

SOUTH AFRICA / JUDGMENT

Hamman v Road Accident Fund (85422/2015) [2017] ZAGPPHC 251 (30 May 2017) [2017] ZAGPPHC 251

COURT

North Gauteng High Court, Pretoria

BEFORE

W R C Prinsloo

CASE / FILE NUMBER

85422/2015

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IN

THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG
DIVISION, PRETORIA)

CASE NO:

85422/2015

DATE:

30/5/2017

IN

THE MATTER BETWEEN

VON

JACOBUS

HAMMAN PLAINTIFF

AND

ROAD ACCIDENT

FUND DEFENDANT

JUDGMENT

PRINSLOO, J

- [1] This is a typical damages action instituted by the plaintiff in terms of the provisions of the Road Accident Fund Act 56 of 1996 ("the Act").

- [2] The relevant collision occurred on 25 April 2014 on the R560 where the R512 forms a T junction with the first-mentioned road between Domdoryn and Scheerpoort. The plaintiff, who sustained serious personal injuries in the collision, was driving a motor cycle and the insured vehicle was driven by Mr Geoffrey John Jacobs.
- [3] As to the general lay-out of the area where the collision occurred, the following can be said: the plaintiff was driving on the R560 from the area of the Hartebeespoort Dam dam wall to Magalies Park where he was due to play golf. The plaintiff was travelling roughly from north to south along the R560. The insured driver, Mr Jacobs, was travelling in the opposite direction, roughly from south to north from Magalies Park golf club and intended to turn right at the T junction where the R512 joins the R560, which is the through road. It follows that the insured driver intended turning right in an easterly direction which meant that he had to cross the path of oncoming traffic moving from north to south, like the plaintiff did.
- [4] Exhibit "C" is a bundle containing useful photographs. "C5", "C6" and "C7" are photographs taken from the south illustrating what the T junction looked like as it was approached by the insured driver ("Jacobs").

"C8" to "C12" are photographs illustrating the view of a driver approaching the T junction from north to south, as the plaintiff did. These photos were taken shortly before the trial. On the photos stop signs are visible indicating that traffic from the north as well as the south has to stop at the T junction before proceeding further.

However, it is common cause that, at the time of the collision, there were no such stop signs and north/south traffic could pass the T junction without having to stop. It is common cause that the only traffic that was governed by a stop sign was that moving from east to west along the R512 which had to stop before entering the R560.

It also appears from the recent photographs mentioned, that there are now "painted islands" leading up to the T junction

from both sides and guiding the motorist into a relatively short lane allowing for vehicles intending to turn to the right into the junction (if approaching from the south) and a relatively short lane allowing for vehicles turning to the left into the junction when approaching from the north.

- [5] It was common cause before me that the "painted islands" were also absent at the time of the collision although the R560 did widen from both sides of the junction into two lanes. The widening into four lanes of the whole road was only limited to a relatively short distance either side of the junction. The two lanes on either side were separated by a dotted white line whereas the centre of the road was separated by a solid centre white line governing the traffic from north to south and from south to north. Exhibits "C3" and "C4" clearly illustrate what the scene looked like at the time of the collision. It was also common cause before me that "C3" and "C4" were taken shortly after the collision and that they depict the position of the insured vehicle as it stood after the collision. It was common cause that this vehicle was

not moved before the photos were taken.

I add that exhibit "B" also contains a number of photos, including "B22" and "B23" which are the same as "C3" and "C4". "B25" shows the badly damaged motor cycle lying in front of the insured vehicle and completely on the eastern side of the solid white line separating the traffic in the two directions. This means that the motor cycle was lying on the "correct" side of the road for the plaintiff as he was travelling and the "incorrect" side of the road for Jacobs as he was travelling. Indeed, the rear wheel of the motor cycle, which was the point of the motor cycle closest to the centre white line, was a noticeable distance away from the solid centre white line. There was no evidence about that distance but, judging by the photos, it could, at a guess, have been more than a metre to the east of the solid centre white line.

