

SOUTH AFRICA / JUDGMENT

Saunders v Road Accident Fund (12828/2019) [2020] ZAGPPHC 413 (30 June 2020)

[2020] ZAGPPHC 413

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela

CASE / FILE NUMBER

12828/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION PRETORIA)

Case

No: 12828/2019

30/6/2020

In the matter between: Saunders, Jean-Paul Marko Amlendro Plaintiffand

Road Accident Fund

Defendant

JUDGMENT

Maumela J.

1. Plaintiff instituted action against the Defendant. It is defended. The action is for damages that allegedly arose from injuries he sustained in a motor vehicle collision which occurred on the 25th of June 2018, (the day of the accident). The accident is alleged to have occurred at approximately 12h30 on the R556 Road, between

Tsitseng and MogoJane in the North West Province.

2. It is common cause that Plaintiff was riding a motor cycle bearing registration number [....]. The motorcycle is alleged to have been collided against by a vehicle identified only as a “bakkie” (“the bakkie”). The parties agreed that these proceedings turn on merits only and by agreement, quantum was postponed. Plaintiff called two witnesses. The defendant closed its case without calling any witnesses.

Plaintiff alleges from the pleadings that the collision was caused solely by the negligence of the driver of the unidentified insured vehicle. The defendant disputes the allegation. For that reason, the plaintiff ought to prove all aspects of the collision. The defendant pleads in the alternative that in the event where this court finds that a collision occurred, and that the insured driver was negligent, then it should find that the plaintiff was contributorily negligent for which reason his claim ought to be apportioned in accordance with the Apportionment of Damages Act 1956: (Act No 34 of 1956).

3. It is trite that the onus is on the plaintiff to prove, on a balance of probabilities that his injuries were caused as a result of the negligent driving of the insured driver. In the case of *Sardi and Others v Standard Bank and General Insurance Co*[1], the court stated the following: “The person, against whom the inference of negligence is sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The court will test the explanation by considerations such as probability and credibility..... At the end of the case, the court has to decide whether on all the evidence and the probabilities and the inferences the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the court would do in any other case concerning negligence. In this final analysis, the court does not adopt the piecemeal approach of (a) first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case, and then

(b) deciding whether this has been rebutted by the defendant’s explanation.”

4. In the case of *Riskie v Viviers*[2], the court stated the following: “The ordinary rule must apply, namely, that the plaintiff must prove every essential, to give him a cause of action. Here, there are two things that are essential, which the plaintiff has to prove: Firstly, a certain condition must be proven to have existed, at the commencement of the lease. Secondly, a different ‘condition,’ must be shown to have set in, by the time the lease was terminated.”
5. In instances of this nature, the test becomes whether or not the defendant exercised the standard of care and skill that has to be observed by a reasonable man applies. See *Flanders v Trans Zambezi Express*[3]. In carrying out this judicial analysis, the court has to consider inter alia, the following factors: 5.1. Whether the plaintiff as a reasonable driver adhered to his obligation to keep a proper lookout in all the circumstances, 5.2. Whether plaintiff kept a reasonable speed within the range of his vision, immediately before the collision. 5.3. Whether as a reasonable driver, the plaintiff met the duty to anticipate a reasonable apparent risk and take appropriate precautions 5.4. The time of day at which the accident

occurred, the location of the collision, the speed involved; and 5.6. Whether alcohol, drugs or other types of impairment played a role to deprive the driver the ability to avoid the collision.

6. In order to avoid being found have been contributorily negligent and therefore laden with liability, plaintiff has to demonstrate that after careful consideration of his whole evidence it should be found that he could not have avoided the accident even by exercise of reasonable care and that he did not, by his own conduct, contribute in any material way to the accident which took place. Plaintiff

submits that on consideration of the evidence on his behalf, coupled with the lack of evidence rebutting defendant's evidence, the available evidence establishes proof in his favour on a balance of probabilities. He has to prove that he displayed the requisite skill and caution of a reasonable driver in his position and that this court only ought to arrive at the conclusion that the sole cause of the collision was the negligence of the driver of the unidentified bakkie.

BACKGROUND.

