

SOUTH AFRICA / JUDGMENT

Rathebe v Road Accident Fund (16432/2000) [2013] ZAGPPHC 22 (5 February 2013)

[2013] ZAGPPHC 22**COURT**

North Gauteng High Court, Pretoria

BEFORE

Sithole

CASE / FILE NUMBER

16432/2000

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IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 16432/2000

DATE:05/02/2013

IN THE MATTER BETWEEN

GAN RY RATHEBE PLAINTIFF

AND

ROAD ACCIDENT FUND.....DEFENDANT

JUDGMENT

SITHOLE, AJ

(A)

INTRODUCTION

- [1] This is a matter which involves a road accident between a bakkie driven by the plaintiff and a stationary bus driven by the insured driver, in which the court was called upon to give a decision.

- [2] The matter was heard by me on 24 April 2004 and there has been an inordinate delay since then before judgment could be given. This is on account of the fact that the first volume of the transcript of proceedings somehow got lost under circumstances beyond my control. I, however, hereby express my sincere apology to the parties and their legal representatives for any inconvenience they may have experienced as a result of the delay.
- [3] The plaintiff was legally represented by Adv C W Jordaan and the defendant by Adv A G Horak. The parties agreed at the relevant

pre-trial conference to have the merits separated from the quantum and such separation was accordingly effected by the court at the inception of the trial. As per agreement the parties proceeded on the merits of the matter and the issue between them is a question of the point of collision, otherwise most facts are common cause.

(B) EVIDENCE FOR THE PLAINTIFF

- [4] Counsel for the plaintiff led him in chief and called a certain Ms Mmusi in support of plaintiff's version which is to the effect that: on 17 July 1999 at approximately 20:00 he was driving a blue Nissan 1400 bakkie on the Bethanie/Rustenburg road. He was from Maluka Village to Rustenburg.
- [5] When he approached a T-junction the defendant's insured bus driver turned into his line of travel from a gravel side road and a collision occurred. Upon being asked by his counsel whether there was anything between him and the bus that might have obscured his vision, he answered affirmatively that it was a lot of wind and dust that did so. He was also asked what he did when he saw the bus for the first time and what avoidance action he took so as not to collide with the bus. He answered that he tried to avoid the bus but unfortunately he did not succeed. To avoid the collision, he testified that he applied his brakes, swerved towards his right side and swerved back onto the tarmac as he was not aware of what lay ahead on the side of the road. The collision then occurred and he lost his consciousness. He does not think there was anything else he could have done to avoid the collision, except what he did.
- [6] Cross-examination by counsel for the defendant, inter alia, yielded the following:
- 6.1 that plaintiff was with a certain Israel Khatani in the bakkie at the time of the collision;
 - 6.2 that plaintiff was travelling at a speed of 80kph;
 - 6.3 that it was a dark night with no street lights;
 - 6.4 that there was much dust which was blowing towards him;
 - 6.5 that plaintiff could only see six metres ahead;
 - 6.6 that the first time the plaintiff saw the bus was when it entered the tarmac;
 - 6.7 that there was no oncoming traffic;

6.8 that plaintiff collided with the right hand rear corner of the bus;

6.9 the plaintiff was informed at the hospital that his friend, Israel Khatani, died at the collision scene;

6.10 that plaintiff sustained head injuries as a result of the collision.

[7] Ms Mmusi testified that on 17 July 1999 at or about 20:00 she was at the community hall with others. She stood at a certain spot outside the hall because the bus they were supposed to board was full and it left them at that spot. The bus proceeded to a stop sign and turned left without stopping at the stop street. She then saw dust and heard a "goo sound" as she described it. She and others then rushed to where the sound was coming from because she heard people screaming. Upon arriving there she saw a van which had collided with the rear of the bus not far from the stop sign (about fifteen to sixteen paces, as she said). Besides the van and the bus there were already a lot of people and confusion at the collision scene and many things were lying around there, as she said. When asked whether there were any other vehicles at the scene, she replied that she could not see properly because it was at night and there was dust.

[8] Cross-examination of Ms Mmusi inter alia elicited the following responses:

8.1 she is 20 years of age about to turn 21 and still at school;

8.2 she had been at the community hall to attend the opening ceremony and there was drama being choral music being performed;

8.3 although she saw dust there was no wind that night. The dust was caused by the bus and not the wind;

8.4 the bus drove straight past the stop sign without stopping;

8.5 she was shocked by the accident and consequently cannot say what she saw and what she did not;

8.6 she did not tell anybody that she saw the bus make a turn without stopping. She also denied the insured driver's version that he stopped at the T-junction;

8.7 she does not agree that the collision occurred 130 paces away from the stop sign as per the insured driver's version;

8.8 upon being asked why she did not notice the bakkie drive past the T-junction she replied: "Remember, the bus had dust towards the tar surface and by then when the bus was gone there was only a cloud of dust hanging there and it was obscuring my view."

