

SOUTH AFRICA / JUDGMENT

Hayward v South African National Roads Agency Limited (1831/2022) [2023] ZAECMKHC 113 (17 October 2023) [2023] ZAECMKHC 113

COURT

Eastern Cape High Court, Makhanda

BEFORE

N G Beshe

CASE / FILE NUMBER

1831/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MAKHANDA)
CASE NUMBER.:
1831/2022
In

the matter between:

GAVIN
HAYWARD
Plaintiff
And
THE
SOUTH AFRICAN NATIONAL ROADS
AGENCY
LIMITED
Defendant

JUDGMENT

Beshe J

- [1] This is a claim for damages for injuries that plaintiff suffered in a motor vehicle collision that took place on 7 September 2019. The collision occurred on the R75 road between Jansenville and Wolwefontein. Plaintiff alleges that the defendant is liable for the said damages.
- [2] The defendant was served with the summons initiating proceedings in this matter on the 27 June 2022. However, no notice of intention to defend was delivered, hence the action being heard on an undefended basis.
- [3] At the commencement of these proceedings, plaintiff's counsel moved an application for the merits of the claim to be determined separately before the determination of the quantum of plaintiff's damages, depending on the outcome of the adjudication of the merits. The application was mainly motivated by the need to contain costs. This, due to inter alia the fact that some of the expert reports will require to be updated or supplemented. This will require a significant amount of funding, which the plaintiff is not in a position to provide due to financial constraints. Being satisfied that a case for separation of issues have been made, I issued an order in the following terms:
1. That the merits of plaintiff's claim be determined separately prior to the determination of the issue of the quantum of his damages.
 2. That the determination of the quantum of damages be stayed pending the outcome of the adjudication of the merits of plaintiff's claim.
- [4] The defendant as the appellant suggests, is the South African National Roads Agency, a company established in terms of the South African Road Agency Limited and National Roads Act 7 of 1988. It is sued on the basis, so it is pleaded by the plaintiff, that defendant as well as its employees acting in the course and within the scope of their employment, had a legal duty to manage and control the national roads of the Republic of South Africa and to take charge of the development, maintenance and rehabilitation thereof. A duty that includes a duty to take reasonable care in monitoring, inspecting, maintaining and improving the roads including the R75 road.
- [5] Plaintiff further pleaded that the said legal duty was breached by the defendant: by failing, inter alia, to ensure that the barricade netting that was placed where the guardrail was damaged, was fitted properly/safely; to ensure that the barricade netting was clearly visible to road users at all times; by failing to recognise that the exposed, unprotected ends of the damages guard rail constituted a hazard to the road users; that the exposed unprotected ends of the guard rail were rendered safe to road users; failing to erect any warning signs alternatively, adequate or sufficient warning signs where the guard rail was damaged to warn road users of dangers attendant thereto. Further that as a result of the said breach, the

plaintiff sustained multiple injuries including to his nose and to his lower legs.

[6] Plaintiff gave viva voce evidence on the 23 August 2023. A number of exhibits were also handed in to wit: a copy of plaintiff's identity card, a copy of his driver's licence, a set of photographs depicting the scene of the accident before and after the collision as well as his affidavit in support of his application for default judgment.

[7] Plaintiff's evidence was, briefly stated, to the following effect:

On Saturday the 7 September 2019 he attended a split braai in the Jansenville area where he had been employed by a construction company as a safety officer. He left the said function at approximately 22h35 and drove to a farm outside Wolwefontein where he was staying. He was driving a Toyota Hilux single cab. He was driving on the R75, a tarred road comprising of single lanes on both directions. The weather was good. He was driving within the requisite speed limit which is 120 kilometres per hour. Approximately 5 kilometres from Jansenville in the direction of Wolwefontein and on the Delport River bridge, something blew in front of the vehicle he was driving. He reacted by swerving right and back to the road again. In the process he lost control of the motor vehicle and collided with a damaged guard rail. It turned out that it was a barricade netting sheet that had flown in front of his vehicle. All this, according to the plaintiff, happened quickly in 'a split second'. He reacted to the object that flew in front of his vehicle out of shock as he did not expect it, thinking it could be a wild animal. A piece of the guard rail pierced his vehicle from below the steering wheel and penetrated the front of the motor vehicle. He was attended to by paramedics at the scene, after which he was taken to hospital. As a result of injuries sustained during the accident plaintiff lost both his legs.

