SOUTH AFRICA / JUDGMENT

Lekgothoane v Road Accident Fund (37965/2016) [2017] ZAGPPHC 657 (29 September 2017)

[2017] ZAGPPHC 657

COURT
North Gauteng High Court, Pretoria

BEFORE
Seima

CASE / FILE NUMBER
37965/2016

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IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO :37965 /2016
NOT
REPORTABLE
OF
INTEREST TO OTHER JUDGES:NO
REVISED
29/9/2017
In

the matter between: LEKGOTHOANE MALESELA ISAAC PLAINTIFF
and
THE ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

SEIMA AJ:

[1] The plaintiff has instituted an action against the defendant in terms of the Road Accident Fund Act 56 of 1996, for damages ar ising from injuries sustained in a motor vehicle collision which occurred on 09th November 2011 at approximately 15H00. The collision occurred at the intersection of River Street (" River") and Malibongwe Road ("Malibongwe"), Kya Sands, between motor vehicles a red Hyundai i120 with registrations ZRL 100 GP then being driven by Ms. Thando Scemisi ("the insured driver"), and motorcycle with registration ZHK 871 GP ("the Gold LB600 Hornet") then being driven by the plaintiff.

[2]The plaintiff's action against the defendant is based on the negligence of the insured driver. The defendant denies that the insured driver was negligent at all or that he contributed to the cause of the collision, and avers that it was the plaintiff who was the sole cause of the collision. The defendant avers further that should the court find that the insured driver was negligent, then the plaintiff also negligently contributed to the cause of the collision.

[3]By agreement between the parties the matter proceeded only on the question of liability. The issue of quantum was held over for later determination. An order in terms of Rule 33 (4) of the Uniform Rules separating the issue of merits from quantum.

[4] The plaintiff led the evidence of one witness being himself. The defendant led the evidence of the insured driver only.

[5]From the evidence it became common cause that:

5.1the collision occurred at the intersection of River Road and Malibongwe Road , Kya Sands.

5.2River Road proceeds east towards the west and has two flow of traffic flowing to each directions.

5.3Malibongwe Road proceeds from north to southerly direction.

ISSUE IN DISPUTE

[6]It is in dispute as to who caused the collision, the dispute being either:

1.that the defendant's insured driver caused the collision by failing to stop, alternatively by failing to take notice of the robot which was red against her; or

2.that the plaintiff failed to take notice of the robot controlled intersection, the robot being red against him at the time.

[7]The plaintiff's case is that the robot turned amber when he entered the traffic intersection, when the insured driver's failed to stop, alternatively failed to take notice of the red robot against her and proceeded through the intersection, thus colliding with the plaintiff's motorcycle.

THE PLAINTIFF'S EVIDENCE

[8]The plaintiff described the collision as follows:

1.he was heading west in River Road to the robot controlled intersection at Malibongwe and River, where he intended to proceed straight and head west along River Road;

2.when he was in what he refers as the traffic line from the above intersect ion, the robot turned amber;

3.there were cars stationary at the robot heading south to the north and on the other lane there were cars from south turning east;

4.he was travelling at a speed of fifty kilometres per hour, because of the vehicles that were turning to the east from the south, he could not see the vehicles on the other lane from the traffic that were travelling straight.

5.When he was in the middle of the intersection, the insured driver collided with his motorcycle.

[9]The plaintiff testified that he only saw the insured vehicle shortly before the collision as the other vehicles were obstructing his view.

THE DEFENDANT'S EVIDENCE

[10]Ms. Scimisi who was the driver of the Hyundai motor vehicle testified:

1.she was stationary for a few seconds at the robot controlled intersection, facing north along Malibongwe;

2. she saw the motorcycle approaching at a speed which she considered high in the circumstances;

3.she states that she thought that the driver of the motorcycle will be able to cross the intersection before the traffic along Malibongwe Road moved.

4.the motorcycle collided with her motor vehicle which sustained damages on drivers' door and rear passenger door on the driver's side and the bonnet and the front right fender; the damages alleged by the insured driver's vehicle were never disputed by the Plaintiff

5.she drove or moved her motor vehicle for about fifteen metres·or so before she stopped.

THE TEST TO BE APPLIED WHERE THERE ARE MUTUALLY DESTRUCTIVE VERSIONS

[12]

12.1 It is trite that the plaintiff always bears the onus of proving negligence on a balance of probabilities.

See: Arthur v Bezuidenhout and Mieny 1962 (2) SA 560 (A) at 576G; Sardi and Others v Standard and General Insurance Co Ltd 1977

(3) SA 776 (A) at 780CH and Madyosi and Another v SA Eagle Insurance Co Ltd (19901 ZASCA 65; 1990 (3) SA 442 (E) at 4440F.

