

SOUTH AFRICA / JUDGMENT

Kwathani v Road Accident Fund (71348/11) [2013] ZAGPPHC 174 (14 June 2013) [2013] ZAGPPHC 174

COURT

North Gauteng High Court, Pretoria

BEFORE

Chetty

CASE / FILE NUMBER

71348/11

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NOT

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IN THE NORTH GAUTENG HIGH COURT.

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case

No: 71348/11

DATE:14/06/2013

In

the matter between:

ROFHIWA

FULUFHELO

KWATHANI.....Plaintiff

and

ROAD

ACCIDENT

FUND.....Defendant

JUDGMENT**CHETTY, AJ :**

- [1] The plaintiff in this matter instituted action against the defendant for a total sum of R4m in respect of damages resulting from bodily injury which she allegedly sustained as a result of being involved in a collision with a motor vehicle on the night of 24 September 2009 at or near Tshidzui Road, near Makhado, Limpopo Province. At the time of the accident, the plaintiff was a pedestrian and the insured vehicle was being driven by one Ndonyana Solomon ('the insured driver').
- [2] The plaintiff in her particulars of claim alleges that collision was caused due to the negligence of the insured driver of motor vehicle bearing registration number and letters DWB 536 GP, in one or more of the following respects:
1. He failed to keep a proper lookout;
 2. He failed to apply the brakes timeously or at all;
 3. He unreasonably placed himself in a situation of sudden emergency and subsequently failed to act in accordance with such situation;
 4. He travelled at an excessive speed under the circumstances;
 5. He failed to avoid the accident a collision when, by the exercise of reasonable care and skill, he both could and should have done so;
 6. He failed to maintain any, or alternatively, sufficient control over the insured motor vehicle;
 7. He drove the insured vehicle knowing or in circumstances where he could reasonably established that it had defective breaks or was in an unroadworthy condition;
 8. He failed to give any warning of approach of the insured motor vehicle;
 9. He encroached onto the path of travel of the plaintiff;
 10. He disregarded the interests of other road users, particularly those of the plaintiff.
- [3] The defendant denies that the negligence of the insured driver was responsible for the collision, and that if any negligence is found, it denies that such negligence causally contributed to the collision. In the alternative, the defendant pleads that if it is found that the insured driver was causally negligent, then in such circumstances alone the defendant pleads that the collision was caused by the joint and contributory negligence of the driver of the insured vehicle and the plaintiff. In such circumstances, the defendant pleads that the Court order a just apportionment of any damages which the plaintiff may be found to have suffered in terms of the Appointment of Damages Act No 34 of 1956, as amended.

- [4] The defendant further contended that the plaintiff was negligent in one or more of the following respects:
1. She failed to keep a proper look out;
 2. failed to avoid a collision when with the exercise of reasonable care and skili she could have and should have done so;
 3. She failed to satisfy herself as to the presence of other traffic on the road, alternatively, failed to respect the rights of other road users;
 4. She failed to exercise the care which a reasonable person would have exercised under the prevailing circumstances.
- [5] By agreement between the parties, the Court agreed to a separation of the issues of liability and quantum and the matter proceeded on the issue of liability only (Rule 33(4)). The Court was therefore only required to determine whether the cause of the collision was the negligent driving of the insured driver as alleged in the plaintiff's particulars of claim, and if so, whether the insured driver was solely responsible for the accident or whether the insured was contributory

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- [6] The plaintiff testified that on 24 September 2009 she and a friend had earlier visited Tshiozwi. near Makhado, Limpopo Province, where they had listened to traditional Venda music. Whilst she confirmed that alcohol was on saie at the function, she stated that she did not drink on this occasion. She testified with reference to the Accident Sketch Pian that she was walking along Tshidzui Road with her friend in an easterly direction, heading towards her home in Madoubidzha. which is close to Tshiozwi. The road surface was tarred and the plaintiff and her friend walked on what she described as the 'shoulder' of the road, which was paved with gravel. This part of the road resembled a pavement, and was only used by pedestrians. The plaintiff also testified that the shoulder of the road was narrow, and for that reason her friend walked ahead and she followed behind. As they walked, they intermittently stopped to signal approaching vehicles that they were hitch-hiking, and wanted a lift.
- [7] According to the plaintiff, they saw a car approaching them from the west, on the same side of the road as they were walking. The driver of the vehicle seemed to be driving in a zigzag manner and appeared to have very bright lights on at the time. In light of the apparent unstable manner of driving, the plaintiff and her friend decided that they would not attempt to hitch a lift with this particular car. The plaintiff then turned, facing east according to the accident sketch pian, and continued walking, with her friend in the front. As she momentarily turned around, she saw the car imminently before the collision. Thereafter, she only recalls waking up in hospital. She testified that her friend with her on the evening, died as a result of injuries sustained in the collision.

[3] The cross examination of the plaintiff produced no inconsistencies in her evidence and her version remained essentially intact. When questioned as to what she did, having seen that the insured driver was heading in the direction of herself and her friend, the plaintiff responded that they continued walking, except that they did not signal to the driver that they were in need of a lift. When questioned as to whether there was anything that she could do to avoid the collision, the plaintiff responded that she was walking on the shoulder of the road which was covered in gravel. There was no further distance away from the road that she could walk due to the number of market stalls lining the road. No further evidence was led on behalf of the plaintiff.

