

SOUTH AFRICA / JUDGMENT

Grobler v Road Accident Fund (38917-17) [2019] ZAGPJHC 425 (2 July 2019)

[2019] ZAGPJHC 425

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

38917/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 38917/17

In

the matter between:

GROBLER, WILLEM

JACOBUS

Plaintiff

and

ROAD ACCIDENT

FUND

Defendant

JUDGMENT

YACOOB J:

1. The plaintiff has sued the defendant for damages arising from a collision that took place on 19 February 2016 at the corner of End and Hendrik Potgieter Streets in Brakpan. The plaintiff was a motorcyclist at the time, while the insured driver was driving an Audi with registration number [...]GP.
2. The issues of negligence and quantum were separated by an order made at roll call by Mojapelo DJP. The matter is before me only to decide the issue of negligence. The defendant denies any negligence on the part of the insured driver. The defendant has suggested that this action was instituted without proper enquiries having been made, and seeks a punitive costs order.
3. The plaintiff called three witnesses, the plaintiff himself, his wife, Mrs Jennifer Grobler, and his wife's sister, Mrs Angelique Bothma. The plaintiff did not adduce any real evidence in the form of photographs or documents. The defendant called the driver of the Audi and an eyewitness who was driving a vehicle not involved in the collision.
4. The date and place of the collision are common cause, as well as the fact that the plaintiff's motorcycle collided with the Audi. The dispute is only about the cause of the collision, and the manner in which it took place.
5. The plaintiff contends that the Audi executed a right hand turn while indicating to turn left, while it is the defendant's case that the plaintiff caused the collision by travelling too fast and not keeping a proper lookout.

THE PLAINTIFF'S CASE

6. The plaintiff testified that he was following the Audi for approximately 2 kilometres. When it indicated to the left, he moved to the right to pass it, but the Audi turned right. The plaintiff then moved to the left hand side and collided with the left rear of the Audi. Only the rear of the Audi was damaged, on the left brake light. It was still daylight, dry and there was good visibility.
7. The plaintiff testified that while following the Audi, he had passed through two controlled crossings at which the traffic lights had been green. There were no other vehicles at the intersection and there were no vehicles coming towards him. Nor were there any vehicles at the intersection to his right or his left. He had confused the names of the streets (which were incorrectly reflected in the particulars of claim), but he knew where the collision took place. He admitted that he is confused about some things.

8. The plaintiff was adamant that there was no vehicle in the oncoming lane on the opposite side of the intersection, and that there was no other vehicle between himself and the Audi. There was no vehicle that turned right while the Audi turned left. He was also insistent that he had kept a safe following distance and had not been travelling too fast.
9. The plaintiff did however concede that, had he been keeping a safe following distance at the time of the collision, he could have stopped in time to avoid it, but that he could not at the time because he was overtaking. He denied that he was weaving between vehicles trying to pass them. He had intended to go into the lane travelling in the opposite direction until the Audi started turning right, so he then had to go left. If he had continued to go right he would have still collided with the Audi.
10. Under cross examination the plaintiff testified that the Audi “made an immediate stop” and then indicated to turn left but turned right.
11. After the collision the plaintiff lost consciousness. His wife testified that she received a call from a neighbour saying that her husband had been injured, and she then called her sister who lived near the scene asking her to go there. She saw her husband at the hospital, where he was unconscious, and picked bits of red glass out of the cuts on his face.
12. The plaintiff’s sister-in-law (his wife’s sister), Mrs Bothma, testified that she lived close by and her sister had called her after the collision and asked her to attend at the scene. When she arrived paramedics were working on the plaintiff who she was relieved to find was alive. She was distraught at the possibility that he may not make it and that was her main focus.
13. Mrs Bothma produced a sketch she had drawn of the scene as she found it, which placed the Audi on the right, across End Street, having turned into it from Hendrik Potgieter Road (which according to her had by then become Northdene Avenue) on which the vehicles had been travelling. According to her the ambulance was on the left hand corner between Northdene Avenue/ Hendrik Potgieter Road and End Street, where the Audi would have been had it been turning left. The plaintiff’s motorcycle was in the middle of the left lane of Northdene Avenue/ Hendrik Potgieter Road, and the Ekurhuleni Metro Police on the opposite left corner.
14. Mrs Bothma testified that she noticed a bump and some blood on the Audi’s rear windscreen. She conceded that the independent witness Mr Muller would be more objective but was certain that the vehicles were where she had depicted them. She had remonstrated with the Metro Police for giving the driver of the Audi his keys back and letting him go.

