

SOUTH AFRICA / JUDGMENT

Khiba v Road Accident Fund (2012/24278) [2015] ZAGPJHC 230 (14 August 2015)

[2015] ZAGPJHC 230**COURT**

South Gauteng High Court, Johannesburg

BEFORE

E F Dippenaar

CASE / FILE NUMBER

2012/24278

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REPUBLIC OF SOUTH AFRICA

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

JUDGMENT

Case no: 2012/24278

DATE: 14 AUGUST 2015

In the matter between

KHIRA GOODNESS.....Plaintiff

And

ROAD ACCIDENT FUND.....Defendant

Neutral citation: Goodness K v RAF (SGJ 24278/2012)

Coram: DIPPENNAAR AJ

Heard: 29-30 July 2013

Delivered: 14 August 2013

Summary: Damages for dependant's claim. Question of liability for collision arising from unknown vehicle approaching on incorrect side of road resulting in driver swerving and losing control of vehicle and colliding with a tree, resulting in death of driver and serious injuries sustained by three passengers. Apportionment of liability.

ORDER

Defendant declared to be liable for 70 per cent of plaintiff's proven damages and costs.

Dippenaar AJ:

- [1] This is an action for loss of support launched by the plaintiff in her capacity as mother and natural guardian of her minor son whose father, Mr B Dlamini ("the deceased") sustained fatal injuries in a motor vehicle accident which occurred during the early hours of the morning of 4 September 2011 on George Avenue, Sandringham, Johannesburg.
- [2] The plaintiff's claim is based on the provisions of s 17(1)(b) of the Road Accident Fund Act 56 of 1996, as amended ("the Act") as read with reg 2(1) thereof, and is based on the driving of a motor vehicle where the identity of neither the owner nor the driver could be established ("the unidentified vehicle").
- [3] By agreement between the parties, the issues surrounding the liability of the defendant were separated from the issues surrounding the quantum of the plaintiff's claim. I accordingly granted an order of separation under rule 33(4) and postponed the issues relating to the quantum of the plaintiff's claim sine die.
- [4] The issue which must presently be determined, is the liability of the defendant.
- [5] The plaintiff called three witnesses who were all passengers in the deceased's vehicle at the time of the accident. The defendant called one witness who was in a stationary vehicle on George Avenue, busy speaking to one of his colleagues when the accident occurred.
- [6] It was common cause between the parties that there was no contact between the vehicle driven by the deceased, a black Mazda Etude bearing registration numbers and letters [P.... 9.....] GP and the unidentified vehicle which the plaintiff contends was the cause of the accident.
- [7] It was further common cause between the parties that the accident occurred when the vehicle driven by the deceased, which had been travelling in an easterly direction in George Avenue, Sandringham, swerved right and the deceased lost control of the vehicle, causing it to leave the road and collide with a tree, resulting in the death of the deceased and his three passengers sustaining various serious injuries.
- [8] It was undisputed that the events leading up to the accident were the following:
- [8.1] The deceased and his passengers were all boxers and were familiar with George Avenue as it formed part of their training route. The deceased had been preparing for a fight and they had spent the night watching boxing dvds of the deceased's opponent at a friend's house in Alexandra. They were on their way home when the accident occurred somewhere between 05h00 and 06h00 in the morning of 4 September 2011. None of the witnesses were able to give an exact time of when the accident occurred.

[8.2] The sun was starting to rise and all vehicles had their headlights on. George Avenue is a single lane dual carriage way. The road surface is tarred and was dry.

[9] The parties were further in agreement that there was no physical contact between the deceased's vehicle and the unidentified vehicle, but that physical contact is not a requirement for liability on the part of the defendant in these circumstances[1].

[10] The nub of the dispute between the parties was what had caused the deceased to lose control of his vehicle.

[11] In summary, the plaintiff contended that the unidentified vehicle, which had been travelling in a westerly direction on George Avenue with its headlights on, which had been travelling in a weaving fashion, had swerved onto the lane of travel of the vehicle driven by the deceased, who had swerved to his right (onto his incorrect side) to avoid a collision, resulting in him losing control of the vehicle. The defendant denied the existence of this vehicle and suggested that the deceased had been travelling at an excessive speed, resulting in him losing control of his vehicle.

[12] The plaintiff called three witnesses, being the passengers in the vehicle driven by the deceased: Mr Ashley Dlamini, the brother of the deceased who had been sitting in the front passenger seat, Mr Norman Masinga and Mr Fikile Nyalungu who had occupied the rear right and left passenger seats respectively.

[13] The defendant called one witness, Mr MJ Makwela, a security guard who had dropped off a colleague at a house on George Avenue to whom he was speaking through the window of his vehicle, when the accident occurred.