[9] Mr Kanye, who appeared for the defendant, informed the Court that he did not intend calling any witnesses. The defendant then closed its case. See

Gaiente v Dickinson 1950 (2) SA 450 (AD) where the Court held at 465 :

"It was not advisable to lay down a general rule as to the effect that may properly be given to the failure of a party to give evidence on matters unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant himself was the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of an explanation from the defendant to select out of the two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant."

The failure to call the driver of the insured vehicle is surprising especially as the defendant knew the identity of the driver and that this matter was set down for trial almost nine (9) months ago. It would seem as though little, if any, preparation had been given to the defendant's case, despite the persistence in the matter proceeding to trial.

[9] Counsel for the plaintiff informed the Court that it was common cause between the parties that an accident did occur on the date alleged by the plaintiff and that the plaintiff was injured as a result of the collision involving motor vehicle DWB 536 GP.

[10] Counsel for the plaintiff submitted that in light of the failure of the defendant to call any witnesses in rebuttal to the evidence of the plaintiff, this Court is obliged to find in favour of the plaintiff. It was further submitted that notwithstanding the plaintiff being a single witness, there was no reason to reject her evidence. In *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E the Court held that

"there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the evidence of a single witness."

The Court must consider the merits and demerits of evidence, and having done so, must be satisfied that the witness has told the truth. There was nothing in the demeanour of the plaintiff that would suggest she was being evasive, un-cooperative or contradictory in her evidence, and accordingly there would be no basis to reject the plaintiff's version as being false. She came

across as an honest witness. When asked whether there was alcohol available at the traditional music festival which she attend before the accident, she responded in the affirmative, but added she did not consume alcohol that evening.

- [11] Counsel for the defendant submitted that if I were to find in favour of the plaintiff. I should give consideration to the application of the Apportionment of Damages Act in determining the extent of the defendant's liability. In this regard, counsel submitted that the plaintiff had not shown what steps she took to avoid the collision, particularly in circumstances where the plaintiff knew prior to the collision that the driver of the insured motor vehicle was approaching in a reckless manner, and in light of her evidence that she carried on walking in the same direction that the insured vehicle was travelling without doing anything in anticipation that the vehicle would collide with her. The problem with the contention of the defendant is that it has not laid the basis or foundation for this Court to apportion blame to the plaintiff. The defendant failed to call any witnesses which may have provided an explanation for why, if at all, the driver drove in the manner as alleged by the plaintiff. The plaintiff however testified that she was walking on the shoulder of the road at the time of the collision, and that she had nowhere else to go to avoid the impact of the insured vehicle. She further explained that the road surface was tarred and the shoulder of the road on which she and her friend were walking was paved with gravel. This portion of the road is reserved for the exclusive use by pedestrians.
- [13] In support of the submission that I should apply a 70/30% apportionment, counsel for the defendant relied on *Gaba v Minister of Police* [1975] (2) SA 220 (EDC) where the court assessed that the plaintiff had been 30% negligent. In that case, the plaintiff was walking to town on a busy road and as she passed a narrow part of the side walk, adjacent to a beer hall, she entered a part of the road, which although regularly used by pedestrians, was nonetheless traversed vehicles. Although the driver conceded negligence, he alleged that there had been contributory negligence on the part of the plaintiff. The Court found that the plaintiff had chosen to walk with his back to the traffic, without keeping a watch for vehicles from the rear, and had failed to walk closer to a fence when circumstances permitted him to do so, resulting in some negligence on his part.
- [14] I find that the above case is distinguishable from the present matter in that the road on which the plaintiff was travelling was not busy, and although there was no lighting, the plaintiff at no time gave evidence that she walked on the road as opposed to the 'shoulder'. She and her friend, although walking in the same direction as the insured vehicle, regularly stopped and turned to look back for approaching vehicles, as they were hitch-hiking home.

- [15] In terms of section 17(1) of the Road Accident Fund Act 56 of 1996, the defendant is “obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury ... is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle" concerned.
- [16] The onus was on the plaintiff to show, on a balance of probabilities, that the injuries were directly caused by the driving of the insured driver, alternatively that it is causally connected with the driving of the insured driver at the relevant time, and that such driving was. therefore, a sine qua non thereof. (See *Barkett v S.A. National Trust and Acceptance Co. Ltd* 1951 (2) SA 353 (A) at 365; *Wells v Shield Insurance Co. Ltd* 1965 (2) SA 865 (C) at 868-871). Referred to in *Lupke v Road Accident Fund* (unreported decision of Ndlovu J, 12 March 2009)
- [17] In my view,-on the basis of the evidence presented by the plaintiff, I am satisfied that the injuries sustained by her were due 100% to the negligent driving of the insured driver. A reasonable person in the position of the insured driver would have foreseen the reasonable possibility that his conduct could cause injury to another person, but the insured driver failed to take any such steps to avoid the collision. The plaintiff was a pedestrian walking on a part of the road not traversed by vehicles. In my view no negligence can be attributed to her.

In the result the following order is made:

- 1.The collision under consideration was caused solely by the negligence of the insured driver
2. The plaintiff is entitled to 100% of the damages that she may prove, or which may be agreed upon.
3. The plaintiff is awarded costs of suit on a party and party scale in respect of the merits of the claim.

CHETTY AJ

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

Parties

For the Plaintiff: Adv Koalepe

Instructed by: Chueu Attorneys

For the Defendant : Adv J.T Kanyane

Instructed by: Fourie Fismer inc

Date, of Hearing: 23 May 2013

Date of Judgment:14 June 2013

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