THE DEFENDANT’S CASE

15. The defendant's first witness was Mr Muller, who is an independent eyewitness. On the fateful afternoon, he was at a stop street in End Street waiting to turn right into Hendrik Potgieter. He saw an Audi, another vehicle and a motorcycle approaching from his right. The Audi turned left, the other car moved to the right and as the Audi turned into End Street the motorcycle hit it from behind.
16. The Audi stopped in End Street. It did not move from where the collision occurred, on the corner. The motorcyclist's helmet flew over Mr Muller's vehicle to Hendrik Potgieter Street. The other car turned right and stopped and Mr Muller turned right and stopped in Hendrik Potgieter.
17. The Audi never indicated right and did not turn right. It was not where Mrs Bothma said it was. If the Audi had turned right the plaintiff could have passed it on the left and passed in front of Mr Muller.
18. Thereafter the Paramedics arrived and the Metro police arrived. He gave them his details and the defendant's attorney contacted him on the number he provided at the time, which has not changed. He was only contacted immediately before the trial, and never by the plaintiff or his attorney. He was asked to sign an affidavit, which had not been commissioned, but he confirmed it during his testimony.
19. The affidavit signed by Mr Muller and confirmed in court contained an inconsistency with the witness's oral evidence. At first he tried to explain it away but it became clear that he had made an error in the affidavit. The plaintiff's attorney argued that Mr Muller's evidence was tainted because of this inconsistency.
20. Mr Muller confirmed that had he seen any vehicle travelling at an excessive speed he would have noticed it, and that he had not noticed any vehicle travelling at an excessive speed.
21. Mr Muller also conceded under cross examination that he had made inferences about the movements of the motorcycle and the other car, rather than actually seeing the movements. For example, he said if the motorcycle had not moved over, it would have collided with the other car. Additionally, that the other car ended up on the right in End Street, so it must have turned right. The other car and the motorcycle were behind the Audi by the time they reached his intersection, so his view of them was no longer unimpeded.
22. Mr Muller was certain that the Audi had indicated to the left and had turned left.
23. Mr Muller was not acquainted with either the plaintiff or the Audi driver, and had not seen either of them since the collision.
24. The defendant's second witness was Mr Eckersley, the driver of the Audi. He had met Mr Muller at the scene but not since and did not know his name. The collision occurred on a Friday afternoon around 15h30-16h00, he had left work and was on his way to the butchery to get meat. He had to turn left into End Street because that is where the butchery was. He was travelling at about 50 km/h because he knew he had to turn soon. End Street was quite

narrow at that point although there were two lanes, one in each direction, and it also had a high kerb, so required careful navigation.

25. Mr Eckersley was not concentrating on the traffic behind him but on executing the left turn. He heard a loud bang when the motorcycle collided with him. The collision was on the rear left wheel arch. He had already committed to the turn and could not have avoided the collision. He denied having turned right. He did indicate left and turned left. He had always been intending to go to the butchery.
26. The plaintiff flew over the Audi, bouncing on the roof, and landing at the right front of the car, in End Street. The helmet landed up somewhere else. Mr Eckersley braked when the collision occurred. The vehicle switched off when he braked and he did not move it until later. It was never on the right in the middle of End Street as suggested by Mrs Bothma.
27. The left of the rear bumper had been damaged, as well as the left rear wheel arch fender, the roof, the muffler and the front windscreen. The damage cost almost R300 000 to repair. There was blood on the boot and the left hand window. There was a dent on the corner, and the lights were also damaged. The plaintiff went diagonally across the car before landing at the front right.
28. Mr Eckersley stated that he had been going quite slowly because of turning and because of the school in the area. According to him the motorcycle came like a “bat out of hell”. He heard the motorcycle but did not see it. Nor could he remember whether there was another vehicle between the Audi and the motorcycle.
29. Mr Eckersley spoke to two women police officers and provided them with his driver’s licence. He also spoke to the motorcyclist to see how he was. The police never took his keys, they only wanted his licence and identity document, and only took a copy of the driver’s licence.
30. In cross examination it was suggested to Mr Eckersley that because of the high kerb, the presence of another vehicle (Mr Muller) in End Street, and the narrowness of the road, he had to move slightly to the right in order to execute the left turn, and that this was the cause of the collision. Mr Eckersley denied this. He said that had he been driving a truck or larger vehicle he may have had to, but he did not have to do so in this case. He stated that he did look in his rear-view mirror before executing a left

turn, for purposes of keeping a proper lookout. Despite this he did not see the motorcycle before the collision.

