

SOUTH AFRICA / JUDGMENT

Padayacchee v Road Accident Fund (22646/2016) [2019] ZAGPPHC 549 (16 October 2019) [2019] ZAGPPHC 549

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

22646/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22646/2016

16/10/2019

In the matter between:

LUZAINÉ
EUGENE PADAYACHEE
PLAINTIFF
and
ROAD
ACCIDENT
FUND
DEFENDANT

Coram: Sardiwalla J
Motor vehicle Accident
- Liability –
plaintiff under a statutory duty to satisfy
the requirements as
contemplated in S 17(1) of the Road Accident Fund Act 56 of 1996 that
there must be negligence of the insured vehicle in order to establish
liability of the Road Accident Fund

JUDGMENT

SARDIWALLA J:

[1]

Introduction:

1.1 The Plaintiff herein is Luzaine Eugene Padayachee, instituted an action for damages in terms of the Road Accident Fund Act[1] for an amount of R 4 100 000.00 (four million one hundred thousand rand).

1.2 In casu, he sues the Road Accident Fund in his personal capacity as a result of injuries sustained during a collision on 8 March 2015 on Petroleum Street, Silverton.

1.3 Pursuant to an agreement between the parties I am to determine this matter only in respect of the merits, and that the quantum stood over for determination at a later stage. Accordingly, the trial proceeded in respect of defendant's liability.

[2] The issues in dispute

2.1 The presence of the insured vehicle in the collision on 8 March 2015, as alleged by the plaintiff in paragraph 4 of his amended particulars of claim as follows[2]:

2.1.1 "On or about 9 March 2015 and at Petroleum Street, Watloo, a 1400 Nissan Bakkie, registration letters and numbers unknown ("the insured vehicle") driven by an unknown driver ("the insured driver") entered the plaintiff's lane of travel;

2.1.2 at all material time the plaintiff was the driver of motor vehicle with registration letters and numbers [...];

2.1.3 Plaintiff, in order to avoid a collision with the insured vehicle swerved and hit the centre barrier and collided with a MAN Truck, driven at the time by RD Mangwane."

[3] The negligence of the insured driver as set out in paragraph 5 of the plaintiff's amended particulars of claim, as to whether or not the driver of the insured motor vehicle was solely negligent in one or more of the following ways[3]:

3.1 "She/He failed to keep a proper lookout;

3.2 She/He failed to take any, alternatively sufficient cognisance of the presence, absence, the actions and the visible intended and alternatively further actions of other road users, inclusive of the plaintiff;

3.3 She/He travelled at a speed which was excessive speed under the circumstances;

3.4 She/He failed to avoid the collision when taken by taking reasonable and proper care (including, but not limited to, travelling more slowly, swerving and sounding any warnings) she could or should have done so;

3.5 She/He failed to maintain any, alternatively sufficient control over the insured motor vehicle;

3.6 She/He encroached upon the plaintiff's lane of travel;

3.7 She/He lost control of the insured motor vehicle;

3.8 He/She entered the plaintiff's lane of travel when it was not safe to do so, thereby travelling on his/her incorrect side of the road; and

3.9 He/She executed an overtaking maneuvered when it was not safe or appropriate to do so."

[4] In essence, the plaintiff alleges from the pleadings that the collision was caused solely by the negligence of the driver of the insured vehicle. The defendant disputes the aforementioned allegation[4] and the plaintiff is accordingly called upon to prove all the aspects of the collision.

[5] In order to determine whether the plaintiff succeeded in discharging the onus, it is apposite to consider the factual matrix upon which the matter is predicated. Three witnesses testified.

[6] Evidence

6.1 The plaintiff testified that at the time of the collision there was only a single lane in each direction. There were no street lights and it was very dark. There was also a traffic signal and some street lights but this was approximately a kilometer away from where the collision actually occurred. The plaintiff described the area where the collision occurred as having a small island that separated the two lanes and that this was where vehicles turned to go right into an Absa building. The plaintiff testified that he was travelling at between 60 to 80km/h. There were traffic lights of other vehicles in

front of him but he assumed that they would pass him on the opposite lane. It was only until about 15 meters away from the insured vehicle did he realize that the insured vehicle was actually travelling on the wrong side of the road, being his lane. In order to avoid a collision, he swerved to the right, struck the curb, lost control of his vehicle and ended up colliding with the wheels of the trailer that was being pulled by a truck in the opposite direction to his lane. He further testified that he could not swerve to the left as there was construction work and ditch. The testified that he was familiar with the features of a Nissan 1400 but as he was blinded by the lights of the insured vehicle that was in close proximity he swerved to his right.

6.2 Under cross-examination the plaintiff denied that he was the sole cause of the collision and stated that the sketch plan of the scene Exhibit “A” as shown by the defendants Counsel was after the alterations were made to the road a year after the collision occurred. He also confirmed that the street lights that were now in place were also part of the alterations that occurred a year later. The truck driver’s version that she saw the plaintiff speeding and ignoring a red traffic light was never put to the plaintiff during cross-examination.

[7] The plaintiff’s wife testified that she received a telephone call informing her that her husband had been involved in a motor vehicle collision. When she arrived at the scene she found the plaintiff’s vehicle under the trailers wheels. She testified that the area where the collision occurred was poorly illuminated and that the light that was provided was by vehicles on the scene, cellphones and flash lights. She further averred that at the time of the collision there was only a single lane and therefore denied that Exhibit “A” was correct. She denied that there were three lanes and traffic lights and indicate that these alterations were made a year later.