- [6] Importantly, in my view, it is common cause that the insured vehicle was straddling the dotted white line separating the short left lane for vehicles turning left into the junction after travelling from north to south, with the greater part of the front portion of the insured vehicle standing well into the short lane for left turning traffic. The left rear of the insured vehicle was also well onto the "incorrect" side as Jacobs was travelling and a clear distance away from the centre white line.
- [7] Debris from the collision was scattered in front of the insured vehicle with the bulk thereof appearing to be in the left lane and the rest in the "straight" lane for south moving traffic.
- [8] It also appears as though the main impact with the insured vehicle took place on the left front thereof although no expert evidence was led in this regard.
- [9] As a matter of fact, it was common cause before me that the collision occurred on the incorrect side of the road for Jacobs as he was travelling.
- [10] On the weight of the evidence, after the collision the plaintiff was lying further to his left, namely a few metres to the east of where the insured vehicle was standing.
- [11] It was common cause that 25 April 2014 was a clear sunshine day and this also appears from "C3" and "C4".

According to the 2014 calendar which I consulted, 25 April was a Friday.

Separating the question of quantum for later adjudication

- [12] During the course of the proceedings, and by agreement between the parties, I made an order in terms of Rule 33(4) separating the question of quantum for later adjudication.
- [13] In their closing arguments, both counsel addressed me on the question of costs flowing from events leading up to an agreement that the quantum would be separated for later adjudication. It is not necessary for me to dwell on the merits of these costs arguments. It seemed that these costs, which I will simply refer to as "the costs flowing from the Rule 33(4) proceedings and related matters" will have to be treated, order wise, separately from the other costs. Indeed I did so at the end of the hearing, and before reserving this judgment.

[14] I turn to a brief summary of the evidence. I will attempt to limit the summary to issues which appear to me to be of direct relevance.

The evidence

(i) The plaintiff, Von Jacobus Hamman

[15] He was approaching the R512 junction from his left driving along the R560 from north to south.

[16] He was driving a BMW 800 GS motor cycle which was not more than a year old. It had about 4 000 kilometres on the clock. It was in an excellent condition.

[17] He was on his way to Magalies Park to play golf with some clients. Magalies Park is situated further south from the junction. The collision occurred shortly after 11:00. His appointment was to tee off at 12:00 and he had to go and make the necessary preparations. It was a perfect sunshine day.

[18] As he was approaching the junction, there was a vehicle travelling in front of him. It was not a sedan but a larger "hatchback" type of vehicle. As he recalls, there was also traffic behind him and there was oncoming traffic from south to north.

[19] All he wanted to do was travel straight past the junction and he was in the right or "straight" lane.

[20] He gave evidence about the photographs and the general lay-out of the scene which I have dealt with.

[21] He confirmed that the road widens into two lanes from both sides shortly before the junction. He referred to the relevant photos in exhibit "C". He confirmed that the stop signs were not there, except for the one governing the R512 traffic at the junction.

[22] The car ahead of him started travelling slower and at one stage he was travelling at about 30kph to maintain his following distance.

[23] When they got to the junction, it appeared that the driver of the car in front of him suddenly decided to turn left into the junction, activated his flicker at a late stage and turned left. He did not enter the left lane before turning but turned over the left lane into the junction from the right or "straight" lane.

[24] When the car in front disappeared from his field of vision, the plaintiff, for the first time, observed the insured vehicle coming from the opposite direction and turning to its right, in front of him.

[25] The plaintiff followed the emergency braking procedure ("nood rem prosedure") and tried to swere to his left but he could not avoid the collision, with the other vehicle colliding with the motor cycle in a head on situation but more from the right.