31. Mr Eckersley, while under cross-examination, stated that while he was talking about the collision he started remembering more, and that he now remembered that there had been another car and the driver had come across to talk to “us”. It was a small car, possibly silver in colour, something like a Hyundai i10 or a Toyota Yaris, and it had gone to the opposite side than he did. He had been standing with someone he referred to as the chaplain, and it appeared that the other driver also knew the chaplain. Thereafter Mr Eckersley went and

spoke to the police.

32. Mr Eckersley testified that he had joined Hendrik Potgieter at the Life Clinic, and had only been on it for about one kilometre. He had been coming from work and had come off the N3. It was therefore impossible that the motorcycle had been following him for two kilometres.

AMENDMENT OF THE PLEADINGS

33. Mr Myburg, who appeared for the plaintiff, moved for an amendment of the particulars of claim to reflect his argument that, rather than turning right, the insured driver moved to the right while executing a left turn in order to make more room for himself. He submitted this was to take account of the evidence that the Audi moved to the right while turning left.
34. There was no such evidence. At the highest point, it was simply something put to Mr Eckersley in cross-examination. It was fundamentally contradictory of the plaintiff's own evidence, and that of Mrs Bothma. Nor was it put to Mr Muller in cross-examination.
35. Had the amendment been granted, it would not have been supported by the evidence. I refused the application for amendment.

ARGUMENT

36. Mr Myburg submitted that, despite the refusal of the amendment, the pleaded version was wide enough to support a conclusion that the Audi simply "moved" to the right rather than "turned" right. I disagree. Not only are the pleadings specific, so was the plaintiff's version, that the Audi indicated to the left but then turned right. The plaintiff was adamant about this.
37. Mr Myburg nevertheless submitted that, considering the emphasis Mr Eckersley placed on how careful he had to be when negotiating the turn, it would make sense that he needed to make a wider approach to the left turn, and that this would have been the cause of the collision. There was no reason otherwise for Mr Eckersley to emphasise the height of the kerb.
38. Mr Myburg also submitted that the plaintiff's version was inherently more probable. According to him the defendant had manufactured an "imaginary" vehicle, although it is not clear what basis Mr Muller would have had for doing so, considering that he was an independent eyewitness who did not stand to gain or lose anything from these proceedings. Mr Myburg submitted that the inconsistencies in Mr Muller's evidence were so fundamental that his evidence could not be relied upon. He submitted that Mr Muller's evidence had been tailored to favour the defendant, although again it is not clear why.

39. He submitted also that, even if the plaintiff had only followed the Audi for less than a kilometre, there is no basis on which the plaintiff would have simply driven into the Audi. There was no other car, and the plaintiff could not have gone any other way because he would have collided with the Audi whatever he did.
40. Mr Myburg also submitted that Mr Eckersley's testimony was unreliable in particular because he contradicted himself about whether the plaintiff had been wearing a helmet when he saw him lying on the ground, and also because he stated in the midst of cross-examination that he now remembered another vehicle being there.
41. Ms Docrat for the defendant argued that the whole trial had had no merit from the outset and was simply a waste of taxpayers' money. It was a rear-end collision and if the plaintiff had been keeping a proper lookout and travelling at an appropriate speed he could have avoided even bad driving by the Mr Eckersley. She pointed out that the plaintiff did not place any photographs of the scene before court, despite having been invited to do so by the defendant at the start of the trial, and had not attempted to consult with the independent eye-witness, despite the fact that the plaintiff's own memory of the incident is not complete, and despite having access to Mr Muller's details.
42. She pointed out that Mr Muller had no way of knowing about the alleged right turn made by the Audi, and had no motivation to make up another vehicle at the scene. It was her submission that Mr Muller's evidence was essentially reliable.
43. She also submitted that Mr Eckersley's evidence was reliable and that the confusion about the helmet was a red herring because it was not material.
44. Ms Docrat also submitted that, despite the discrepancies in the defendant's witnesses' versions, the obligation was for the plaintiff to show that the insured driver was negligent and the plaintiff had failed to do so. In fact, the plaintiff's own version was that he wanted to overtake the Audi and in order to do that he would have had to accelerate.
45. Ms Docrat also submitted that the plaintiff's case not only did not succeed, but that it had never had any prospects of success and ought not to have come to court. The late attempt to amend showed that. She submitted that, had the plaintiff's attorney done basic investigations before submitting the claim, he would have known there was no merit in it.
46. Mr Myburg did not respond to the submissions dealing with the integrity of the claim.