That concluded the case for the plaintiff.

(C) EVIDENCE FOR THE DEFENDANT

[9] Counsel for the defendant led the evidence of three witnesses, namely: the insured driver Mr Matsonyane, Mr Molefe an inspector of the SAPS and Mr Rheeder an investigator of the Road Accident Fund (defendant).

9.1 The insured bus driver Matsonyane testified that on the night in question he was transporting passengers (the Obakeng choir) from the community hall to their homes in Modikwe. The bus was full and it was dark. Fie approached a stop street and stopped at a stop sign. He further approached the tarred road where he stopped. There was a car approaching from his right hand side and he waited for it to pass. He then looked right again

and after that car had passed there was nothing coming and so he turned into the tarred road.

9.2 He further testified that he pulled away in second gear, changed into third and fourth gears and as he was going into the fifth gear the collision occurred about sixty metres away from the T-junction. By then he was travelling at 40kph as the speed limit on that road is 60kph. At the time of the collision he felt a bump and he lost control of the bus but fortunately, as he said, he managed to control it until after it was out of the tarmac road. He then pulled his handbrake, alighted from the bus and went to the rear of the bus on foot to inspect what happened.

9.3 He further testified that at the rear of his bus he found an open roofed bakkie stationary where it collided with the bus on the left hand side lane of the tarred road. In the roofless bakkie he found two passengers, the one whose body was tilted to the front and the other who was busy trying to lift his body to get out of the bakkie. Furthermore, he also testified that the following morning he drove past the collision scene while taking school children to school in a smaller car and found people cleaning blood and debris strewn on the road. That enabled him to determine the exact spot of the collision, he said. He consequently could not agree with the version of the plaintiff and his witness (Mmusi) on the collision spot.

9.4 Cross-examination of the insured driver did not yield any significant facts save for the following few ones:

9.4.1 there were some people who wanted to board his bus when he departed from the community hall at around 20:10;

9.4.2 those outside the bus could not climb into it because it was full and its doors were closed;

9.4.3 the road was dry and there was dust moving with a gust of wind;

9.4.4 he was stationary before he pulled onto the tarmac;

9.4.5 he was familiar with the T-junction as he used it quite often;

9.4.6 before turning left onto the tarred road he had to stop and did stop;

9.4.7 while changing to the fifth gear he did not look at the rear view mirror. That is why he did not see the vehicle which hit his bus from behind;

9.4.8 the noise of the collision sounded to him like a tyre burst or a gunshot;

9.4.9 he did not know that it was a vehicle which collided with his bus from behind because the whole thing happened very quickly;

9.4.10 he denies the version of the plaintiff as to how the collision occurred as well as that of Ms Mmusi that his bus created a lot of dust and that he never stopped at the stop street.

[10] The testimony of Inspector Molefe amounts to the fact that he is an SAPS member who trained at Potchefstroom in 1995 in the taking of measurements, police photographs and plans. In June 1999 he was based at the Brits Local Criminal Record Centre and he visited the collision scene on the night the accident occurred at 20:30. At the accident scene he said he found a 1400 bakkie on the road and a bus on the side of the road. He also found paramedics who were busy attending to the bakkie passengers. He took measurements and photographs but unfortunately they did not come out, as he said. He further testified that the point of impact is at B on p7 of the photo album. When asked how he determined that that is the point of impact, he responded that he did so "through glass concentration", as he put it. He also stated that the T-junction is far away from the collision scene, about sixty paces away. Also, that from the back of the bus to the collision point is twenty three metres, and from the T-junction to the point of impact is sixty metres.

[11] Cross-examination of Inspector Molefe, inter alia, elicited the following responses:

11.1 that the police plan does not reflect a true picture of the accident scene because it is not drawn to scale;

11.2 that measurements were taken on the night of the collision;

11.3 that point 0 in photograph 6 and point P in photograph 10 cannot be one and the same point;

11.4 that he was shown the points he testified about by someone else, namely, Sgt Kgobane;

11.5 that what Sgt Kgobane pointed out to him, includes the point of impact.