- [26] Before the vehicle in front of him (I will refer to it, for the sake of brevity, as "the SUV") turned to its left, it was also travelling in the right hand lane.
- [27] The collision was more or less a head on collision.
- [28] The insured vehicle did not attempt to stop or avoid the collision. He had no time to take evasive action.
- [29] The collision occurred on his "correct" side of the road. I have dealt with this subject. He also described the dotted white line separating the two lanes near the intersection and the solid white line separating the north/south traffic from the south/north traffic. He testified, correctly according to what one sees on "C3" and "C4", that there were no "painted islands" at the time neither any stop signs. This is common cause. He testified about the position of the insured vehicle and the motor cycle after the collision. I have dealt with this subject.
- [30] He pointed out that, as he recalls, the motor cycle collided with the left front portion of the insured vehicle. As I explained, this appears to be correct judging from the "C3" and "C4" exhibits.
- [31] He lost his consciousness and regained it in the ambulance.
- [32] In his opinion, he did everything possible to avoid the collision. Before he acquired this particular motor cycle, he attended an advanced safety and driving course for BMW motor cycles at the Swartkops racing track. There he was taught about the emergency stop and swerving ("uitswaai") procedure. In his view, he did the best he could. He could not swerve to the right because of oncoming traffic. He confirmed that it was a Friday, and Friday afternoon traffic was dense.
- [33] The BMW was not the first motor cycle that he owned. He had been driving motor cycles since he obtained a licence to do so in 1998 and had a number of motor cycles, some of which he shared with his father. This happened over a sixteen year period.
- [34] He was wearing a protective helmet.
- [35] He did not have his golf clubs with him but had an arrangement with his wife that she would take the clubs to Magalies Park to avoid the necessity of having to carry the clubs with him on the motor cycle. Magalies Park was only one and a half to two kilometres to the south of the junction.
- [36] The head lamp of the motor cycle was on. It is designed in such a manner that it goes on automatically when the motor cycle is in motion.
- [37] The plaintiff was subjected to lengthy cross-examination but, in my view, he was in no way discredited. He consistently stuck to his version. He impressed me as a good and credible witness.

(ii) Navin Premdutt

- [38] He remembers the collision of 25 April 2014 near the dam area on the R560 between a motor cycle and a Mercedes Benz vehicle. He did not know the area well at the time.
- [39] He was travelling along the R560 towards the dam area, from south to north.
- [40] The white car in front of him, which turned out to be the insured vehicle, and which he describes as an "SUV" was slowing down as they approached the junction. He followed the white SUV to the point where the road widened into two lanes so that he could overtake on the left. The white vehicle did indicate an intention to turn to the right.
- [41] He overtook on the left travelling about 20 to 30kph and he saw an oncoming white or silver vehicle and behind that a motor bike.
- [42] A few seconds later there was a large crashing sound and when he looked in the mirror he could see that the motor bike and the white SUV had been in a collision. The SUV was, according to him, a Mercedes ML. It was common cause that the insured vehicle was a Mercedes.
- [43] The witness pulled off the road, jumped out and ran to the scene. He wanted to find the motor cycle driver. He saw him lying in the middle of the road on the right (east) side of the SUV, as I have described.
- [44] He also testified with reference to the photos, both in Bundle "C" and Bundle "B".
- He confirmed that he found the vehicles as they are depicted on "C4" and, for example, "B22". The vehicles were not moved from those positions where he saw them during his stay at the scene.
- [45] The witness was subjected to lengthy cross-examination but he was not in any way discredited. He struck me as an honest and reliable witness.

(iii) Anna Magdalena Hamman

- [46] She is a practising attorney and also the wife of the plaintiff. As a practising attorney and conveyancer, she had a good understanding of Court procedures and she knew about the details of the case.
- [47] She confirmed the arrangement to take the golf clubs to Magalies Park club just before 11:00. She dropped off the clubs in the locker room and waited for her husband. When he was not there by 11:15 she left because she had work to do at her office. She left the club at about 11:15 or 11:20 and passed the R512 junction shortly thereafter, noticing that there had been an accident. There were many bystanders, also partly obscuring her visibility of the scene, and she drove on, not realising that her husband had been involved. She would have passed the scene at about 11:25, by which time, as I said, the collision had already occurred.

- [48] On her way she got a call from a bystander, using her husband's cell phone, when she heard about the incident. She turned back and when she got to the scene the plaintiff had already been placed in the ambulance. She accompanied him in the ambulance, leaving the car keys with the paramedics on the scene. She testified by using some of the photographs as well.
- [49] She was subjected to some cross-examination, some of which was evidently aimed at persuading her that the collision took place later than what she said it did. I add that Jacobs also testified that the collision happened a bit later, and it could be that this evidence was aimed at supporting an inference that the plaintiff was in a hurry to get to Magalies Park because he was late for his appointment. Ms Hamman persuasively dealt with this cross examination and, in my view, her evidence about the time when the collision occurred is well supported by her clear evidence about the time when she had to be at Magalies Park and the short period that she waited before leaving.
- [50] Ms Hamman was a particularly impressive witness.
- [51] After this, the plaintiff's case was closed.