EVALUATION

47. It is trite that the plaintiff has to prove the insured driver's negligence.

48. Taking into account only the plaintiff's version, that he had been travelling behind the Audi, that the Audi made "an immediate stop", indicated to the left and then turned to the right, and that the plaintiff had been trying to overtake the Audi at the time, leads me to the conclusion that the plaintiff had not been keeping a proper lookout, nor had he kept an appropriate distance between himself and the Audi.
49. The plaintiff's version that he had then suddenly swerved to the left while the Audi was turning right is in my view inconsistent with the damage caused to the Audi on its left rear. The insured driver's version that the plaintiff landed near the front right of the Audi was not challenged, nor was there any other version before the Court. This would have been impossible had the Audi been turning right at the time of the collision.
50. The plaintiff also did not give any specific testimony about his speed, save to deny that he had been going too fast. He did however, as stated above, concede that he could not have avoided the collision because he was trying to overtake at the time.
51. In addition, although there are some inconsistencies in the defendant's witnesses' testimonies, there is no reason to believe that they have manufactured evidence. In particular Mr Muller had nothing to gain from doing so. It is not surprising that there were some immaterial inconsistencies, considering that the incident took place almost three years ago, and he had only been approached shortly before the trial.
52. The fact that there were issues on which Mr Muller and Mr Eckersley differed slightly shows that they had not conspired together in their evidence.
53. In my view the plaintiff's own version is inherently improbable on its own. When weighed against the version of the defendant, the probabilities are in the defendant's favour.
54. Even if the Audi had moved out to the right in order to make room for the left turn as submitted by Mr Myburg may have happened, had the plaintiff been keeping a proper lookout and paying attention to what the traffic in front of him was doing, he would have been able to avoid it. Particularly since, according to him, the Audi came to a stop before executing any turn, it would have moved slowly whatever it did. The plaintiff would have had more than enough time to adjust his course appropriately had he been travelling at a reasonable speed and following distance.
55. It must be noted that a vehicle behaving erratically in front of one is not an invitation to accelerate in order to pass it, but rather a signal to slow down and take particular care because one may not be able to anticipate the vehicle's movements.
56. However, it seems to me that the plaintiff was bona fide in his belief that the Audi had caused the collision. It is possible that he was truly confused. Mr Myburg is not to be overly criticised for believing him. Despite that, it does appear that the efforts made by Mr Myburg to investigate the incident are somewhat inadequate.

57. Nevertheless, I do not take the view that Mr Myburg's conduct was, in this case, such that it attracts the censure of an order of costs de bonis propriis.

CONCLUSION

58. For the reasons above, and having considered the evidence, arguments and authorities submitted by the parties, I find that the plaintiff had been trying to pass the insured driver's Audi at the time of the collision, when and in a manner that was not safe to do so. The collision was therefore due to the plaintiff's own negligence.

59. I make the following order:

"The plaintiff's case is dismissed with costs."

_____. S. YACOOBJUDGE OF THE HIGH COURT

Appearances

Counsel for Plaintiff:

Mr A Myburgh (Attorney)

Attorneys of record:

Leon JJ van Rensburg Attorneys

Counsel for Defendant: Ms F F Docrat

Instructing Attorneys:

Molefe Dlepu Attorneys

Date of hearing:

7 & 8 February 2019

Date of judgment:

02 July 2019

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