

SOUTH AFRICA / JUDGMENT

Kotze v Road Accident Fund (16725/2022) [2025] ZAWCHC 303 (24 July 2025)

[2025] ZAWCHC 303**COURT**

Western Cape High Court, Cape Town

BEFORE

R K Parker

CASE / FILE NUMBER

16725/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN CAPE****DIVISION, CAPE TOWN)****REPORTABLE****Case****No: 16725/2022**

In the matter between:

RYNO

KOTZE

Plaintiff

and

THE

ROAD ACCIDENT

FUND

Defendant

Matter heard : 5 February

2025; 20 March 2025

Heads of argument filed : 30 May 2025
Judgment delivered : 24
July 2025
ORDER
a)
Defendant was the sole cause of the collision.
b)
The defendant is liable to plaintiff for 100% of his damages that may
be proven
at the quantum hearing.
(c)
The defendant is liable for plaintiff's costs on a party and
party scale such
costs to include.
(i)
Costs of counsel on scale B.
(ii)
The qualifying fees of the expert witness Mr Barry Grobbelaar.

JUDGMENT

PARKER AJ

Introduction

- [1] This judgment on the liability or the apportionment thereof pertaining to that of plaintiff who on 9 June 2021 on a gravel road in Saron, Western Cape, was injured in a motor vehicle accident when a tractor with registration number C[...] driven at the time by Nicholas Thomas Willemse (hereinafter referred to as Mr Willemse) collided with the plaintiff's Yamaha motorcycle bearing registration number C[...] which was driven at the time by the plaintiff.
- [2] The plaintiff attributed sole negligence caused by Mr Willemse in that he drove in a negligent manner. The defendant opposed the summons and pleaded that the insured driver was not negligent and pleads that the collision was caused by the sole and exclusive negligence of the plaintiff, alternatively if it should be found that the insured driver was negligent, that there should be an apportionment of negligence.

The issues for

determination

- [3] The issues are:

3.1 whether the plaintiff proved that the insured driver was negligent.

3.2 If the plaintiff proved that the insured driver was negligent whether the plaintiff proved that such negligence was causally connected to the collision

3.3 if it should be found that the insured driver was negligent whether an apportionment of negligence applies and if so, to what extent.

The evidence

- [4] The plaintiff testified that around midday, he was on his way to eat lunch at the farm manager's house on the farm. He was travelling on his motorcycle on the gravel road (dirt road) alongside the naartjie orchards, when the tractor driven by the insured driver towing a spray tank, suddenly appeared out of one of the orchards and turned directly across his line of travel. Plaintiff was wearing a helmet and travelling at a speed of 20 km/h at the time of the collision. The weather was clear, and the road was not in a terrible condition albeit it had some thick sand.
- [5] The plaintiff only saw the tractor for the first time when it pulled out of the orchard in his line of travel which was very close to him at that stage. The orchards were described as in rows meeting the gravel road at a sharp angle and not a 90 degree angle. According to his evidence the insured driver had to take a wider turn into the gravel road because of the sprayer that it towed, to ensure that it did not jack knife.
- [6] As the plaintiff was on his motorcycle he kept a close watch on the unobstructed road and as a result of the loose sand, he was concentrating on the road as feared if he looked left or right , he may lose his balance on the thick sand. He describes how he slammed his brakes and attempted to avoid the accident by swerving to his left.
- [7] The material damages to both vehicles were pointed out by the plaintiff, to the front of the tractor especially against the weights used to weigh down the tractor at the front. The motorcycle came to a rest in the direction that he was traveling, and the plaintiff lay close to the right front wheel of the tractor after the collision occurred.
- [8] The collision occurred on the right hand side of the motorcycle, specifically the fuel tank area and the cooling fins of the engine. It was put to the plaintiff that the insured driver's version of the point of impact was on the front left wheel of the tractor and that the plaintiff flew across the bonnet of the tractor and landed on the right hand side of the tractor. This version was denied by the plaintiff as the damage to his motorcycle does not support the insured driver's version.
- [9] Under cross examination, it was put to the plaintiff that the insured driver's version was that he had put out warning boards at the entrance to the area of the orchards where they would be spraying. This was denied by the plaintiff as he had not seen any such warning boards in his two years of working on the farm nor were there any warning boards on the day of the accident nor were there any red flags warning passers-by of the presence of a tractor.

- [10] It was also put to the plaintiff under cross examination that the spray tank attached to the rear of the tractor has a tower with the spraying nozzles attached and that such tower would have risen above the line of trees implying that he ought to have seen it. This plaintiff denied that the height of the sprayed tower would have been visible above the tree line since the trees were already fully grown, very dense and therefore would have been taller than the spray tower.