(iv) Geoffrey John Jacobs, the driver of the insured vehicle ("Jacobs")

- [52] He was indeed driving a Mercedes Benz 320 ML and had it in his possession for about three months when the collision occurred.
- [53] He is also a golf member at Magalies Park and he had to meet his son at the Pecanwood golf course at about 12:30. To do this he travelled from south to north from Magalies Park and had to turn to his right at the junction to get onto the R512. He had enough time and was driving slowly, at about 40 to 50kph. According to him, the collision occurred at about 11:50. He says he left Magalies Park at about 11:45. In my view, the weight of the evidence supports the version of the plaintiff and his wife that the collision occurred earlier. This is corroborated by the independent facts, uncontested, that the plaintiff planned to get to Magalies Park at 11:00 and so did his wife. On the probabilities, I see no reason why I should reject the evidence offered on behalf of the plaintiff, particularly that of Ms Hamman.
- [54] As to how the collision occurred, Jacobs confirmed that he was driving north towards the intersection and he saw an approaching SUV, which he identified as a Landrover, at a distance of about 300 metres, coming from the opposite direction. His

impression was that the SUV was travelling at an excessive speed. He decided "to protect himself". He confirmed that there was a white line in the middle of the road and as he was over the white line he stopped, not knowing whether the driver of the SUV would come in the straight lane or turn off the lane but the car looked as if it was uneasy on the road and it looked as if it was "jumping" from left to right. This was not in line with the evidence of the plaintiff. On the probabilities, if the SUV behaved in this fashion and also drove at an excessive speed, there is no reason why the plaintiff would not have said so, having driven directly behind the SUV. Moreover, on the probabilities, if the SUV was travelling at a dangerous and excessive speed, it is difficult to understand how the driver thereof managed to successfully negotiate a sharp turn to the left.

Jacobs said that he noticed the flicker or indicator of the SUV going on "as he got to the turn off lane, turning left onto the bridge. He put his indicator on at that point in time." Jacobs says he had stopped because "I did not know whether he was going straight or not. I know the area, that piece of road is like a race track." He said there were many collisions and this is one of the reasons why the stop signs were installed later.

- [55] Jacobs said that he was trying to protect himself. If the SUV was going to go straight Jacobs would move forward, executing the turn before the vehicle got to him and if it was going to turn left into the R512, Jacobs would follow it by turning after it.
- [56] When he saw the bike for the first time, it was very close to the intersection. He illustrated this by reference to a black car entering the intersection from the north on exhibit "C6" in the "straight" lane. Rather dramatically, Jacobs demonstrated that the biker (plaintiff) was lying forward on his bike and, when he got close to the insured vehicle, he came from the side (eastern) of the road which is demarcated by a yellow line and the biker then sat up in the straight position. He actually made eye contact with the biker. "When we made eye contact he must have realised that he was coming straight for me as a person I thought my life had ended." It is difficult to understand, under those circumstances, with the plaintiff wearing a helmet, how eye contact would have been made. Jacobs said that the plaintiff took evasive action by swerving to his right but the collision occurred. The air bag "popped out" but he got out and saw the plaintiff lying on the ground in the vicinity of the right back wheel of the insured vehicle. That is when Premdutt ("Indian fellow") also arrived to offer his assistance.
- [57] Jacobs confirmed that where the insured vehicle stood, the left front tyre was already over the dotted line demarcating the two lanes and the motor bike "half and half" straddled the dividing dotted line of the two lanes.
- [58] He denied that the plaintiff was travelling in the "straight" lane. He said there was nothing he could do because the bike was approaching "at such a speed".
- [59] In cross-examination, Jacobs was referred to "C3" (same as "C4") showing people standing between the centre white line and the left side of the insured vehicle. There were five of them, two tow away experts as well as Jacobs and his son and wife. They all stood between the insured vehicle and the centre white line, they all stood to the east of the centre white line.
- [60] Significantly, and correctly, Jacobs admitted that he crossed the centre line as he approached the junction.
- [61] The cross-examination then goes as follows (paraphrasing from my notes):

"So what you did by crossing into the lane for oncoming traffic you started cutting the turn into the face of oncoming traffic? --- I tried to manoeuvre, had eyes on the big car coming to me at 'hell of a speed'. If he had come straight I would have turned onto the bridge and if he turned I would have followed him. ...

