

SOUTH AFRICA / JUDGMENT

Naicker v Road Accident Fund (26413/2009) [2017] ZAGPPHC 684 (1 November 2017)

[2017] ZAGPPHC 684

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa

CASE / FILE NUMBER

26413/2009

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 26413/2009

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

1/11/2017

In

the matter between:

NARAINSAMY
NAICKER Plaintiff
and
THE
ROAD ACCIDENT
FUND Defendant

JUDGMENT

Baqwa J

Introduction

- [1] This is an action under the provisions of the Road Accident Fund Act No. 56 of 1996 in which the plaintiff sued the defendant for damages arising out of injuries sustained in a motor vehicle collision which occurred on 1 June 2005 at approximately 06h45 on the Gonubie Main Road, opposite the Springbok Farm Stall. Gonubie, East London.
- [2] The matter became defended and all forms of negligence alleged by the plaintiff have been denied by the defendant.
- [3] The matter has proceeded only on the question of liability as provided for in terms of Rule 33 (4) of the Uniform Rules of Court

with the issue of quantum being held over for later determination.

The Evidence

- [4] The plaintiff was the first witness to testify and what follows is a summary of his evidence. At the time of the accident

4.1 The plaintiff was sole proprietor of a business known as Exclusive Mobile Trimmers which specializes in providing fittings for the interiors of motor vehicles.

4.2 On 1 June 2005 he embarked on a journey from East London to Durban and as he did so he had to drive past an area known as Gonubie, East London. He was accompanied by his father, his daughter and an employee at his business.

4.3 He departed from his East London home at about 06h15 in the morning and was driving a Mercedes Kombi motor vehicle commonly referred to as a Vito.

4.4 He was driving on a tarred road with one lane in each direction. The road surface was dry and the sun was coming up. He further testified that it was peak hour with extra traffic on the road. He was traveling in an 80 kilometre zone at about 60kph to 70kph.

4.5 He was travelling on the left lane of the road in an easterly direction. He observed a yellow truck moving in the same direction on the shoulder or gravel part of the roadway.

4.6 The plaintiff testified that the driver of the yellow truck (the insured driver) suddenly turned onto his line of travel in the process of turning or attempting to turn into the Springbok Farm Stall. The turning movement by the insured driver was so sudden that even though the plaintiff applied brakes, he could not avoid a collision with the rear end of the insured driver's vehicle.

The plaintiff stated that when the insured driver started to turn, he was about two car lengths away from him.

4.7 The plaintiff testified that the damage to his vehicle was on the front driver's side. He presented a sketch plan (exhibit B) which showed the insured driver's truck almost at right angles in front of the plaintiff's vehicle which was stationary facing an easterly direction on the left hand side of the road. The plaintiff was cross-examined by the defendant's counsel and he denied that he had caused the accident by colliding with the rear end of the insured driver's stationary vehicle.

4.8 The plaintiff did not call any witnesses and at the end of his testimony, he closed his case.

[5] The defendant's only witness was the insured driver, one John Baleni. A summary of his evidence follows.

5.1. At the time of the accident Baleni was a 58 year old truck driver. He testified that on the morning in question he proceeded to his place of employment where he inspected his truck and checked the oil and water level, the lights, brakes and indicators. He established that the truck was properly functional; he drove out and proceeded to drive towards the quarry to pick up his first load.

5.2. In doing so he had to first proceed towards the Springbok Farm Stall and then make a 'U' turn.

5.3. He proceeded along the same road in which the plaintiff was driving. It was peak hour and there was extra traffic.

5.4. He stopped on the left lane near the centre line next to the Springbok Farm Stall. He had his flicker/indicator lights on, indicating his intention to turn to the right. He was stationary at that point for a few minutes due to heavy oncoming traffic when he heard a loud bang from the rear of his truck.

[6] The impact jolted him from his seat to the roof of the driver's cockpit. He went out to find out what had happened and discovered

that he had been rear-ended by the plaintiff's vehicle. He found the plaintiff slumped on his steering wheel.

[7] He proceeded to the passenger side of the plaintiff's vehicle and found a six year old girl who was lifted out by another member of the public. Paramedics and police were called. The plaintiff and his passengers were taken to hospital.

[8] The insured driver was also thoroughly cross-examined after which the defendant closed its case.

[9] It is trite that 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 Mishy* 1962 (2) SA 566 (AD) at 576 G; *Sardi and Others v Standard and General Insurance Co. Ltd* 1977

(3) SA 776 (A) at 780 C - H and *Madyosi and Another v SA Eagle Insurance Co. Ltd* (1990) 1.ASCA 65[1990] ZASCA 65; ; 1990 (3) SA 442 (E) at 444 D- F. In deciding whether the plaintiff has succeeded in discharging this onus, the Court has to view the entire evidence which was led during the trial in toto.