[12] Re-examination of this witness revolved around points he drew on the police plan and the point of impact. When asked why there is no T-junction nor stop sign in the police plan, he replied that the accident is far away from the T-junction.

[13] The last witness called by counsel for the defendant was Mr Hendrik Petrus Rheeder, who, by occupation, is an investigator of the defendant's panel of investigators. He testified in Afrikaans that he took a series of photographs in respect of an investigation of the accident which occurred on 17 July 1999.

13.1 He identified photo 1 on pi 7 of bundle A as one he took from a southern to a northern direction. He also testified that by means of a measuring wheel, he measured the distance from a point in line with the stop street to the T-junction, which is 14,5 metres.

13.2 Photograph 2 was taken in the opposite direction, he said. He put a man with a yellow and orange jacket next to the stop sign in order to make it visible. The 14,5 metres is the distance from a point on the left hand side of the person with a yellow and orange jacket to the tarmac, he said.

13.3 The third photograph he took from the east to the western direction and it is 15,5 metres from the T-junction. This distance he measured by means of the measuring wheel.

13.4 The fourth photograph, with the inscription "from a point opposite the centre of the T-junction" was taken in the opposite direction. It depicts a blind side and a dent and the road emerges from the eastern direction. He further testified that counsel for the defendant asked him to conduct an experiment in terms of which, from the T-junction, how long a vehicle would disappear in the dent and re-appear again when moving from the eastern direction to the western direction. The results were those of three vehicles, the first took nine seconds, the second twelve and the third fifteen seconds. These vehicles were about 180 metres from the T-junction, which he measured by means of his wheel.

13.5 Photograph 5, which is the same as photo 4, was taken 2,5 metres south of the tarmac. He testified further that he thought it was more or less the point where one would stop before one got onto the tarred road while looking in an eastern direction. This photo shows a vehicle in a lane approaching the T-junction. This is the 160 metres distance referred to earlier.

13.6 Photograph 6 was taken almost opposite the middle of the T-junction in a western direction. He further identified two brake marks on a lane of the descending road.

13.7 Photograph 7 depicts a residential area on the south western side of the T-junction, whose first entrance is on the right side of the brick wall depicted in the photo, he said.

13.8 Photograph 8, he said, was taken from north to south, opposite the first entrance of the residential area.

13.9 Photograph 9 was taken from north to south opposite the second entrance to the residential area. He further testified that in this photo he sees the man with a glowing jacket who stands on the same spot as in photograph 7.

13.10 In photograph 10 the same man is depicted as standing next to the stop sign. This photo was taken from west to east in the opposite direction from which the bus is said to have come. He also testified that in this photograph brake marks are depicted and these are the same brake marks which appear in photograph 6, save to say that in photograph 10 these marks are from the opposite direction.

13.11 Photograph 11 depicts the speed limit if one drives from east to west before entering Bethanie residential area, he said.

13.12 Photograph 12 is just a close photo of the T-junction. Also, the BAFA Funeral Services board and a white car with an open boot on the opposite side are depicted.

13.13 Furthermore, Mr Rheeder testified that he took photographs 13, 14 and 15 which depict the insured driver's bus. He also took photographs contained in album marked C. The first photograph in this album was taken from the east to a south western direction and it depicts the concrete wall shown in photo 4. Photograph 2 in this album is a close shot of the concrete wall referred to above. Photo 4 in the album depicts the hall whereat, it is alleged, the bus passengers were standing before they boarded it. Photo 5 in the album was taken from the gate of the hall in the direction of the T-junction, and is 250 metres to the T-junction. This distance he measured by means of his measuring wheel. The sign "Stop 500" in photo 5 is totally wrong, he said.

13.14 He further testified that he was asked by counsel for the defendant to conduct another experiment, namely to see how fast he can move on foot for a distance of 100 metres, especially when he moves very fast. He first measured the 100 metres with his wheel and took 55 seconds to cover the distance. The second attempt took 75 seconds and the third "stroll", as he called it, took 95 seconds. He concluded his evidence-in-chief by explaining to the court that he first measured the 100 metres by marking the starting and end points and thereafter walking this distance rapidly and the outcome was 55 seconds.

13.15 Cross-examination of Mr Rheeder was to the following effect: He was referred to photographs 3 and 4 and was asked whether the BAFA board that is depicted in photo 3 also appears in photo 4. He answered negatively.