They are normal single lanes? --- Yes.

You say you stopped waiting for oncoming traffic? --- Yes.

So your car occupied the entire lane for oncoming traffic? --- There was space behind the car.

And the right front of the car took up some space in the turning lane? --- No the front of my car (left) room to move.

The point is where you stopped you straddled into both lanes at an angle cutting the corner? --- Yes.

I said to you it was in the face of oncoming traffic both turning and going straight? --- Yes."

[62] It was put to him –

"You could have approached the turn in a different fashion: instead of cutting across the barrier line, which prohibits what you did, you could have stayed in the turning lane for north bound traffic driving to a point where you were allowed to execute the right hand turn which incidentally was north of where you stopped? --- I agree."

And –

"You could have stopped there where your vehicle would have been no impediment whatsoever for oncoming (south bound) traffic? --- Yes that is the law of the road ... but unfortunately under the circumstances I felt as a driver with a gut feel with my life being threatened, when you see a car approaching you at high speed 'shall I do this or that, if he does this and I can do that'."

I add that there was no plea, for example, of the insured driver Jacobs having been placed in a position of sudden emergency which he may have offered as some sort of a defence.

On the probabilities, it is difficult to see how Jacobs would have managed, from a standing position, to get out of the way of the speeding SUV if the latter, after all, moved straight instead of turning. Jacobs would have to do this from a standing position and a position still to the south of the mouth of the junction. Moreover, as I already pointed out, it is difficult to see, on the probabilities, how the driver of the SUV managed to execute a sharp left hand turn despite the fact that he was travelling at a high speed. This makes the evidence of the plaintiff, that the SUV was slowing down, more probable.

[63] At one point Jacobs said when he saw the car bearing down on him he cut the corner. He thought if he went straight (presumably to the mouth of the junction) the car may hit his car and that is all he had to his name. At this point Jacobs started crying.

While he was crying he explained that he had just bought the car and that is all he had, so he was trying to avoid an accident.

Whilst not blaming the witness for being emotional, it seems to me that he executed a manoeuvre that was unlawful and he drove in a manner which was not in harmony with what can be expected from the reasonable driver under those circumstances. Indeed, as I illustrated, he admitted that if he had gone straight to the mouth of the junction, staying on his correct side of the road, there may not have been a collision at all. He admitted that once he started cutting the corner he moved onto his incorrect side of the road.

"At that stage already when you went onto the wrong side you knew of the oncoming SUV had high speed in circumstances which alarmed you? --- Yes."

He conceded repeatedly that if he did not go onto the wrong side of the road he would have been out of harm's way.

[64] At one point the witness offered evidence which is clearly improbable: he said that he saw the motor bike coming past the SUV on its left hand side.

"Before the SUV turned? --- Yes I never saw the SUV turn. All I saw was the bike coming towards me. The rest is history ..."

He was reminded of the fact that the plaintiff had said that the SUV turned off but he denied the statement. He was asked whether the SUV turned off and he said no! When he was asked to explain this he said because the bike came before the car turned off. He did not see it turn. He did not see the SUV when he got out of his car.

When it was put to him emphatically that the SUV turned off at the junction he accepted that this happened.

This is an example of the unsatisfactory nature of the evidence of Jacobs.

Another example is that it was put to Jacobs that on his version, with the bike being on the extreme left of the road, it could simply have carried on, easily avoiding the insured vehicle. He could not contest this statement.

[65] It was put to him that there was no conceivable reason for the plaintiff being in the left hand lane, or even in the yellow

demarcated lane if he wanted to go straight to Magalies Park. The rather lame explanation he offered was that motor bikes often race on that stretch of road and they are known to overtake other vehicles on the left. On the probabilities, if the SUV had its flickers on, it is even more unlikely that the plaintiff would have overtaken on the left, quite apart from the fact that there was no reason to do so.

