

SOUTH AFRICA / JUDGMENT

Mthobeni v Road Accident Fund (18/23608) [2019] ZAGPJHC 389 (18 June 2019) [2019] ZAGPJHC 389

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

18/23608

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 18/23608

In the matter of

MTHOMBENI FANNY MAPHINDA PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] This is an action instituted by Mr Mthombeni (“the plaintiff”) for damages against the Road Accident Fund (“the defendant”), as a result of bodily injuries he sustained arising out of an accident that occurred on the 5th of May 2017. The plaintiff was driving a minibuss and Mrs Maake (“the defendant’s insured driver”), was driving a Mercedes Benz.
- [2] The parties agreed to separate merits from quantum in terms of Uniform Rule 33(4).
- [3] The matter is before me to determine the merits with specific reference to the question of negligence.

BACKGROUND

[4] Common cause facts are that an accident took place at 21h00 on the 5th of May 2017 at the T-junction of Tonk Meter road and Vlakfontein road in Kwa-Thema, Springs.

[5] The plaintiff contended that the insured driver had been the sole cause of the accident in that;

“a. She failed to avoid a collision when by the exercise of reasonable care she could and should have done so;

b. She failed to keep the vehicle she was driving under proper and adequate control;

c. she failed to keep a proper lookout;

d. she drove at an excessive speed;

e. she failed to use the brakes of his vehicle timeously or at all;

f. she disobeyed the rules of the road;

g. she failed to pay due regard to the rights of the other road users;”

[6] The plaintiff contended that the insured driver came from his right hand side and collided with his vehicle, causing his vehicle to roll a few times. The defendant denies any negligence on the part of the defendant’s insured driver, alleging that it is in fact the plaintiff who was negligent in that;

“4.2.1 He failed to keep any, alternatively, proper look-out, and/or;

4.2.2 He failed to prevent the collision when he was, with the exercise of reasonable care in a position to do so;

4.2.3 He failed to pay due regard to the rights of the other users of the road;

4.2.4 He drove his vehicle at an excessive speed in the circumstances.

4.2.5 He failed to apply brakes to his vehicle timeously, adequately or at all.

4.2.6 He entered the intersection at an inopportune time, when it was dangerous to do so.”

EVIDENCE

[7] The plaintiff testified and then closed his case. The insured driver then testified and Mr Dlodlu, (a passenger in the insured driver’s car) testified on behalf of the defendant.

Evidence of Mr Mthombeni

[8] The plaintiff testified that he was driving along Tonk Meter road from East to west. He was intending to drive straight. He stated that the other vehicle appeared on his right-hand side and collided with his vehicle. This vehicle was driving along Vlakfontein road from North to South and there was a stop sign for that vehicle. The plaintiff testified that he had no

intention of turning right into Vlakfontein road and did in fact not turn right into Vlakfontein road. When the collision occurred his vehicle caught fire and he lost consciousness.

Evidence of the defendant's insured driver - Mrs Maake

- [9] The insured driver's testimony is briefly that she was driving along Tonk Meter road from West to East. As she was approaching the stop sign situated in Vlakfontein road, (which was on her left), she saw car lights from a car which was in the carriageway of oncoming traffic. The car lights were from a minibus which was stationary on the opposite side of the road, and this minibus intended to turn right into Vlakfontein road. The front part of the minibus was already in her lane. She believed that the minibus was waiting for her to pass. However, when she approached the minibus, it started moving further into her lane and collided with her car. She was driving at a speed of 70 kilometres per hour. She stated that this collision occurred roughly 4 meters from the T-junction intersection of Vlakfontein road and Tonk Meter road. When she was 2 meters away from the minibus, it started moving

into her lane and she could not swerve or apply brakes. She stated the damage to her car was on the right-hand side in the front. The damage extended from the middle of the bonnet, where the Mercedes logo is positioned, to the right front of her car.

Evidence of Mr Dlodlu

- [10] This witness stated that he was a passenger in the insured driver's car and they were driving along Tonk Meter road. At no stage does he say that the insured driver was approaching a stop sign and no stage does he say the insured driver was going to turn right. He corroborated the insured driving by saying that when they first saw the minibus it was stationary on Tonk Meter road waiting to turn right into Vlakfontein road. According to him the insured driver's car was 8 meters away from the minibus when he first saw the minibus. When the insured driver's bumper passed the minibus, that is when the minibus collided with the insured driver's car. This witness corroborated the insured driver by stating that the minibus collided

with the insured driver's car on the front right-hand side. He heard 3 bangs and the insured driver's car eventually ended up facing the stop sign in Vlakfontein road. The collision occurred in the middle of the intersection. He corroborated the insured driver's testimony that she was not driving at a high speed. He stated that there was nothing the insured driver could have done to avert the collision.

