

SOUTH AFRICA / JUDGMENT

Naidoo v Road Accident Fund (22249/19) [2020] ZAGPPHC 562 (15 October 2020)

[2020] ZAGPPHC 562

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mngqibisa-Thusi

CASE / FILE NUMBER

22249/19

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED.

Case

Number: 22249/19

In

the matter between: NAIDOO,
 DOORSAMY LOGANATHAN
 Plaintiff
 and
 ROAD
 ACCIDENT
 FUND
 Defendant

JUDGEMENT

MNGQIBISA-THUSI J

- [1] The plaintiff has instituted an action against the defendant in which he claims damages for loss suffered as a result of injuries he sustained in a motor collision that took place on 31 October 2017. The collision occurred between two vehicles driven by the plaintiff bearing registration number [...] and by the insured driver, bearing registration number [...].
- [2] On the day in question the plaintiff was travelling along John Ross Road, a road he knew well, from Richardsbay to Empangeni in the afternoon. The road was described as a two lane road which had a detour where it turned into a single lane with traffic travelling in each direction.
- [3] The parties agreed to the separation of issue of liability and quantum. A ruling was made in terms of Rule 33(1) whereby liability and quantum were separated and quantum was postponed sine die.
- [4] The defendant, the Road Accident Fund, has denied liability contending that the collision was caused by the negligence of the plaintiff in failing to keep a proper lookout. In the alternative the defendant pleads that the plaintiff's negligence contributed to the collision.
- [5] The only issue in dispute was whether the plaintiff or the insured driver was negligent, and if the insured driver was negligent, whether there was contributory negligence on the part of the plaintiff.
- [6] The plaintiff's evidence is as follows. On the relevant day in the afternoon he was travelling along John Ross Road, Richardsbay, a road he knew well. He was on his way to Empangeni. The road is tarred. He described the road as having two lanes. Although the road is straight, along the way there is a bend where there was a detour, which was made of

pre-mix tar, as a result of road construction. At the detour the road became a single lane with traffic travelling in each

direction. Along the detour there is a train bridge and opposite it there is a concrete barrier. As it was peak hour there was a heavy volume of traffic in each direction and the vehicles were travelling at approximately 30-35 km per hour. As he was approaching the bend there was a truck travelling in the opposite direction and veering on his side. As the width of the road was narrow,

he was unable to avoid the truck as if he had done so, he would have crushed either into the concrete barrier or the truck. As a result, the truck's centre axle wheel crashed into his vehicle. He lost control of his vehicle and collided with a Mazda bakkie which was travelling behind and in the same direction as the truck. It is significant to note that in his s 19(f) statement submitted to the defendant with his claim, the plaintiff did not mention the collision which happened after his vehicle collided with the insured vehicle between his vehicle and a third vehicle driven by Mr Sibusiso Goodman Mbatha, the defendant's first witness.

- [7] Under cross examination the plaintiff conceded that it is possible that the point of impact could have been on the insured vehicle's lane of travel. He further conceded that it is possible that he could have collided with a second vehicle but denied that he was travelling at an excessive speed. Further under cross examination he testified that the truck collided with his vehicle after its tyre burst and it veered onto his lane. Again I need to point out that from the photos admitted as evidence there is no indication that any of the tyres on the side the two vehicles had contact had burst, of more than after colliding with the insured vehicle and his vehicle
- [8] Mr Sibusiso Goodman Mbatha ("Mr Mbatha") testified on behalf of the defendant and his evidence is as follows. On the day in question he was travelling from Empangeni to Richardsbay and was driving behind the insured driver. He was travelling at a speed of approximately 60km per hour which was the average speed the traffic on the road was travelling in that although there was traffic the road was not congested. As they reached the detour plaintiff, who was driving at an excessive speed lost control of his vehicle and ended on his and the insured driver's lane, colliding with the right rear wheel of the insured vehicle and thereafter colliding with his vehicle, bumping his right front and rear side. He further testified that he took photos of the damage to his and the plaintiff's vehicles. He was later contacted by the assessor whom he took to the scene of the collision in order to point out how the collision happened but did not deem it necessary to make a statement. Not much was elicited from Mr Mbatha during cross examination.
- [9] The next witness called by the defendant was an assessor, Mr Conwell Malusi Sithole ("Mr Sithole") who testified as follows. He was mandated by the defendant to investigate the collision in which the plaintiff had submitted a claim. He tried to get the insured driver to meet with him but he refused on the ground that he would not be of any assistance as he did not see how the collision happened. He later met with Mr Mbatha who took him to the scene of the collision where he explained

to him how the two collisions occurred and also gave him some of the photos of the damaged vehicles he had taken.

- [10] Under cross examination, Mr Sithole testified that there is no mention of the plaintiff in his report because he did not interview him as the defendant's mandate he is not allowed to consult the plaintiff.