[66] When it was put to him that according to the photographic evidence water and oil lying on the road surface in front of his car leaked from his car he said that he could not say that that was the case.

"So you can't say? --- If it came from my car let's say it came from my car.

So you accept that? --- No!"

[67] The unsatisfactory evidence came to an end when the following was put to Jacobs by way of repetition:

"Had you done what the law says, stopped, waited for the SUV and the bike to pass on their side, there would have been no accident? --- Looking at the car coming down the hill, I thought instead of going to the end, where I could lawfully turn, I looked up, saw the indicator, I was already turning so I stopped right in the middle, realising it was going way too fast."

[68] The witness was also in the habit of making long, somewhat incoherent, statements, not directly relevant to the business under

discussion.

[69] For the reasons mentioned, I consider Jacobs to have been an unsatisfactory witness. Apart from the unsatisfactory nature of his evidence, as illustrated, certain aspects of his evidence were also inherently improbable.

[70] Although one is not dealing here with a situation of a classic case where there are mutually destructive versions (with some of the important aspects not being in dispute) I remain mindful of the fact that the onus is on the plaintiff and, it seems to me, in order to determine whether the onus is discharged, there should be a comparison between the two versions by considering the credibility of the witnesses and the inherent probabilities. See, for example, National Employers' General Insurance Co Ltd v Jagers 1984 4 SA 432 (ECD) at 440D I.

In this case, for the reasons mentioned, I consider the credibility of the plaintiff's witnesses, to be superior to that of Jacobs and the same applies to the inherent probabilities, if applied to the two versions. The reasons have been mentioned.

[71] In the result, and for the reasons mentioned, I am satisfied that a proper case was made out by the plaintiff to prove that the collision was caused by the negligence of Jacobs.

[72] The onus to prove contributory negligence on the part of the plaintiff rests on the defendant. For the reasons mentioned, I am satisfied that such an onus was not discharged. I have come to the conclusion that the sole cause of the collision was the negligence of Jacobs. It seems to me that the conduct of the plaintiff fell well inside the ambit of what one would have expected from the reasonable driver. He was confronted with the sudden appearance of the insured vehicle in his path of travel, and made diligent efforts to avoid the collision. His failure to do so has not been proved to amount to contributory negligence.

Conclusion

[73] In the result, the claim as far as the question of negligence is concerned ought to succeed.

Costs

[74] There is no reason why the costs, as far as the "merits trial" is concerned, should not follow the result.

[75] Finally, I was asked to order that the defendant pays the costs which are to include the costs flowing from the employment of senior counsel. I am satisfied that the plaintiff was well justified in taking the precaution of employing the services of senior counsel. However, it recently came to my knowledge that there are two unreported judgments by the Supreme Court of Appeal, both by Leach JA, to the effect that there is no costs scale such as "the costs of senior counsel" as opposed to a situation where the costs of two counsel are allowed. The learned Judge of Appeal held, when dealing with a similar request and rejecting it, that to order the costs of senior counsel would be to fetter the discretion of the Taxing Master.

- See *The City of Johannesburg Metropolitan Municipality v The Chairman of the Valuation Appeal Board for the City of Johannesburg* (282/2013) [2014] ZASCA 5 (12 March

2014) at paragraph [24]; and

- *Hanger v Robertson* (211/2015) [2016] ZASCA 102 (10 June

2016) at paragraph [21].

In the circumstances, the best I can do is to express the respectful view, as I have already done, that the employment of senior counsel was justified, and to suggest, respectfully, that the Taxing Master may take this into account.

The order

[76] I make the following order:

1. It is declared that the defendant is liable to pay 100% of the plaintiff's damages arising from injuries sustained in the collision

of 25 April 2014.

2. The defendant is ordered to pay the costs of the trial to determine the question of negligence.
3. It is declared that the witnesses Navin Premdutt and Anna Magdalena Hamman were necessary witnesses.

W R C PRINSLOO

JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 30 JANUARY TO 1 FEBRUARY 2017

FOR THE PLAINTIFF: G W ALBERTS SC

INSTRUCTED BY: SAVAGE, JOOSTE & ADAMS ATTORNEYS

FOR THE DEFENDANT: N D MOSES

INSTRUCTED BY: MORARI THOBEJANE INC

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