THE LAW

- [11] The conduct of the insured driver (executing a right turn), should be considered against the following principles confirmed by the learned Msimeki J in the case of *Jacobs v Road Accident Fund* (A402/2008) [2011] ZAGPPHC121 (13 June 2011), namely;

1. In the case of *AA Mutual Insurance Association Ltd v Noneka* 1976 (3) SA 45 (A), the learned Viljoen AJA stated that; to turn across the line of oncoming or following traffic is an inherently dangerous manoeuvre and there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so.
2. A driver turning to the right must signal his intention clearly and avoid turning until an opportune moment presents itself. (See in this regard *Welf v Christner* 1976 (2) SA 170 (N)).
3. He should only turn to the right once he has satisfied himself that there is room enough between his motor vehicle and the approaching vehicles to allow him to complete the manoeuvre safely. (See *R v Court*, 1945 TPD 133 at 134).
4. A driver is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunately turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary. (See *Van Staden v Stocks*, 1936 AD 18 and *Rustenburg v Otto*, 1974 (2) SA 268 (C) and *Old Mutual Fire and General Insurance Co of Rhodesia (PVT) LTD and Others v Britz and Another* 1976 (2) SA 650 (RAD).

[12] In the case of *Welf v Christner* (supra) it was stated that;

“...No systems of signals, however helpful that system might be, can be a substitute for or replace the fundamental duty of every driver to keep a proper look-out.”

[13] The learned author W.E Cooper in *Delictual Liability in Motor Law*, states at page 134 that the duty to keep a proper look-out entails;

“a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions.”

[14] The learned author W.E Cooper in *Delictual Liability in Motor Law*, states at page 167 that;

“(a) if [a driver] is driving a vehicle on a roadway of a public road where such roadway is intended for traffic in both directions –

- (i) He must steer such vehicle as near as circumstances may permit to the immediate left of the middle of the roadway on which he is travelling;”
- (ii) where the turn is at an intersection, he may not encroach on the right half of the roadway into or out of which he intends to turn, except in the intersection itself, but he must in any event pass to the left of any traffic island in such intersection or comply with the direction conveyed by any appropriate road traffic sign; ...

...To turn to the right across the line of following or approaching traffic is a potentially dangerous manoeuvre”.[my emphasis]

[15] In the case of *JM Grove v The Road Accident Fund* 2011 ZASC 55, the learned Judge Tshiqi at paragraph 7, 8 and 11 stated;

“[7] ...There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available acts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.”

And further at paragraph [12];

“The basic question is whether there is a close enough relationship between the wrongdoer’s conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.”

EVALUATION

[16] From the oral evidence that has been presented it is clear to me that there are two mutually destructive and irreconcilable versions as to how the collision occurred. The decision of Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others [2002] ZASCA 98 is instructive, in that it lays down the guidelines to be employed by the court in resolving factual disputes. The learned Nienaber JA stated at paragraph [5] the following;

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions...The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression

about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a),

(b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

- [17] On the question of onus, in the case of *African Eagle Life Insurance Co Ltd v Cainer* 1969 (1) SA 553 (A) the learned 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...”

- [18] The insured driver made a good impression on me. During cross-examination this witness maintained her version that she was driving straight along Tonk Meter road. Even though there was a slight confusion regarding the stop sign on her left-hand side, when shown the sketch that was compiled in court, she was able to clearly demonstrate that the stop sign was on Vlakfontein road (on her left-hand side) .I found her evidence to be reliable and credible.
- [19] The evidence of the insured driver is that she saw the plaintiff’s vehicle in the opposite carriageway and that it appeared that the minibus was waiting for her to pass before executing the right turn into Vlakfontein road. This version is corroborated by Mr Dlodlu who also saw the minibus stationary on the opposite side of the road.
- [20] The witness Mr Dlodlu who testified on behalf of the insured driver, made a favourable impression on me. This is an independent witness who has nothing to gain out of this case. He was merely a passenger in the Mercedes-Benz and I can find no reason why he would fabricate evidence that the insured driver was proceeding straight on Tonk Meter road. During cross-examination this witness was adamant that the insured driver was not driving on Vlakfontein road. He also repeated his evidence in chief that the minibus was stationary at the T-junction intersection, (prior to moving forward to turn).
- [21] Although there may be some difference between the evidence of the insured driver and Mr Dlodlu regarding exactly where the damage was to the insured driver’s car, the fact remains that both witnesses corroborate each other that the damage was to the front right-hand side of the car. Mr Dlodlu added that the door of the driver was also damaged.
- [22] There is an additional contradiction amongst the insured driver and Mr Dlodlu in that the insured driver states that although the minibus was stationary, the front part of the minibus was already in her lane prior to turning right, whereas Mr Dlodlu states although the minibus was stationary, it was in its own lane. Although there is there difference, I do not find it a material contradiction, as both witnesses for the defendant corroborate each other that the minibus was intending to turn right into Vlakfontein road.