[14] The slight variations in the evidence of the various witnesses can in my view be ascribed to their differing perspectives and none of the witnesses' evidence can be rejected outright. Their evidence can be summarised as set out below.

[15] Dlamini was a passenger on the front left passenger seat and accordingly had a good view of the road ahead. Their vehicle had been driving in an easterly direction on George Avenue after having stopped at a red traffic light some distance back. The vehicle had been driving at a speed of between 40 and 50 kilometres per hour. He noticed a vehicle coming towards them from the opposite direction which was weaving across the two lanes. He alerted the deceased to the approaching vehicle who replied that he was aware of it, then swerved and lost control of the vehicle, resulting in it leaving the road surface and colliding with a tree.

[16] The evidence of Dlamini was not satisfactorily in all respects. Although admitting that he signed two statements, one given to the South African Police Services ("SAPS") on the day of the accident[2], and another, being an affidavit deposed to before a Commissioner of Oaths during 2012[3], he disavowed any knowledge of the contents of the two statements. Dlamini's statement of 4 September 2011 to the SAPS does not refer to any oncoming vehicle, but only refers to the deceased swerving and losing control of the vehicle, whereas the later

statement and his evidence in court refers to an oncoming vehicle that was weaving between the lanes and approached their vehicle in its incorrect lane, causing the deceased to swerve and lose control of the vehicle.

- [17] Dlamini, despite admitting his signature on both these statements, disavowed any knowledge of the contents of the two statements, which are significantly different as set out above. Whilst his explanation for not having any knowledge of the first because of trauma and confusion in the days subsequent to the accident on 4 September 2011 may be plausible in relation to his statement to the SAPS, he could tender no logical explanation for his disavowal of any knowledge of the later statement, which was clearly prepared in conjunction with the legal representatives of the plaintiff, who, if I understand the evidence of Masinga correctly, were jointly approached by all three the passengers. It is unknown whether those representatives are the same as are representing the plaintiff in this matter. Dlamini's disavowal of any knowledge of the aforesaid affidavits appears to be untruthful and improbable. It was put to Dlamini under cross-examination that he was aware of the inconsistencies in the two statements and accordingly denied any knowledge of their content. He could provide no answer to this contention.
- [18] Dlamini's evidence regarding the accident was that he was speaking to his brother during the trip. Shortly before the accident, the deceased pointed out a flat along George Avenue in which one of their friends lived by gesturing with his head. They were travelling at a speed of between 40 and 50 kilometres per hour. He disputed the proposition put under cross-examination that the speed was in excess of 100 kilometres per hour. He noticed the approaching vehicle which was weaving between its correct lane and the lane occupied by their vehicle. He alerted the deceased to its presence, which the latter confirmed he had noticed, shortly after which the deceased swerved to the opposite lane, resulting in him losing control of the vehicle. Dlamini could not describe the events which followed and only regained his senses once the vehicle had collided with the tree. No reliance can in my view be placed on the various distances provided by Dlamini as they were clearly rough estimates which could or could not be correct.
- [19] Dlamini did not deviate from this version under cross-examination and strongly disputed the suggestion that the deceased had been travelling at a high speed. He similarly disputed the defendant's contention that the oncoming vehicle did not exist.
- [20] In argument, the defendant urged me to disregard the evidence of Dlamini in its entirety as being unreliable and incredible. Despite the above stated difficulties with Dlamini's evidence, I am not however persuaded that his evidence must be rejected in its totality.
- [21] The evidence of Nyalungu did not contribute much to unravelling how the accident occurred as he was asleep during the trip and only regained consciousness after the accident in the Edenvale Hospital.

[22] The defendant criticised the veracity of Nyalungu's evidence on the basis that it was allegedly in conflict with an affidavit signed by him in relation to the accident during October 2011[4] as a description of the accident is given in paragraph 2 of the affidavit, of which Nyalungu testifies he has no knowledge. His

explanation that he relied on the events described by the other occupants of the vehicle accords with the evidence of Malinga that

the passengers all saw attorneys together and gave them composite instructions of what had occurred. I am not in the circumstances

satisfied that Nyalungu's evidence is false and should be rejected as the defendant has suggested.

[23] The wording of Nyalungu's affidavit is exactly the same as the affidavit signed by one of the other passengers, Masinga[5] and appears to have been prepared at the same time. The said affidavits appear to give a collective version of the respective witnesses' evidence and observations. As such, the two affidavits may well contain evidence of a hearsay nature, but is not

in conflict with the evidence tendered at trial by either Nyalungu or Masinga as to what had occurred.