The trees were already higher than the spray tower and the sprayer would spray the trees on the naartjies rather than the top of the trees.

- [11] As to what steps the plaintiff had done to avoid the collision his answer was none which he echoed through his cross examination and testified that he tried to avoid the collision but could do nothing more than what he had done.
- [12] Mr Grobbelaar was called as an expert witness. He is a mechanical engineer that specializes in the reconstruction of motor vehicle accidents with experience in forensic mechanical engineering. His evidence was based on his opinion formed by looking at the photographs provided and noted that there was some damage to the front and bottom of the weights. He did not physically inspect the tractor nor was he permitted to do a site inspection as he was not provided access to farm. Consequently, his report was drawn on information provided to him by various affidavits, interviews, documents, photographs and Google Earth images. From the above resources he could point out the location of the accident, indicating the direction of travel of the parties, and in which direction the tractor had turned. He testified that the orchard had a sharp angle, and that the tractor would have to make a wide turn to the other side of the road to come back because of this angle. Of importance, he noted that the road was approximately 6 meters wide. He also examined the photographs of the material damages to both vehicles and confirmed that the damage was to the front right of the motorcycle specifically damage of the cooling fins of the engine and the right side of the fuel tank whilst the tractor was damaged along the weights attached to the front of the tractor as shown by horizontal scrape marks.
- [13] In his expert opinion, his evidence was that when considering the damage to both vehicles, it was probable that the motorcycle collided with the weights attached to the front of the tractor and the weights rammed into the right side of the motorcycle in the vicinity of the fuel tank and engine cooling fins. It was probable that the vehicles were close to being at a right angle relative to one another when the collision occurred. Under cross examination the expert witness answered that one could not exclude that the marks on the weight could have been old marks.

[14] In the reconstruction function of how the collision had occurred Mr Grobbelaar testified that the insured driver would have entered the gravel road from the left to the right hand side of the photograph which was exhibited and once the insured driver had passed the last three in a row of trees, he would have had a clear visibility all the way down the gravel road. Photographs of the tractor was shown to the expert who explained for the defendant to have seen the

motorcycle approaching, the insured driver sits just forward of the axle of the rear wheel of the tractor, in other words the rest of the tractor projects in front of the driver, this has the implication that the front of the tractor(the nose) would project about 2.5 meters into the gravel road (considering that the road is 6 meters wide - would make it nearly halfway) before the insured driver would be able to see down the road.

[15] In testing the above against the version of the insured driver gleaned from the statement provided to Mr Grobbelaar, his opinion is that the insured driver did not stop before exiting the orchard when he entered the gravel road, bearing in mind that he also leaned over to the right in order to close the spraying taps and only looked left when the tractor was already out of the orchard with the front wheels on the gravel road.

[16] Mr Grobbelaar went to lengths to explain the measurements of the gravel road, the distance between the end of the orchard and the start of the gravel road, as well as the specifications of the tractor. In his view it would have been possible for the insured driver to have come to a stop at the edge of the orchard and to have had a clear view of the gravel road before proceeding to execute his turning manoeuvre. Had the insured driver done the latter ,the insured driver would have seen the plaintiff travelling along the road and could have waited for him to pass before entering the gravel road.

[17] To explain it further having regard to the plaintiff, Mr Grobbelaar testified that if the tractor had emerged from the row of trees and then stopped the plaintiff would have been able to see the tractor as he had an unobstructed view down the road. Had this occurred, the plaintiff would have been able to stop his motorcycle by applying his emergency brakes prior to the tractor colliding with the motorcycle. Under cross examination, the insured driver's version of the point of impact was put to Mr Grobbelaar that it was on the front left wheel of the tractor and that the plaintiff flew across the tractor and landed on the right hand side of the tractor. Mr Grobbelaar replied that the latter statement was highly improbable and further improbable that it was the tractor's tyre that caused the damage to the motorcycle. This he said is because the damage sustained to the motorcycle could not have been caused by a blunt impact such as the wheel of the tractor. Such impact was only caused by a narrow point of impact such as the weights of the tractor.

[18] Therefore the conclusion drawn by the expert witness is that the plaintiff travelling at 20 kilometers per hour and the tractor having been 5.5 meters in front of him when it pulled out of the orchard would have needed 1.1 seconds from the start of braking for the motorcycle to have come to a halt to avoid the collision viewed from the insured driver's

perspective. It would have taken the tractor 2 seconds to reach the point where the collision occurred. The average reaction time is 1.5 seconds there would have only been 0.5 seconds of braking time before the collision occurred, thus pointing to the sole negligence of the defendant in that the plaintiff would not have been able to brake in time to avoid the collision.

