of De Freitas by inter alia putting to him several statements in regard to what Sam Mbete would testify. That indeed casted a duty on the respondent to call Mbete as a witness. Mbete moreover, was a vital eye witness to the respondent's case: he was travelling right behind the

respondent with the sole purpose of providing her with security support. He stopped after the collision and assisted in moving or pushing the respondent's vehicle out of the way to the side of the road. This became a contentious issue raised in cross-examination, in respect of which the countering evidence of Mbete is simply lacking. No reason for his absence or failure to call him was advanced in the court a quo and it must accordingly be assumed that he was available and could have testified for the respondent. The respondent's failure to call him to testify, for these reasons, must be and is held against her.[3]

33. In the absence of probabilities favouring any particular version, both parties failed to discharge the respective onus resting on them. The correct order, in these circumstances, is the granting of absolution from the instance on both the claim in convention and the claim in reconvention.

## Conclusion

34. As a result, neither the appellant nor the respondent has proved their respective claims.
35. Although the appellant is successful in obtaining a setting aside of the judgment and order of the court a quo, substantial success has not been achieved disentitling it to the costs of the appeal.
36. In the result the following order is made:
1. The appeal is upheld, with no order as to costs.
  2. The judgment and order of the Additional Magistrate, Johannesburg, delivered on 5 August 2015, in the above matter, is set aside and substituted with an order of absolution from the instance with no order as to costs, in regard to both the claim in convention and the claim in reconvention.

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FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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S YACOOB

ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING

30 OCTOBER 2017

DATE OF JUDGMENT

7 DECEMBER 2017

- [1] As set out in Stellenbosch Farmer's Winery Group Ltd and another v Martell et cie and Others 2003 (1) SA 11 (SCA).
- [2] National Employers' General Insurance Co Ltd v Jagers 1984
- (4) SA 437 (E).
- [3] CHW Schmidt and H Rademeyer Law of Evidence 3.2.4.
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