[24] The evidence of Nyalungu must accordingly be accepted, albeit that it is of limited use in clarifying the issue at hand.

[25] The evidence of Masinga was that he was a passenger in the right rear of the vehicle. He heard Dlamini drawing attention to the oncoming vehicle, looked up, saw lights of an approaching vehicle on their side of the road and heard screaming. He testified that everything happened very quickly. He could give no estimates of speed or distance, which is not unusual, bearing in mind his position in the vehicle. The deceased swerved to avoid the oncoming vehicle. He could not explain what happened thereafter. He woke up in hospital, having sustained serious injuries to his legs. On his discharge from hospital some two months later, he made a statement to the SAPS.

[26] In that statement[6] he said that the driver of the unidentified oncoming vehicle was not driving straight. This evidence was not repeated in court, but he was not cross-examined on this issue.

[27] Masinga did not deviate from his version under cross-examination and I find no reason not to accept his evidence as credible.

[28] The defendant called Makwela, a security officer who had been on duty at the time of the accident, as a witness. He works in the area and is accordingly familiar with George Avenue. He had just dropped off a colleague at his home in George Avenue, his vehicle was stationary and he was engaged in a discussion with the colleague through the window of his vehicle when he heard the screeching of tyres. This drew his attention to the street and he observed the vehicle driven by the deceased leaving the tarmac onto the gravel, creating a dust cloud

and thereafter colliding with a tree. He rushed to the accident scene to assist the occupants of the

vehicle and recognised Dlamini in court as being one of the passengers of the vehicle.

[29] Makwela testified that whilst he was stationary on George Avenue, he observed about three vehicles passing in an easterly direction and about five vehicles passing in a westerly direction. He could not say which of the latter vehicles could have disturbed the deceased. He did not witness the events which resulted in the deceased losing control of the vehicle. He candidly stated that his attention was on the deceased's vehicle and not on what was happening on the road.

[30] Makwela impressed me as an honest witness. His evidence however sheds no light on the circumstances which led up to the collision between the deceased's vehicle and the tree and he appears to have witnessed the events only after the deceased lost control of the vehicle. He readily conceded that everything happened suddenly and he was not concentrating on the cause of the accident.

[31] None of the witnesses could provide any reliable evidence regarding the speed at which the deceased's vehicle had been travelling at the time the deceased lost control thereof. No direct evidence was presented by the defendant regarding the speed of the vehicle driven by the deceased, other than Makwela's observation that once the vehicle had left the road it was travelling at a high speed. He could however not give any indication of what constituted such 'high speed' and I am unable to make any positive finding on this issue.

[32] The defendant also did not present any evidence that there was indeed no approaching vehicle in the lane of travel of the deceased's vehicle.

[33] The plaintiff contends that the witnesses substantially corroborated each other and that a finding should be made that the defendant is liable for 100 per cent of the defendant's proven damages. She contends that an apportionment is not appropriate and that the negligence of the driver of the unidentified vehicle was solely responsible for the accident.

[34] The defendant on the other hand contends that it must be determined whether sufficient evidence had been presented to sustain any finding of negligence on the part of the driver of the unidentified vehicle[7] and that no finding can be made as to how the collision in fact occurred.

[35] The defendant contends that insufficient evidence was presented upon which a reasonable person may find in the plaintiff's favour[8] and that the plaintiff's claim must either be dismissed or that absolution from the instance should be granted.

[36] On considering the evidence as a whole, certain probabilities emerge. There were some vehicles travelling in both an easterly and westerly direction on George Avenue at the time of the accident. Both Dlamini and Masinga observed lights of the oncoming unidentified vehicle in their lane of travel.