- [19] It was also put to Mr Grobbelaar during cross examination that it was the instruction of the farm manager to the insured driver that he was not to stop at any cost whilst he was busy spraying the naartjie trees. Mr Grobbelaar replied that he could not comment on such an instruction however went on to state that if the driver would blindly adhere to such an instruction this would mean that the driver would drive into the road without heed of other road users. The issue of the nozzles of the sprayer protruding above the line of trees as defendant needed to spray the very top of the trees, Mr Grobbelaar referred to the photograph of the spray tower and specifically noted that the nozzles at the top of the tower are angled in a manner that prevents them from spraying downwards and instead sprayed outwards and concluded that as such, the tower

could not have been tall enough to protrude above the line of the trees in order to spray the top of the trees.

- [20] The insured driver, Mr Willemse testified had been working on the farm for 12 years and six months as a spray man and monitor and he was instructed not to stop inside the orchards as the tractor had been calibrated to spray a certain dosage on trees and that he cannot spray more than the allowed dosage. Before commencing his spraying activity, he would plant a sign at the bottom of the orchard depicting a tractor and spraying trailer placed at the start of the

orchard as well as one at the top of the orchard. The boards were described as being approximately 30cm by 30cm and were attached to a small pole which was stuck into the ground next to the road, however, that the boards could not reach a height of more than 40cm above the level of the ground.

- [21] The insured driver admitted to not looking before entering the gravel road and that he had made his turn without consideration whether there were other users on the gravel road.[1] There were also inconsistencies raised about the affidavit he had deposed to obtained by a Mr Colyn. There is no need for me to dwell too much on this as the insured driver denied the contents that the motorcycle collided with the weights of the front of the tractor and that he disagreed with certain contents at paragraph 5 and 6 thereof alluding those contents of the affidavit obtained by Mr Colyn had been added the affidavit. He took issue with regard to the contents of paragraph 6 which should be paragraph 5, was not his own.[2] During the trial he testified that he was instructed to spray the naartjie orchards that morning and he was not to stop while he was spraying the orchards, and he travelled at the low speed as instructed.

[22] The insured driver conceded that the plaintiff may not have seen the warning boards and confirms there were no assistant with a flag to warn other road users of the spraying. Furthermore, photographs of the scene of the accident were presented to the insured driver and he was shown where the plaintiff was lying on the ground subsequent to the collision and seemed to suggest that someone had moved the motorcycle. He insisted that when he exited the orchard he looked left and right and thereafter turned back to his right hand side to turn off the sprayer and once he had started the turning manoeuvre and turned back to face forward that he saw the plaintiff coming from the left hand side about 5 to 10 metres away from the tractor and that he was already in the road at that time and he saw the plaintiff applying brakes and sliding in the sand causing the insured driver to apply his brakes.

[23] Under cross examination the testimony of the insured driver regarding his observations of looking left and right as he was exiting the orchard that his view was still obscured by the trees, his response was that that is why he had set out the warning signs. Importantly, he conceded that after the last tree he had leaned over top his right to close the spray nozzles [3]. The insured driver could not tell what speed the plaintiff was riding at and therefore could not dispute that this plaintiff's

version that he was only travelling 20 kilometres per hour. Also, the insured driver testified that after the collision the motorcycle was on the left of the tractor and the plaintiff on the right hand side.

[24] It was the evidence of the insured driver that there was nothing he could do to prevent the accident as it happened suddenly. He also conceded that there was a possibility that the spray tower might not have been visible at the time of the accident. Under cross examination he also confirmed that the naartjie trees are on a ridge, so the base of the trees is higher than where the tractor is in the orchard, and a further concession was that the naartjie trees were bigger at the time when the accident occurred as it was not due for pruning.

