

SOUTH AFRICA / JUDGMENT

Koekemoer v Road Accident Fund (2123/2021) [2023]

ZAECQBHC 34 (8 June 2023)

[2023] ZAECQBHC 34

COURT

Eastern Cape High Court, Gqeberha

BEFORE

S A Collett

CASE / FILE NUMBER

2123/2021

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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISON, GQEBERHA**

Case No:

2123/2021

Date Heard: 5 June
2023Date Delivered: 8
June 2023

In the matter between:

ROCHE

KOEKEMOER

Plaintiff

And

ROAD

ACCIDENT FUND

Defendant

JUDGMENT

COLLETT AJ:

- [1] On 15 April 2018, at approximately 11h15, a collision occurred at or near the intersection of Caledon Street and Headingley Road, Sherwood, Gqeberha (formerly Port Elizabeth) between a motorcycle driven by the plaintiff and a VW Golf driven by Ms. Yolande Ann Walton (insured driver).
- [2] These proceedings concerned only the determination of negligence, the issues of liability and quantum having been separated by agreement.
- [3] The plaintiff contends that the sole cause of the collision was the negligent driving of the insured driver who executed a right-hand turn into Headingley Road across the plaintiff's line of travel at a time when it was inopportune to do so.
- [4] The collision occurred on the Caledon Street near the intersection at Headingley Road. There is a single lane of traffic proceeding in both directions. The collision occurred on a Sunday with sunny and clear weather conditions and good visibility.
- [5] The plaintiff was born on 1 June 2000 and just shy of 18 years old at the time of the collision. Whilst he was not in possession of a motorcycle license at the time of the collision, he testified that he had been riding motorcycles since he was 13 years old. The motorcycle, a Suzuki 185CC, belonged to his best friend.
- [6] On the day in question, his grandfather had dropped him at Baywest Mall to fetch the motorcycle in question which his friend had left there because it would not start. His intention was to take it to his house and attempt to repair it.
- [7] Whilst pushing the motorcycle from Baywest Mall along Caledon Street, he was eventually able to run start it at approximately 60-70 metres from the scene of the collision. He indicated the spot on a google map contained in Exhibit "A". He put the motorcycle into second gear and was proceeding in his line of traffic towards the intersection with Headlingly Road.
- [8] The plaintiff saw the insured driver's vehicle, a green Golf, which was travelling from the opposite direction in its lane of travel. when he was approximately three houses from where the collision occurred.
- [9] Without indicating, the insured driver suddenly executed a right turn into Headingley Road and despite attempting to swerve to the left, the plaintiff's motorcycle and the insured driver's vehicle collided near the stop-markings at the intersection of the two roads. The plaintiff alleged that the insured driver cut the corner.

- [10] According to the plaintiff, he collided with the right front of the insured driver's vehicle. After the collision his motorcycle landed next to the curb and he was thrown on to the sidewalk next to the street name pole.
- [11] He contended that the motorcycle connected with the insured driver's vehicle between the front wheel approximately where the engine is located on the right side. His right knee was pressed between the bonnet of the insured motor vehicle and the tank of the motorcycle.
- [12] He confirmed the damage to the insured motor vehicle contained in Exhibit "A" and further he indicated the paint marks made by the insured vehicle on the shock, footrest, and tank area of the motorcycle in Exhibit "B".
- [13] He stated that the insured driver asked him whether he was okay to which he responded that he was not and thought his leg was broken. He asked for someone to call his grandfather. The insured driver repeated the question but before he could answer, she pulled around the corner and parked the motor vehicle.
- [14] He could not move and people from the church came to assist. Whilst an ambulance arrived and transported him from the scene, the police never arrived.
- [15] He stated that there was nothing he could have done to avoid the collision.
- [16] Under cross-examination, the plaintiff was asked whether the motorcycle was "stable" after he had managed to run start it, to which he answered in the affirmative.
- [17] It was put to the plaintiff that the insured driver was in her lane of travel, indicating and intending to turn right when he collided with her stationary vehicle. The plaintiff denied any indicators being activated and stated that he had right of way on Caledon Street when the insured driver cut the corner across his line of travel into Headlingly Road.
- [18] Plaintiff denied that he encroached upon the plaintiff's lane of travel whilst she was stationary, caused the collision and in so doing failed to keep a proper look out. He further denied that he could have avoided the collision and maintained that the insured driver was the sole cause of the collision.
- [19] Shereen du Plessis, a 33-year-old female, stated that she was attending the Lig & Lewa Pinkster Church which is on the corner of Calendon Street and Headingley Road on the day of the collision.
- [20] She was outside the church and facing Caledon Road at approximately 11h00 when she heard the loud noise of a motorcycle. She was standing and looking up the road in the direction of the noise.