[8] The defendant called the driver of the tank truck Rebecca Dikiledi Mangwane.

8.1 She testified that she was the driver of the petrol truck and as she was driving she saw the plaintiff’s vehicle approaching from a distance. She testified that she was not speeding and that she noticed that there were vehicles behind her. She averred that the truck and trailer that she was driving was approximately 22 meters in length. She testified that she was the author of the sketch A (Exhibit “A”) which illustrated that there were three lanes. Two lanes in the direction of the plaintiff and one in the direction in which she was travelling. She denied that the alterations were made a year later and indicated that the area was well lit by street lights. She further testified that she saw the plaintiff speed past a red robot, veer into the middle lane, swerved into the curb and then collided with the wheels of the trailer. She indicated that she never saw the insured vehicle. It was put to her that as she observed the plaintiff’s vehicle in front of her she could not have physically been able to observe simultaneously what occurred next to or behind the truck. This was especially so

since she indicated that the plaintiff executed such dangerous maneuvers as described by her that it would have been reasonably

expected that her attention would have been only on the plaintiff and therefore it was impossible for her to observe two different points at the same time. The witness had no answer to this statement.

[9] Evaluation

9.1 It is common cause that on 8 March 2015 the plaintiff was the driver of a motor vehicle with registration number RHP 128 GP, which was travelling along Petroleum Street, Silvertown when he subsequently collided with a truck and trailer.

- [10] However, the dispute simply is whether there was an insured driver and whether the insured was causally negligent; or whether the plaintiff was solely negligent.
- [11] The plaintiff submitted hospital records at the time of the lodgment of the claim with the defendant on 1 July 2014[5]. Medico legal reports were submitted by both parties.
- [12] It is trite that the onus rests squarely upon the plaintiff to prove that the insured driver's negligent conduct and specifically in this case the presence of the insured driver caused the harm giving rise to the claim[6]. In this regard, it is clear that this court has to determine whether the plaintiff's version regarding the accident and the presence and negligence of the insured driver is probable. The court must be satisfied that sufficient reliance can be placed on the plaintiff's story for there to exist a strong possibility that his version is the true one.
- [13] To determine this I have carefully applied my mind and taken due cognisance of the fact that the viva voce evidence of the plaintiff in court is consistent to the pleadings in his particulars of claim; the evidence that is contained in the hospital records; and the affidavit made by the claimant in pursuance of his claim against the defendant.
- [14] What is significant to note is that the only time the plaintiff became aware of the version that he was speeding through a red robot, is at the time when the defendant's witness tendered her evidence during the trial. In addition, her version of how the accident occurred and the involvement of the insured vehicle is inconsistent with her testimony on her observations and actions at the time of the collision. It could not have been reasonably possibly true that she was able to observe if there were any other vehicles if she insists that she maintained her vision and focus solely on the plaintiff and his actions. Further that as a frequent driver of the street on which the collision occurred any reliance on her memory regarding the visual of the area prior to the accident maybe distorted. It is clear in my mind that the defendant is attempting to distort the evidence in respect of her version to extinguish the plaintiff's claim. This fact is clearly telling on the credibility of the defendant's

witness and ultimately affects the weight that must be attached to her evidence.

- [15] In my view there are numerous serious discrepancies fatal to the case of the defendant's case. I am unable to place any reliance on the evidence of the defendant regarding the manner in which the accident occurred; the absence of the insured vehicle and insured driver; and consequently the negligent conduct of the plaintiff. I accordingly find that the evidence of the plaintiff is satisfactory in all material respects and stands to be accepted.
- [16] After carefully considering the evidence before me, I am satisfied that the Plaintiff has discharged the burden of proof that his version as true and has established negligence on the part of the defendant[7].

[17] Order

In the result, I make the following order:

1. The defendant is liable to pay 100 % of the plaintiff's agreed or proven damages with costs.
2. The quantum is separated and postponed sine die
3. The defendant shall be liable for all the High Court costs of the action to date of this order, including the cost of cost of senior/ junior counsel, including drafting heads of argument, his trial fee for 29 May and the noting of his judgment.
4. All payments shall be made into the trust account: Nothnagel Attorneys Trust Account, First National Bank, Account Number: [...]

Branch Code: 252445, Reference: Mat 26.

5. In the event that the costs are not agreed, the Plaintiff agrees to shall serve notice of taxation on the defendant's attorney of record and allow the defendant 14 court days to make payment of the taxed costs.
6. The Defendant shall be liable for the interest calculated at 10% on any late payment.

SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing

: 29 May 2019

Date of judgment

: 16 October 2019

Plaintiff's Counsel

: ADV.: A A Lubbe

Plaintiff's Attorneys

: Nothnagel Attorneys

Defendant's Counsel

: ADV.: U B Makuya

Defendant's Attorneys

: Maponya Inc.

[1] 56 of 1996

[2] Pleadings bundle – page 31

[3] Pleadings bundle – page 31and 32

- [4] See paragraph 3 of the defendant's plea – page 15 of the pleadings
 - [5] Quantum bundle Volume 1 – pages 2 and 3
 - [6] Guardian National Insurance v Saal 1993 (2) SA 161 (C) at 162
 - [7] Stellenbosch Farmer's Winery Group Ltd and another v Martell et CIE and others 2003 (1) SA 11 (SCA)
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