[10] The versions tendered by the parties are entirely different and mutually destructive with regard to

10.1 The manner in which the collision occurred.

10.2 The probable speed at which the two vehicles were traveling.

10.3 The positions of the vehicles immediately before the collision.

[11] The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employees General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440 E - G when Ekskeen AJP said:

"Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he 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 or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[12] The Supreme Court of Appeal in the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 SCA at 141 - 15E approved this approach by saying:

"The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities... 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 ..."

[13] The principle is therefore established that where there are mutually destructive versions before the Court, the plaintiff's onus of proof can only be discharged if he establishes his case on a preponderance of probabilities. The principle is also established that the

requirement that a Court has to be satisfied that the plaintiff's version is true and that the defendant's false in order for the plaintiff to succeed in discharging his onus of proof. is only applicable in cases where there are no probabilities one way or another . See African Eagle Life Assurance Co. Ltd v Cainer 1980 (2) SA 324 (W).

Common Cause Facts

[14] The following facts are common cause:

14.1 On 1 June 2005 at approximately 07h45, the plaintiff was driving his motor vehicle when it was involved in a collision with the insured motor vehicle along the main road in Gonubie, East London.

14.2 The plaintiffs motor vehicle was damaged on the whole front with slightly more damage towards the driver's side.

14.3 As a result of the impact the plaintiff's vehicle was crushed into the rear of the insured vehicle.

14.4 Shortly before the collision both the insured and plaintiffs vehicles were traveling in an easterly direction on a tarred road in Gonubie.

[15] I found the version presented by the insured driver to be believable in that he seemed to be meticulous in giving the details pre and post accident right up to the point of impact. He did not for example presume that all the parts and mechanisms in his vehicle were fully functional. He checked them and satisfied himself that they were in good working condition.

[16] Strangely enough, his version finds corroboration from the plaintiffs version when he testified that the morning traffic from the opposite direction was heavy just before the collision. This supports the reason as to why he (the insured driver) was stationary for a while opposite the Springbok Farm Stall. Consequently, the testimony by the plaintiff that the insured vehicle was in motion just before the collision cannot hold water. The insured could not have moved as he would have collided with the heavy oncoming traffic if he had done so. That therefore explains his stationary position. The one version must exclude the other.

[17] The plaintiff attempted to bolster his evidence by presenting a sketch plan exhibit B to depict the scenario immediately prior to the collision. On the sketch plan, the insured vehicle is almost at right angles to the plaintiff's vehicle with its front portion standing across the centre line. When asked how the insured vehicle could achieve that position in light of the heavy oncoming traffic, the plaintiff could not explain.

- [18] Further, the plaintiff's vehicle is standing straight on the left lane facing east yet the plaintiff's version was that he applied his brakes and tried to swerve. If he did so, his vehicle on exhibit B would be skewed towards the left. When questioned by the Court in this regard, he said that was a mistake on his part.
- [19] What is also significant is that the plaintiff was traveling with three other people in his vehicle namely, his father, his employee and a 6 year old daughter. He had a golden opportunity to call either his father or his employee to corroborate his version. Yet no witness was called by the plaintiff.
- [20] The plaintiff testified that the insured vehicle was about two car lengths in front of him when he started to move into his line of travel. If he was traveling at about 60kph he ought to have been able to apply his brakes and avoid the accident or swerve out of harm's way. He testified that he did apply his brakes but the objective evidence shows differently. It does not need a rocket scientist to observe especially from exhibit C 52 which depicts damage to his vehicle that the impact upon collision was massive. The injury suffered by the plaintiff and the fact that the paramedics found him slumped on his steering wheel demonstrates that his speed must have been much higher than what he testified in court.
- [21] On the facts I find that the accident was wholly attributable to the plaintiff in that he failed to keep a proper look-out or that he failed to apply his brakes or to swerve out of harm's way and avoid the collision. I find further that he drove at an excessive speed in the circumstances.
- [22] In my view the plaintiff acted negligently as he acted in a manner in which a reasonable person in his position would not have acted. In all probability the plaintiff's testimony that the insured's vehicle was traveling on the shoulder of the road just before the collision is nothing but a figment of his imagination which was to try and create an opportunity to impute culpability on the part of the insured driver.
- [23] I accordingly find that this was the classical rear-end collision and that the plaintiff's negligence was the sole cause of the collision.
- [24] I am satisfied that the plaintiff failed to discharge the onus of proving on a balance of probabilities that the insured driver drove his vehicle in a negligent manner.

[25] I accordingly make the following order:

The plaintiff's claim is dismissed with costs.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Heard on: 7 September 2017

Delivered on: 8 September 2017

For the Plaintiff: Advocate H.A. de Beer

Instructed by: Shireen Amod & Company

For the Defendant: Advocate J.T. Kanyana

Instructed by: Brian Ramaboa Incorporated

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/684.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/naicker-v-road-unknown-topic-agpphc-2017>

Prepared on 28 October 2026 · Esheria