- [21] Whilst she was watching, she saw a green Golf coming from the opposite direction and it turned right into Headingley Road. The motorcycle collided with the right front side of the Golf. She could not remember whether the Golf had indicated to turn.
- [22] Ms. du Plessis stated that the motorcycle landed next to the curb and the driver was thrown through the air and came to rest at the street name pole. Furthermore, she maintained that there was nothing that the motorcycle driver could have done to avoid the collision.
- [23] Whilst she did not speak to the driver of the Golf, she did converse with the driver of the motorcycle whom she recognised as part of the youth of the church. She remained at the scene until the ambulance arrived and confirmed that the police did not attend.
- [24] Under cross-examination it was put to the witness that she could not see the road from her vantage point to which she responded that she could see the pavement.
- [25] Under re-examination she confirmed that she could see the cars on the road and was shown a photo in Exhibit "A" clearly depicting a motor vehicle visible from her vantage point.
- [26] The insured driver testified that she was coming from church and driving along Calendon Street. The motor vehicle that she was driving belonged to her son.
- [27] She confirmed that she and the plaintiff were coming from opposite direction on Caledon Street. She had indicated to turn right into Headingley Road but was stationary on her side of the road at the time waiting for the motorcycle to pass as it had right of way.
- [28] Whilst she was stationary, the motorcycle seemed to lose control and hit her vehicle on the right fender. She could not avoid the collision.
- [29] Under cross-examination, it was put to the insured driver that the accident report Exhibit "A", recorded that she was turning right and there was no indication of her vehicle being stationary or of a head-on collision as she testified. Despite alleging that she had waited several hours to calm down before reporting the matter to the police, she responded that she was traumatized and could not remember what she told the police.
- [30] Her son took photos of the motorcycle at the scene as contained in Exhibit "C". She was unable to provide information regarding the whereabouts or existence of statements made to the insurance company regarding the incident.
- [31] She stated that the motorcycle was travelling fast around the corner in Calendon Street and she had already stopped when she saw it. The plaintiff then veered onto her side of the road.
- [32] Her evidence changed from being a head-on collision to the motorcycle driver trying to avoid the collision by turning somewhat perpendicular the insured vehicle. It was put to her that her version was physically impossible.

[33] Thereafter she advanced unsolicited evidence that the plaintiff was not wearing a helmet or shoes and did not drive with his headlight on as required by law. Whilst the relevance hereof is uncertain, it was put to the plaintiff under cross-examination. She also denied speaking to the plaintiff which was similarly not disputed under cross-examination of the plaintiff.

[34] The common cause facts relating to time, place, conditions, the travel of the parties, that the insured driver intended to make a right-hand turn into Headingly Road, where the plaintiff and his motorcycle landed after the collision, where the insured driver stopped after the collision, that the motorcycle moved to the left to avoid the collision, the photographs, and the lack of police attendance, all limited the issues to be determined. The crisp issue is whether the insured driver had executed an inopportune right-hand turn into Headingley Road across the line of traffic of the plaintiff

thus causing the collision.

[35] In *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) the court stated that credibility findings cannot be decided in isolation and should be considered in accordance with proven facts and the probabilities.[1]

[36] It is incumbent upon the court in deciding whether the plaintiff has discharged the onus of proof to consider the credibility of the witnesses which is inextricably linked to the considerations of the probabilities of the case.[2]

[37] In *Stellenbosch Farmers' Winery Group v Martell Ex Cie and Others*,[3] the court outlined the technique to be employed in resolving the factual disputes that arise from the evidence.

[38] In my view, the plaintiff was an excellent witness who testified in a clear and consistent manner in relating the events of the day. He did not seek to embellish or over-emphasize the actions of the insured

driver.