- [37] Even though the evidence of Dlamini was not satisfactorily in all respects and even if this evidence is disregarded, the evidence of Masinga as to the timing, presence and position of the unidentified vehicle, is uncontroverted. The existence of these lights, which, it is undisputed, were connected to a vehicle, constitutes direct and cogent evidence of its existence in the lane of travel of the deceased's vehicle immediately before the deceased swerved onto the opposite side of the road (to his right) and lost control of the vehicle.
- [38] The defendant did not present any evidence that there was indeed no such vehicle. The evidence of Makwela does not negate the possibility that such vehicle indeed existed and acted in the way as testified by the plaintiff's witnesses, Dlamini and Masinga. Makwela further testified to five vehicles travelling west in George Avenue during the period he was stationary and speaking to his colleague. Although it was suggested to these witnesses under cross-examination that there was indeed no such vehicle and control had been lost over the vehicle as the deceased had been speeding, this was disputed by both witnesses and no concrete evidence was presented either that there was indeed no vehicle, or that such vehicle was travelling in its correct lane.
- [39] I agree with the argument advanced on behalf of the plaintiff that it is not probable that the deceased would have lost control of the vehicle for no apparent reason.
- [40] I am accordingly constrained to find on the evidence presented and on the probabilities that there was indeed an approaching vehicle on its incorrect side of the road which resulted in the deceased swerving and losing control of his vehicle, despite there being no contact between it and the deceased's vehicle.
- [41] Having accepted the existence of an approaching vehicle travelling on its incorrect side of the road, the issue of negligence on the part of the respective drivers must be assessed in order to determine whether there must be an apportionment of liability.
- [42] The conduct of a driver by driving on its incorrect side of the road is clearly negligent. Proof that a vehicle was at its incorrect side is prima facie proof of the driver's negligence[9]. No evidence was led on what caused the unidentified vehicle to be on its incorrect side of the road and this issue cannot be taken any further.
- [43] The deceased, on the facts presented is however not blameless and his conduct which resulted in him losing control of his vehicle, appears prima facie to have been negligent, bearing in mind that a driver of a vehicle should not drive in such fashion as to lose control thereof at any stage.
- [44] Very little evidence was led on this issue other than that the deceased braked and swerved right to avoid the collision and this issue was not fully explored in evidence. It does not appear from the evidence that the deceased took any steps to avoid a collision immediately after having become aware of the existence of the unidentified vehicle. No alternative evasive course of action was however proposed under cross-examination. Masinga could not testify whether it was possible for the deceased to avoid a collision by any other means such

as by applying brakes and/or stopping.

[45] Having regard to the available evidence, Makwela's observations and seriousness of the collision and the injuries which were sustained by the occupants of the deceased's vehicle, it is improbable that the deceased had been travelling at a speed of between 40 and 50 kilometres per hour as testified by Dlamini. On the probabilities the deceased must have been travelling considerably faster, although no exact finding on this issue can be made on the evidence presented. On the probabilities his speed in the circumstances was excessive.

[46] The issue of sudden emergency was not argued before me. I am mindful of the principle that allowance must be made for the particular

circumstances in which the deceased found himself[10] and that a driver acting in the best way to avoid danger in a sudden emergency, is not negligent.[11] It is however incumbent on a driver, when faced with sudden emergency, to exercise reasonable care and use reasonable skill to avoid the immediate danger[12].

[47] It is uncontested that the swerving of the vehicle caused the deceased to lose control of his vehicle, which directly resulted in it leaving the road and colliding with a tree. Whether the action of swerving was too dramatic in the circumstances or whether the speed of the vehicle was such as to not accommodate the swerving action, is unknown. It however appears that the deceased did not use proper skill or care in his conduct to remain in control of the vehicle and in this respect he was negligent and his negligence contributed to the collision and the injury and death of the occupants of the vehicle. In my view, an apportionment of 30 per cent negligence on the part of the deceased would be appropriate.

[48] In my view, in apportioning negligence on the part of the driver of the unidentified vehicle, a percentage of 70 per cent would be appropriate.

[49] I accordingly make the following order:

[49.1] The defendant is liable for payment of 70 per cent of the plaintiff's proven damages.

[49.2] The defendant is directed to pay the plaintiff's costs.

E F DIPPENAAR

ACTING JUDGE

APPEARANCES:

PLAINTIFF: Adv T Lipshitz

Swartz Attorneys, Johannesburg

DEFENDANT: Adv TJ Mosenyehi

Sishi Incorporated, Johannesburg

- [1] Bezuidenhout v Road Accident Fund, 2003
- (6) SA 61.
- [2] Exhibit A at 51 and 57.
- [3] Exhibit A at 69-70.
- [4] Exhibit A at 68.
- [5] Exhibit A at 71.
- [6] Exhibit A p 41 para 3.
- [7] Relying on Motor Vehicle Assurance Fund v Dubazane 1984 (1) SA 700 (A).
- [8] Relying on Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A).
- [9] Jennings v Pararg 1955
- (1) SA 290 (T); Mayers v Lemonsky 1924 CPD 125; Marais v Caledonian Insurance 1967 (4) SA (E); Goode v SA Mutual Fire & General Insurance 1979 (4) SA 301 (W); Khumalo Ngcoco v Southern Insurance 1980 (3) SA 660 (D).
- [10] UG v Buur 1914 AD 273 at 286; Bennett v President Versekering 1973 (1) SA 6764 (W) at 683 (C).
- [11] Mane & Trade Insurance v Mariamah 1978
- (3) SA 180 (A); Sardi v Standard & General Insurance 1977 (3) SA 776 (A).
- [12] Van Staden v Stocks 1936 AD 18 at 22.
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