13.15.1 He was then asked how broad the gravel road which runs parallel to the tarred road is. He answered that he did not measure it but estimated that it could be five to six metres broad. This gravel road is depicted in photograph 9.

13.15.2 He was further asked about the man with the red and yellow coat depicted on photo 9. The question was where was this man standing when the photograph was taken. He answered that he was standing on the opposite side, that is,

on the furthest side of the gravel road on which he was standing. He was then asked to give an estimation of the distance between the tarred road and the person with a red and yellow coat. He answered that it could be twenty to twenty five metres.

13.15.3 He was further asked whether he sees the pole marked M, to which he answered affirmatively. The next question was that if he drew a straight line from the tarred road to the pole, how far does he estimate the distance. He answered that it is very difficult to estimate this distance, but if his memory is anything to go by, it is sixty to seventy metres. He supported his estimation by stating that the said pole is beyond the first pole.

13.15.4 He was then referred to photograph 8 and asked whether he sees the wall depicted therein, to which he answered affirmatively. Further, he was asked how far this wall is from the tarred road. Could it be approximately twenty metres? He conceded that it could be more or less twenty metres. Upon being asked about the same exercise in respect of the pole M, he answered, once more, more or less the same. This concluded the cross-examination of Mr Rheeder and there was no re-examination. Counsel for

the defendant indicated that this is the case for the defendant.

(D) ANALYSIS OF EVIDENCE AND FINDINGS THEREON

[14] A close examination of the plaintiffs evidence indicates, if anything, that he was a poor witness for himself. For example:

14.1 He, on several occasions, avoided questions put to him during cross-examination on the difference in his oral evidence in court and what appeared in his affidavit.

14.2 Although he conceded that what appears in his statement to the police and his testimony do not correlate, he gave a somewhat poor explanation of the difference in his testimony and the statement and had no explanation for the clash of incompatible statements.

14.3 He also conceded that the raging dust that night played a big role in the collision, causing him to temporarily lose control of his car and swinging it back onto the tarred road and thus colliding with the rear of the bus in the process.

14.4 On being asked by counsel for the defendant whether the dust obscured his view of the bus, he refused to answer the question or any further questions by saying the following: "I have got no further comment M'Lord. I am going to end there. That is all what I know." The record further reads as follows:

"COURT: Do you mean you are no longer prepared to answer questions put by counsel? — Saying anything further M'Lord I will be lying to the court.

Yes, but are you going to continue answering questions put by counsel? — I am not going to answer any more. My mind is confused now.

Are you confused now? — It is because M'Lord I am not capable of speaking or talking the whole day. My nerves are starting to disturb me because I can feel that through my eyes. I cannot take it anymore.

So you do not want to continue with the trial, you want it to stop right there? — Yes, I am not proceeding anymore."

14.5 Before making the above intimation to the court, he conceded that he was travelling too fast although he denied being negligent. He testified that he forgot to tell his attorney about the dust storm when he gave his statement to him.

14.6 The evidence of the plaintiffs witness, Ms Mmusi, is also not much helpful because she testified that she did not see the collision

occur but merely heard a loud bang. Besides, when asked by counsel for the plaintiff whether there were any other vehicles on this road that she could see, she answered: "I could not see properly due to the fact that it was at night and as well as because of the presence of the dust."

14.7 Although she could remember and testify about paces between her and the bus, she could not testify about where the bus and the bakkie were after the collision. Instead she answered: "By then we were so shocked due to the accident itself, I cannot say exactly what I see and what I did not see."

14.8 Upon being asked why she did not see the bakkie which struck the bus drive past the T-junction that she was walking towards, she answered: "Remember, the bus had dust towards the tar surface and by then when the bus was gone there was only a cloud of dust hanging there and it was obscuring my view."

[15] The rebuttal evidence adduced on behalf of the defendant, when viewed as a whole, was purposefully and meticulously presented to the court. The testimony of the insured bus driver in particular, in so far as the issues in this matter are concerned, is, in my view, open to little or no criticism. The record speaks for itself and it should not be rehashed herein. Suffice it to say that the dust cloud, whether it was wind-driven or caused by the bus, played a critical role in the collision.

(E) DUST AS A RESTRICTIVE FACTOR OF VISIBILITY

[16] Our law imposes a duty on the driver of a motor vehicle to drive it so as to avoid causing harm to others. *R v De Swardt* 1949 1 SA 516 (N). To this end he is obliged, inter alia, (a) to keep a proper look-out, (b) to drive at a reasonable speed, and (c) to drive at a safe distance from the vehicle ahead. Keeping a proper look-out means "more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity". He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavement on the side of the road as well. (See *Neuhaus v Bastion Ins* 1968 1 SA 398 (A).) The duty to drive at a reasonable speed and the duty to keep a proper look-out are, in my view, two sides of the same coin.