[39] He was unshaken during cross-examination and remained steadfast in the assertions that he had made during his evidence in chief. Despite his apparent youth, he was a calm and impressive witness.

[40] His version is corroborated in all material respects by Shereen du Plessis who was similarly an excellent witness. Her description of how she came to witness the events of the day is both reasonable and

plausible. Her evidence was direct and to the point. She readily conceded, under cross-examination that the area where she standing

was below street level but unequivocally stated under re-examination that she could see the cars on the road.

- [41] Ms. Walton was a far from an impressive witness. Her evidence was confusing and contradictory. Her recollection of the events appeared tailored to suit the questioning. She was evasive and embellished upon her evidence, frequently sprinkling it with unnecessary and unsolicited facts.
- [42] Her evidence was also at variance with portions of the version put by defence counsel to the witnesses. When pressed for explanations, she displayed selective memory recall.
- [43] As correctly submitted by the plaintiff's counsel, the onus is upon the plaintiff to establish the negligence of the insured driver and upon the defendant to prove contributory negligence. During argument, the issue of contributory negligence was seemingly abandoned negating any further consideration thereof.
- [44] The dispute relates to whether the insured driver was executing a right-hand turn into Headingly Road in the line of travel of the plaintiff on Calendon Street when the collision occurred or whether the plaintiff collided with the insured driver whilst she was stationary on her side of the road before executing the right-hand turn. The two versions are irreconcilable.
- [45] As mentioned supra, the evidence of the plaintiff and the independent witness, Ms. du Plessis was excellent and I have no reservations in accepting their evidence.
- [46] On the contrary, the evidence of the insured driver was riddled with both internal and external contradictions, dubious recall of the events, inconsistencies, and embellishment. The inescapable conclusion was that the evidence was concocted to exonerate her from any liability and to throw the plaintiff under the proverbial bus.
- [47] The probabilities favour the plaintiff's version if regard is had to the common cause facts outline supra, the quality of the evidence presented by the plaintiff and, as correctly submitted by the plaintiff's counsel, the lack of challenge to the plaintiff's version by the defendant's counsel. In essence, the evidence tendered by the plaintiff is unassailable.
- [48] It is directly contrasted with the somewhat farcical evidence of the insured driver that the plaintiff collided with her stationary vehicle "head on" and thereafter manoeuvred his motorcycle perpendicular to her vehicle to side swipe it on the right-hand side. This was nothing more than a calculated attempt to align her version with the signs of the damage to both vehicles as depicted on the photographs.
- [49] This was further inconsistent with the place where the plaintiff, his motorcycle and the insured driver were after the collision. The version is neither plausible nor probable in the circumstances of the matter.
- [50] What emerged clearly in considering the evidence was that the plaintiff had the right of way^[4] at the time of the collision and that the insured driver made an inopportune right-hand turn into Headingly Road in the line of travel of the plaintiff at a time when he could not reasonably be expected to take evasive action. This was the sole cause of the collision.

- [51] In the result, I find that the insured driver was solely negligent in causing the collision which occurred on 15 April 2018.
- [52] Counsel agreed that the costs should follow the result and defendant's counsel conceded that on a previous occasion a tender of costs of two counsel was made to the plaintiff. I accordingly see no reason not to award such costs.
- [53] In the circumstances the following order will issue:
1. The defendant is liable to plaintiff for 100% of such damages as may be proven or agreed in consequence of any injuries sustained by him in the collision which occurred on 15 April 2018, such collision having been occasioned solely by the driver of motor vehicle B[...], namely Yolande Ann Walton.
 2. The defendant is ordered to pay the costs of trial on the merits, including the costs of two counsel and the reasonable costs of the photographs and the inspection in loco.

S A COLLETT

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv J Nepgen and Adv K Williams Instructed by PBK Attorneys Gqeberha
For Defendant: Adv I Dala Instructed by The State Attorney, Gqeberha

- [1] Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) 589G.
- [2] National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E).
- [3] 2003 (1) SA 11 (SCA) paragraph 5.
- [4] Sierborger v South African Railways and Harbours 1961 (1) SA 498 (A) at 504 H.

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