[23] Regarding the evidence of the plaintiff, he merely states a version that he saw a car coming from his right and “it did not stop and collided with my vehicle”. On assessing the plaintiff’s evidence he made a favourable impression, purely based on the fact that he stuck to this version during cross-examination, namely, that he was travelling straight and did not turn right. However, I cannot place reliance on his version, nor is his version probable based on the following reasons:

1. The plaintiff gives cryptic evidence of what he saw prior to the accident. All he says is that a car came from his right and collided with the side of his minibus causing his minibus to overturn. He also mentions he saw a car 500 meters in front of him on the carriageway for traffic travelling from West to East. Nothing is mentioned about the speed the car that collided with his minibus was driving at. Neither did he mention whether this car skipped the stop street on Vlakfontein road. He could not remember the make and model of the car, or, whether it was going to turn right or left into Tonk Meter road. He could not state whether this car proceeded straight crossing the carriageway for traffic travelling from West to East.
2. No mention is made by the plaintiff whether the insured driver’s car had its head lights on, so this court accepts that the Mercedes-Benz’s headlights were in fact on, thereby allowing the plaintiff with clarity to explain the exact movements of the car travelling along Vlakfontein road.
3. In comparison to the plaintiff’s evidence, there are detailed versions from both the insured driver and Mr Dlodlu as to what they saw prior to the collision. This includes the distances when they first saw the headlights of the stationary minibus in the middle of the road. Both these witnesses were also able to explain how far the Mercedes-Benz was from the minibus, when the minibus started to execute the right turn.
4. Should this court accept that the plaintiff’s version of events is correct, the following problems emerge in respect to the probabilities, namely;

4.1 The only direction the insured driver travelling along Vlakfontein road could have turned, was either left, right or to proceed straight across the carriageway of traffic travelling from West to East. If the insured driver did cross the first carriageway, for traffic travelling from West to East and crossed over to the carriageway for traffic travelling from East to West, (being the direction the plaintiff travelled), then that version would have supported the plaintiff’s case. However, no such evidence was ever adduced by the plaintiff in this regard.

4.2 In addition, should I accept the version of the plaintiff and find that the insured driver was travelling along Vlakfontein road, the only way the insured driver could have crossed the carriageway for traffic travelling from West to East, is if the brakes of her vehicle failed, or if she took an extremely wide turn to either the left or right. However, this version was also not put to the insured driver for her comment.

4.3 The damage to the insured driver's car is on the front, extending from the Mercedes-Benz logo to the front right-hand side. The evidence of Mr Dlodlu suggests further that this damage extended to the insured driver's door as well. If the insured driver, according to the plaintiff's version, was driving along Vlakfontein road, (direction North to South), and was approaching the intersection with Tonk Meter road and in fact collided with the plaintiff's minibus, travelling from East to West, then it is more probable that the damage to the insured driver's car would have been on the front left-hand side of the car. This is not the case. Instead, the damages are on the front right-hand side of the insured driver's vehicle.

4.4 This aspect pertaining to the damages existing on the front right-hand side of the insured driver's car, and not on the left-hand side, was never disputed by the plaintiff.

4.5 On the probabilities, the damages sustained to the insured driver's car supports the version of the insured driver that she was indeed driving along Tonk Meter (direction West to East) and that the plaintiff who intended to turn right, hit her car from her right-hand side.

[24] Due to the corroboratory evidence of both the insured driver and Mr Dlodlu that the plaintiff's vehicle was stopped in the middle of the road, at the intersection into Vlakfontein road, I find that the plaintiff intended to turn right into Vlakfontein road. There is no other plausible reason for the plaintiff to have stopped at that specific point unless he intended turning right. The version of the plaintiff, namely, that the insured driver was driving along Vlakfontein road and collided with his car is not probable.

[25] The version of both the insured driver and Mr Dlodlu is more probable. These two witnesses corroborate each other that the insured driver was proceeding straight along Tonk Meter road and was not travelling along Vlakfontein road. Both witnesses state The insured driver was about to pass the minibus when the minibus hit the Mercedes Benz. The distance was extremely short when the insured driver saw the plaintiff starting to move and there was no way that she could have swerved to the right or to apply brakes.

[26] I cannot find that the actions of the insured driver were in anyway unreasonable. She had the right of way and the minibus entered her lane when she was a short distance from that minibus.

[27] Due to the insured driver having the right of way, she reasonably expected the minibus who was stationary in the road and attempting to turn right, that such minibus would have waited for her to go past. The plaintiff had a duty to exercise caution whilst executing a right-hand turn. He failed to exercise caution and drove the minibus negligently by entering the opposite carriageway.

[28] I accordingly find that the negligence of the plaintiff was the cause of the accident.

ORDER

[29] In the premises the following order is made;

The plaintiff is liable 100% for the accident that occurred and accordingly the action is dismissed with costs.

D DOSIO

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff : Mr R. Kok

On behalf of the Defendant : Adv L.R. Molohe

Instructed by

: Diale Attorneys

Heard on the 21st of May 2019

Judgment

handed down on the 28th of June 2019

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