It follows that for a driver at night to travel at a speed which does not permit him to stop within his range of vision implies that he will be driving towards a part of the road which his eyes cannot see, ie blindly. Such a speed effectively precludes the driver from keeping a proper look-out. "Reasonable speed" can therefore be defined as the speed at which a driver is able to stop his vehicle within his range of vision. (See *R v Wells* 1949 3 SA 83 (A) 88.) The driver of a vehicle following another is under a duty to regulate his speed and distance from the vehicle ahead of him so as to be able to avoid colliding with it should the vehicle ahead make a sudden stop. (See *Uniswa v Bezuidenhout* 1982 3 SA 957 (A) 965B-C.) It should be stated that in our law proof that a following vehicle collided with the rear of the vehicle travelling ahead is *prima facie* evidence of negligence. (See *Kruger v Van der Merwe* 1966 2 SA 266 (A).) The situation is an instance of *res ipsa loquitur*. An evidential onus of rebuttal is cast on the following driver. If he fails to adduce evidence to negotiate the inference of negligence, his failure tilts the scale in the ahead driver and the latter is entitled to succeed. (See *Cooper W E: Delictual Liability in Motor Law* Juta & Co Ltd 1996 at pi41.)

[17] According to Cooper op cit at pi36, a driver who encounters a cloud of dust ahead of him who realises, or should realise, that the dust is so dense that when he enters it he may be able to see ahead of him for only a short distance should conduct himself as follows:

"(a) He should enter the dust cloud, if he does so at all, at a speed which will enable him, within the range of his restricted vision, to avoid a collision with any vehicle, person or other object which he might reasonably expect to encounter in the dust.

(b) He should drive in the dust with such skill, care and alertness as will enable him to avoid the collision.

(c) If the visibility in the dust cloud is expected to be so bad that even at a slow pace there is a danger that he will be unable to avoid a collision, he should not enter the dust cloud but should stop and wait for it to disperse. There may be circumstances in which the duty to exercise reasonable care will require a motorist to drive off the road and stop on the verge or the veld. In other circumstances he may be required to hoot or switch on his lights.

(d) If the dust is not stationary but is one which the driver has seen moving towards him and he has, because of that, been able to see a stretch of the road ahead of him before it becomes obscured by dust and he has satisfied himself that it is clear of obstruction, he may drive over that stretch even after it has been obscured, provided that he does so at an appropriate speed and with appropriate care."

[18] I am in full agreement with the above succinct propositions by Cooper, for they are directly applicable in casu, more so that they are in line with our case law where the driver's vision was impaired by dust. (See *Rondalia v Mtkombeni* 1979 3 SA 967 (A) and *Maphosa v Wilke* 1990 3 SA 789 (T) at 795G.)

(F) CONCLUSION AND ORDER

[19] In the light of the foregoing facts and analysis, I am convinced that, if anything, this collision was, in the main, caused by the plaintiff who was travelling too fast at night into a raging dust cloud while his vision was restricted. For him to refuse to answer the question whether the dust obscured his view of the bus can, and does, in my considered opinion, attract an adverse inference. He knew that the dust cloud obscured his vision but was not prepared to admit this fact in an open court, and rather chose not to answer questions any further. I find that there is contributory negligence in this case.

[20] As to the point of collision as an issue between the parties, the plaintiff also failed to indicate to the court how far he travelled when he saw the bus for the first time, tried to take avoidance action and ultimately collided with the rear of the bus. The insured driver, on the other hand, explained in detail how he determined the collision point. He concluded this part of his evidence by stating that the

following day he drove past the collision spot and found people clearing blood and debris strewn on the road. I find that the point of collision has clearly been demonstrated by the defendant.

[21] Having found much contributory negligence on the part of the plaintiff, it remains for me to indicate the apportionment of

liability in respect of each party in terms of the Apportionment of Damages Act 34 of 1956 (as amended). I conclude that in this matter the apportionment of liability is 75% on the part of the plaintiff and 25% on the defendant. I therefore make the following order:

- (a) on the merits of the matter, the plaintiff is held to have been 75% negligent and liable in causing the collision, the defendant 25%;
 - (b) the defendant is hereby ordered to pay 25% of the plaintiffs costs.
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