- [11] On behalf of the plaintiff it was submitted that the court should accept that the collision occurred in the middle of the road and since neither the plaintiff or the insured driver took steps to avoid the collision, a finding should be made that both drivers were negligent and that there should be a 50% apportionment of liability. For the above submission counsel relied on the matters of *Jadezweni v Santam Insurance Co Ltd* and another[1], *Van Staden v Avenant en 'n ander*[2] and *Van Eck v SANTAM Insurance Co Ltd*[3].
- [12] On behalf of the defendant it was argued that the collision was caused by the sole negligence of the plaintiff in that he had veered into the lane of oncoming traffic and collided with the insured vehicle and thereafter losing control of his vehicle and colliding with Mr Mbatha's vehicle. In the alternative it was argued that based on the damage to the vehicles, the plaintiff was more negligent than the insured driver and that liability should be apportioned on a 5% or 10% /90% or 95% in favour of the defendant.
- [13] It is common cause that on the day the collision between the plaintiff's and the insured driver's vehicles it was in the afternoon and the weather was clear. The road in which the two vehicles were travelling was a single narrow road.
- [14] There is a duty on all road users to keep a proper lookout on the road in order to avoid colliding with other road users. In *Van Staden (supra)*[4] the court held that in order to avoid colliding with each other, two vehicles passing each other on the in that "the middle of the road is the extreme boundary to which the concerned vehicles' danger areas extend to the inside". In the event of either of the vehicles traversing the middle lane onto the other driver's path of travel and a collision occurs, that driver would be negligent. The court further held that, however, the negligence of that driver does not absolve the other driver who has a duty to take evasive action in order to avoid the collision[5].
- [15] According to the plaintiff the collision occurred as a result of the insured vehicle encroaching on his lane of travel and since there was a concrete barrier on left side, he could not swerve to the right in order to avoid colliding with the insured vehicle, result in him losing control of the vehicle and colliding with Mr Mbatha. The plaintiff's evidence in chief was that the point of impact was on his correct side of the road. However, in cross examination the plaintiff appeared to be a little

confused as to how the collision occurred and conceded that it is possible that his vehicle encroached beyond the middle line leading

to it hitting the right rear wheel of the truck. Mr Mbatha's version is that the plaintiff had veered on the lane of his and the insured driver's.

- [16] Although there is evidence by Mr Mbatha that the plaintiff encroached on the opposite traffic's lane, he did not testify as to what evasive action the insured driver took. Counsel for the plaintiff submitted that a negative inference should be drawn from the failure of the insured driver to testify. In *Elgin Fireclays Ltd v Webb*[6] the court held that a negative inference must be drawn where a party fails to produce evidence of a witness who is

available and able to assist the court on the issues to be determined. There is, however, evidence that the insured driver was subpoenaed but chose not to avail himself.

[17] In the absence of the insured driver testifying, it cannot be concluded that he did take evasive action to avoid the collision. The evidence of the assessor that the collision occurred on the incorrect lane of the plaintiff does not assist as he did not see how the collision happened. In *Motor Vehicle Assurance Fund v Kenny*[7] 1984

(4) SA 432 (E) at 436H-I the court stated that:

"Direct or credible evidence of what happened in a collision must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be. seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles".

[18] From the evidence of both the plaintiff and Mr Mbatha it is not clear whether the point of impact occurred. As the plaintiff conceded during cross examination that he could have encroached on the lane of the truck, he may as well have been negligent. However, this does not absolve the culpability of the insured driver. In *Jadezweni (supra)*[8] the court stated the following:

"I am in agreement with his submission that if either of the vehicles was across the centre line at the time of the collision the inference would be that the driver of that vehicle was negligent. I am also in agreement with his submission that, if one of the drivers was on his correct side and saw that the other was travelling on his incorrect side, or was about to cross over to his incorrect side, it would negligence on his part if he failed to take all reasonable steps to avoid a collision . . ."

[19] Inasmuch as I am satisfied that the plaintiff did encroach on the lane of the insured driver, in the absence of evidence from the insured driver, an inference can be drawn that the insured driver did not take any evasive action to avoid colliding with the plaintiff. In the result I find that both drivers' negligence was the cause of the accident and that liability for the cause of the collision should be apportioned on a 50%/50% basis.

[20] In the result the following order is made:

1. The defendant is liable to compensate the plaintiff for 50% of the agreed or proven damages.
2. The defendant to pay the costs of these proceedings.

N P MNGQIBISA-THUSI

Judge of the High Court

Date of Hearing: 24 October 2019

Date of Judgement: 15 October 2020

Appearances:

For plaintiff: Adv D J Erasmus (instructed by De Broglia Attorneys Inc.)

For defendant: Adv S Mchasa (instructed by T.M Chauke Incorporated)

[1] 1980 (4) SA 310 (C).

[2] 1971 (2) SA 456 (NC).

[3] 1996 (4) SA 1226 (C).

[4] At 459.

[5] See also *Cantamessa v Reinforcing Steel Company Limited* 1940 AD 1 at 6.

[6] 1947

(4) SA 744 (A).

[7] 1984

(4) SA 432 (E) at 436H-I.

[8] At 311.

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