Test for negligence

[25] Counsel for both parties articulated that the onus rests on the plaintiff who bears the onus of proving negligence which caused the damages suffered on a balance of probabilities. The test for negligence was stated in *Kruger v Coetzee* [4] and I need not repeat the findings. Furthermore, the defendant must provide evidence to disprove the inference of negligence on its part failing which he risked the possibility of being found to be liable for damages suffered by the plaintiff.[5]

[26] On the other hand, where the defendant has in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish a legal basis on the part of the plaintiff on a balance of probabilities.[6]

Apportionment of Damages Act 34 of 1956

- [27] In terms of section 1(1)(a) of the Apportionment of Damages Act, a trial court has the discretion to reduce plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where the court is considering an apportionment, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties.
- [28] In AA Mutual Insurance Association Limited v Nomeka,[7] turning across the line of oncoming traffic is inherently a dangerous manoeuvre placing a stringent duty upon a driver who intends

executing such manoeuvre and in order to do so, the driver must properly satisfy himself that the road is safe when choosing the opportune moment to do so. The duty of the driver requires a driver to scan the road ahead continuously for potential

obstructions.[8]

Facts applied to the law

- [29] Counsel for the insured driver in quoting National Employees General Insurance Company Limited v Jaggers[9] was of the view that where there are mutually destructive versions, and plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false and false or mistaken and therefore, falls to be rejected.
- [30] I do not agree that there are two mutually destructive versions and in the following paragraphs I will set out why I am of the view that the plaintiff's evidence is more probable and truer, and that the defendant's version stands to be rejected.
- [31] Firstly, the insured driver was an experienced farm employee, therefore whether the reasonable person in the position of the insured driver would have foreseen the possibility of his conduct by executing the manoeuvre causing injury to another and whether the reasonable person would have taken reasonable steps to guard against such occurrence. In this regard on the insured driver's own evidence , he did not look before exiting the orchard as he was concentrating on the spray nozzles. It is clear that he did not have a view of the whole road before entering into it.
- [32] This manoeuvre, together with the instruction not to stop the tractor while spraying, goes against the reasonable person in the position of an insured driver, would have foreseen the possibility of a vehicle travelling down the road and that turning across the entire road might cause injury to a vehicle travelling down the road or road users who could not see the tractor suddenly emerging from the orchard whilst not stopping.

- [33] According to the expert witness Mr Grobbelaar there were several opportunities for the insured driver to have taken the necessary steps to have avoided the collision had he stopped past the edge of the orchard or had he emerged from the row of trees and then stopped. In that event , the plaintiff would have been able to see the tractor and the plaintiff would have been able to stop his motorcycle earlier.
- [34] Even if I accept that the plaintiff concession that because the sand on the dirt road was so thick he could not look left and right as he was driving in the middle of the road and feared losing his balance, in my view cannot be used be against him. When one weighs this evidence as against the concessions made by the insured driver, there is no escaping that there was by far a greater duty on the defendant.
- [35] The insured driver cannot escape that on his own version he failed to stop. The question then remains what more could the plaintiff have done in those circumstances. His own and that of the expert witness was none. It would have been too late. The expert witness explained the calculations based on speed, distance , reaction and timing. In the result the insured driver failed to satisfy himself that it was safe and opportune to carry out the manoeuvre that he did, pointing to him having failed to keep a proper lookout and ultimately, he failed to exercise the level of care expected of a reasonable person in his position at the time of the collision.
- [36] The insured driver's failure to take reasonable steps to avert such a reasonably foreseeable danger result in the insured driver being negligent and the sole cause of the collision.
- [37] In considering the defendant's plea of contributory negligence, in my mind, it was pleaded only to reduce its liability and no more. The court is satisfied that there is nothing more that the plaintiff could have done to have avoided the collision . Accordingly, the plaintiff has proven that the insured driver was solely responsible for the collision and accordingly no apportionment is to be applied.

Costs

- [38] There are no reasons to depart from the norm that costs follow the result.

Order

- [39] Having heard the submissions made by counsel it is ordered:
- b) The defendant he's liable to plaintiff for 100% of his damages that may be proven at the quantum hearing.
 - (i) Cost of counsel on scale B.

R K PARKER

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv Pierre Rabie

Instructing Attorney:

K G Kemp Attorneys

Mr K Kemp

For the Respondent:

State Attorney: Mr F Goosen

Instructing Attorney:

Mr A Hoosen - RAF

Hearing Date:

20 March 2025

Judgment Date:

24 July 2025

The judgment is delivered by electronic submission to the parties and their legal representatives.

[1] Sworn affidavit of the insured driver

[2] page 11 line 15 of the transcript

[3] Pages 15- 16 lines 20-10

[4] 1966

(2) SA 428 (A) AT 430E -G

[5] Supra De Kock

[6] supra para 22

[7] 1976

(3) SA 45 (A) at 52E-F

[8] Nogude vs Mniswa 1975 (3) SA 685 (A) at 688-D

[9] 1984

(4) SA 437 (E) at 44O E-G

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