[13] The evidence of the Plaintiff and Defendant are mutually destructive as to how the accident occurred or took place. The plaintiff

testifies that the traffic light or robot was amber for him and the on the other hand, the insured driver insists that the traffic light has just turned green for him.At the conclusion of the viva voce evidence, this court was faced with two mutually destructive and irreconcilable versions as to how the collision occurred. In this regard Nienaber JA stated in the decision of Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others 2003 (1} SA 11 SCA, as to what technique to be employed by the courts in resolving factual disputes in order to come to a conclusion. The court is required to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. In the present instance, two issues arise for consideration:

13.1which of the two irreconcilable versions is more probable;

13.2 and secondly the duties upon a driver who enters a traffic light controlled intersection.

[14]On the question of onus, it has been held in previously decided cases that a party who asserts has a duty to discharge the onus of proof. In African Eagle Life Assurance Co Ltd v Cainer 1969(1} SA 553 (A) Coetzee J applied the principle set out in National Employers General Insurance Association v Gany 1931 AD 187 as follows:

'Where there are two stories mutually destructive before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version....."

[14]If Ms Scimisi's version that she saw the plaintiff's vehicle entering the intersection and had in mind or appreciated the possibility that the plaintiff was not going to stop and was of the mind that he will be able to cross the intersection before the flow of traffic on Malibongwe started moving , then this raises the obvious question whether the plaintiff first ensured whether it was safe to proceed into the intersection before she actually did so. However, based on the testimony of Ms Scimisi, I have no doubt that in accepting that the robot directing traffic along Malibongwe has just turned green.

[15]It is trite law that a driver of a vehicle entering an intersection with a robot green in his/her favour has a duty to look out for any traffic which might not yet be clear of the intersection and which might be about to cross his or her path of travel. Such driver has a duty to look out for any traffic approaching from his/her right and to take necessary precautions to avoid a collision.

[16]On her own version the insured driver was negligent by entering the intersection before the traffic crossing Malibongwe has cleared. I accordingly find that the insured driver negligently contributed to the cause the collision.

[17]Priority of right of way does not confer an absolute right of way on a driver. A driver entering an intersection when the traffic light signal is green in his favour, has to regulate his speed and entry so as not to endanger the safety of traffic which entered the intersection lawfully and which may still be in the intersection.

See: Santam Insurance Co. Ltd v Gouws 1985 (2) SA 630 (A) at 6 34 .

S v Desi 1969(4) SA 23 T

[18]Although I find the insured driver was negligent and part to be blame for the collision, on the evidence the plaintiff cannot be absolved of any blame, for the following reasons:

1.He testified that he entered the intersection, when the traffic has turned amber for him and the robot on Malibongwe was green for the traffic turning to the east. There will be no way that the traffic light, will open the right of way for the traffic from south turning to the east at the same time give right of way to the traffic that was proceeding straight along River Road.

In S v Van Stryp 1979 (2) 707 (ECD), at 709 H the Court said:

"A motorist approaching a green light should anticipate the possibility that it may change to amber and so control his vehicle's speed that he will be able to stop in a short distance and only in exceptional circumstances will he be forced to cross when the light is amber, for instance when he is very close to the white line with traffic following him. Had the Appellant approached the green light more slowly he would have been able to stop before the intersection, or have entered it at a speed which would have enabled him to stop within the intersection when he became aware of Mrs. Mulder's approach."

2.On his version, the plaintiff testified that he entered the intersection even when he could not see the traffic that was travelling straight in Malibongwe Road because of the traffic that was entering or turning east into River Road from Malibongwe Road.

3.It is clear to me that, the plaintiff entered the intersection when it was not opportune to do so and further that he did not keep a proper lookout .

4.Both the evidence of the Plaintiff and the Defendant were poorly presented.

[18]It is trite law that every roaduser owes a duty of care and consideration for any other road user. This duty includes a duty to keep a proper lookout. The duty of care requires of every driver to drive like a reasonable man who would be able to reasonably foresee the possibility of unforeseen consequences and act in accordance with such appreciation. Failure to act in accordance to the above is tantamount, in law to negligence.

See: Minister of Safety and Security v Van Duivenboden

[20021 3 All SA 741 (SCA).

[19]I find that both the plaintiff and the defendant are equally liable for contributory negligence resulting in the collision. In the circumstances I am of the view that an apportionment of 50/ 50 in favour of the plaintiff

is appropriate .

[20] I accordingly make an order as follows:

1. The defendant is liable for 50°/o of the plaintiff's proven or agreed damages.

2.The defendant is ordered to pay the plaintiff 's costs of suit.

EM SEIMA

ACTING JUDGE OF THE HIGH COURT

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