[8] During questioning by court, it transpired that some of the photographs that were exhibited were taken by the plaintiff a day preceding his accident. He noticed that an accident involving a truck had occurred in the course of which the guard rail was damaged and displaced. The damage to the bridge including the guard rail is quite extensive as can be gleaned from the photographs. That collision seemingly involved a Checkers articulated truck which can be seen resting on its side next to the bridge. The images depict a missing guard rail and where there was one, it had exposed ends. He explained that he took these photographs because he is a safety officer. He testified that it did not occur to him as he was driving in that area on the following day, being the evening of the 7 September 2019, that he had observed the damage to the bridge, including the guard rail the previous day.

[9] Even though in the photographs taken after the accident involving his vehicle there appears to be chevrons, he testified that there were none at the time of his accident. There were no other warning signs as well.

[10] It is trite that the standard of proof in civil cases requires proof on a balance of probabilities. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs prevailed.[1] The onus to prove one's case on a balance of probabilities can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests.[2] The evidence given by the plaintiff in support of his claim, read with his affidavit in support of his application for default

judgment

against the defendant cannot be faulted. His evidence was consistent without any obvious contradictions. He struck me as a credible witness. In my view, he has discharged the onus resting on him to show, on a balance of probabilities that the accident was as a result a breach of a legal duty on the part of the defendant. That legal duty being to take reasonable steps to inspect and maintain the road and to ensure that it was reasonably safe to use. Due to the defendant's failure in this regard, the accident in question was caused by a loose barricade netting which was placed against a damaged guard rail, suddenly blowing across the front of plaintiff's motor vehicle causing him to lose control thereof.

[11] Questions were directed at the plaintiff by the court about whether he did in fact keep a proper look-out being aware of the damage to the bridge, having taken photographs thereof on the day preceding the accident involving his motor vehicle. This was in view of the fact that the plaintiff did not suggest that he lowered his speed. Stating that he was driving within the speed limit being 120 kilometres per hour. In view also of the fact that it was around 22h00. This prompted plaintiff's counsel, in his written submissions, to address the issue of contributory negligence. It being submitted that the matter should be adjudicated on the basis that plaintiff's particulars of claim have not been disputed by the defendant. The issue of apportionment of damages/contributory negligence on the part of the plaintiff has not been placed in issue and such, so it was argued, does not warrant the court's consideration. Plaintiff's particulars of claim do not assert that the collision/accident was due solely as a result of defendant's omission to guard against harm coming to users of R75 or that portion of R75. Neither did plaintiff testify to that effect in his viva voce evidence. However, in his affidavit in support of the default judgment application, plaintiff makes the averment at paragraph 5.20, that the defendant's failure to properly secure the barricade netting was the only and direct cause of him losing control of the vehicle, thus causing the collision. [my emphasis] There being no evidence to gainsay this, it may be accepted that this allegation is not disputed.

[12] I do not have any reason not to accept plaintiff's evidence that even though he was keeping a proper look-out, he did not see any signs, notices, warnings or delineators relating to the damaged guard rail or bridge, in the absence of any evidence to gainsay this.

[13] In the circumstances, the following order will issue:

1. The defendant is liable to pay 100% of plaintiff's proven or agreed damages resulting from the accident that occurred on the 7 September 2019 at Delpont River bridge, Jansenville.
2. The defendant shall pay the plaintiff's taxed or agreed party and party costs in respect of suit, which costs shall include, where applicable, the reasonable fees for travelling, accommodation, preparation and reservation of plaintiff's attorney and counsel.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES For the Plaintiff Adv: H J VAN DER MERWE Instructed by SYMINGTON DE KOK
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October 2023

[1] Principles of Evidence: P J Schwikkard et S E Van Der Merwe 4th edition 627.

[2] See National Employer's General Insurance v Jagers 1984 (4) SA 437.

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