

SOUTH AFRICA / JUDGMENT

Mudau v RAF (8699/14) [2017] ZAGPPHC 980 (29 September 2017) [2017] ZAGPPHC 980

COURT

North Gauteng High Court, Pretoria

BEFORE

E M Seima

CASE / FILE NUMBER

8699/14

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IN THE HIGH COURT OF
SOUTH AFRICA

(GAUTENG DIVISION,
PRETORIA)

CASE

NO: 8699/14

(1) NOT

REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

29/09/2017

In

the matter between:

FHEZISANI
GERSON MUDAU
PLAINTIFF
and
THE
ROAD ACCIDENT FUND
DEFENDANT

JUDGMENT

SEIMA AJ:

- [1] The plaintiff instituted an action claiming damages from the defendant arising from the bodily injuries sustained during a motor vehicle collision that occurred on 03rd October 2011.
- [2] When the matter came before court the parties agreed to an isolation of merits from quantum. The court subsequently ruled in favour of the separation in terms of Rule 33(4) of the Uniform rules. Accordingly, the matter proceeded on merits only.
- [3] It is an established principle in our law that, with one or two exceptions, the Plaintiff always bears the onus of proving negligence on the part of the insured driver on a balance of probabilities.

See: Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (AD) at 576G;

Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780C-H; and

Madyosi and Another v SA Eagle Insurance Co Ltd [1990] ZASCA 65[1990] ZASCA 65; ; 1990 (3) SA 442 (E) at 4440-F.

- [4] The issue for determination is whether the insured driver was on a balance of probabilities negligent or not. If he was, can the resultant damages suffered by the Plaintiff be causally linked to such negligent driving.
- [5] The Plaintiff called two witnesses to present his case, being himself and this wife who was the passenger on the day of the accident.
- [6] The Plaintiff states that he was travelling with his wife , who was seated in the passenger's seat and they were from Shoprite Shopping Centre travelling from east to west on Brown Road in Claremont Location also known as Newclare.
- [7] He states that as he was approaching his house, which is situated in the same road and he saw his neighbour's children whom one was a toddler standing on the left hand side of his correct lane of travel.
- [8] It is Mr Mudau's evidence that when he was very near the position where the children were standing, suddenly they entered road and created a sudden emergency when caused him to swerve to the right into his incorrect lane of travel and collided with the insured vehicle which was travelling from the opposite direction on the same road from the west to the east direction.
- [9] He states that he could not swerve to his right hand side as there was the concrete blocks or what was referred to as "pavement" that blocked the road thus prohibiting him to swerve to the right, an averment denied by the insured driver.

- [10] Mrs. Mudau, the second witness on behalf of the Plaintiff, evidence was that they were travelling from east to west on Brown Road and two children entered the road, one fell on the road and the other one went back to the direction that he came and the Plaintiff swerved to the right into his incorrect lane of travel and she could not testify as to how the accident occurred as she was concentrating on unfastening the seat-belt because she wanted to attend to the child that had fell.
- [11] Both Mr and Mrs. Mudau's evidence as to how the accident occurred was not satisfactory and credible. They both in the process of giving their evidence attempt to tailor such evidence to suit the Plaintiff's case though such attempt was forlorn as they could not attribute any wrong-doing or negligence on the part of the insured driver.
- [12] The Defendant called a single witness Mr. Madhavha, who was the driver of the insured vehicle, he stated that he was driving from the west to the east in Newclare on the road he does not know the name of but frequently drove on the said road
- [13] He states that he describes the road as a straight road though it is an uneven, bumpy and it is two way traffic road. His evidence further that on the date the accident occurred it was a clear and visibility was good. He, just like the Plaintiff states that the road is a fairly busy road with lots of people, children and animals crossing the road.
- [14] He states that the Plaintiff motor vehicle approached him from an opposite direction and driving at a high speed and there were children playing in the street upon seeing the children in the street the Plaintiff swerved to his right in order to avoid colliding with the children, he states that he reduced speed and swerved to his left to give space and passage to the Plaintiff's motor vehicle so that the accident should be avoided but the Plaintiff's motor vehicle collided with his.
- [15] He states that by reducing speed and swerving to his left was the only evasive actions he could have taken as he could not swerve his right because there were children on the road.
- [16] The insured driver denies that he drove negligently and that such negligence was the cause of the ensuing damages now claimed by the Plaintiff, on the other hand, the Plaintiff states that he was confronted with a situation of sudden emergency and had to make decisions that were apt for the prevailing moment.
- [17] For the Defendant to be liable for the damages of the Plaintiff on the basis of negligence, the Plaintiff will have to demonstrate that:
- 17.1 a reasonable person in the position of the insured driver -
- i. would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - ii. would take reasonable steps to guard against such occurrence; and

17..2 the insured driver failed to take such steps.

See in this regard the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E- G.

[18] Counsel for the Plaintiff at the end of the case, argued that there was a contributory negligence on the part of the insured driver and when asked what was the negligence of the insured driver she could not say but later in her argument correctly conceded that there was no way that the insured driver could be faulted or any contributory negligence could be attributed to him.

[19] Having considered the evidence and the argument presented on behalf of both the Plaintiff and the Defendant, it cannot be held by a reasonably objective court that the plaintiff discharged the onus of proving, on a balance of probabilities that the accident was caused by the negligent or contributory negligent driving of the insured driver. As a result I make the following order:

1. The Plaintiff cause of action is dismissed; and
2. The Plaintiff is ordered to pay the costs of this cause of action.

Signed at Pretoria on this day the 29th day of September 2017.

E M SEIMA

ACTING JUDGE OF THE HIGH COURT

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