7. Plaintiff testified that in the morning of the 25th of June 2018, he responded to a text message to the effect that his ex-mother in law has passed on. Later during the day, in a sober state, he drove his motorcycle a GMV Augusta bearing registration number [...] along the R556, heading home to Randburg. He stated before court that he was riding on a single carriage lane with a small emergency lane on each side. He further stated that the speed limit on that road is 120km. He stated that the speed limit reduces to 100km, and eventually to 80km per hour. He said that along this road, domestic animals and school children are found.
 8. Plaintiff testified further that while riding, he saw ahead of him; at a distance of about 800 meters, a Bakkie moving slowly. He stated that he reduced his speed and remained on his lane. He indicated to alert the driver of the bakkie that he is about to overtake. He said that he started overtaking, at a speed of 80 to 90 kilometres per hour. He stated that what happened next is that the van flipped his motorbike aside. He stated that from there, the next thing was that when he woke up, he was surrounded by Good Samaritans who were assisting him. The plaintiff stated that on the day of the accident, he is not sure if the Bakkie made contact with him but he had already crossed the dotted line in the middle of the road to overtake when the accident happened.
- #### EVIDENCE OF MR. SAUNDERS.
9. Mr. Juan-Paul Mark Almendro Saunders testified in his capacity as the plaintiff. He told court under oath that on the 25th of June 2018, (the day of the accident), he departed from Anglo Platinum in Northam at approximately 13h00; en route to Randburg. He stated that he was of a sound and sober mind at the time, in that he had not taken any alcohol or any dependence

producing drugs prior to embarking on his trip. He said that he was in a well-rested state of being. Under cross-examination, he

confirmed that he was not in a hurry. As such, he waited traffic to abate before starting his trip.

10. Plaintiff testified that as he drove, he noticed a bakkie ahead of him, travelling at a slow speed and decided to overtake it. He said that he initially moved to just inside the Centre-line of the roadway, with his indicator flickering so as to draw the attention of the driver to his presence behind him and his intention to overtake. He said that he did this for approximately 20 seconds, before crossing the midline of the road and accelerating so as to overtake. He testified that whilst he was alongside the bakkie, he was suddenly flung to his right side. He stated that he fell off the motorbike, grazing his right shoulder and helmet on the tarmac in the process.
11. Plaintiff said that he lost consciousness due to the collision. By the time he regained consciousness, there were people standing over him who were rendering assistance to him. He pointed out on the sketch plan that the point of impact was in the middle of the oncoming lane. For that reason, he concluded that the bakkie veered to its right and collided with him. In his evidence-in-chief, he stated that he had created a wide distance between his bike and the insured vehicle as he overtook. The Plaintiff was asked about whether there were any paramedics on the scene. He responded, to the effect that there were paramedics present and he was transported by an ambulance to the hospital. However, he could not remember the hospital to which he was taken.
12. This evidence was not controverted; neither were any questions put to the witness in regard to the berth he had created between him and the bakkie. Counsel for the defendant took issue with the fact that plaintiff did not know which ambulance collected him from the scene, much as he did not know the hospital where he was treated. However, Plaintiff explained satisfactorily in each instance, noting that he lay on his stomach on a stretcher in the ambulance and all he could see the inside of the ambulance. Therefore, he did could not see what was outside. Plaintiff did not contradict himself in his version.
13. Plaintiff told court that the affidavit he submitted to the defendant in support of his claim remains correct and it is evident that his version in it is consistent with the version in the oral testimony he gave before court. He proved to be reliable, credible and honest. He did not contradict himself. He outlined the chronology of events with the utmost clarity. He neither embellished upon, nor minimized any details. He simply retold the event to the exact extent that he could remember it.
14. The defence also took issue with the fact that plaintiff was unable to say with certainty that there had been contact between the bakkie and his motor cycle. However, plaintiff testified that he was "99% certain" that there was contact and that there was no other explanation for the manner in which his motorbike was flung sideways, other than that there must have been contact between his motor bike and the insured vehicle.
15. Two aspects ought to be kept in mind namely: 15.1. That it is trite law that there need not be contact between the motor vehicles in question for the plaintiff to have a valid claim. See *Bezuidenhout v RAF*[4]. This question falls short of establishing anything other than that the

plaintiff could not be one hundred percent certain that there was contact.^{15.2} The second consideration is that once the independent witness confirmed that he had seen the bakkie colliding into the plaintiff's motorbike and driving off, no questions at all in this regard were put to this witness and accordingly, no concessions were elicited.

16. The court has to consider that the defendant puts into dispute the allegation by the plaintiff that there was contact between his

motorbike and the insured vehicle. It also raises the issue that plaintiff failed to furnish the defence with an officer's

accident report. The plaintiff on the other hand asserts that he reported the matter and then followed up several times to no avail,

trying to trace the officer's accident report.

17. It is trite that neither the Road Accident Fund Act nor its regulations make it compulsory for the officer's accident report to be furnished to the defendant. Plaintiff is merely required to furnish the defendant with as much detail as is necessary in order to enable the defendant to investigate the claim. Plaintiff contends that in this case, he has furnished sufficient information through the form of the affidavits and independent the witness, together with the hospital records which confirm the plaintiff's admission on the date of the accident. Plaintiff testified that the case number was provided to the motor cycle's insurers, who utilized same to process the plaintiff's partner's claim and replaced the motor cycle. This evidence was uncontroverted and counsel for the defendant did not take issue with it. EVIDENCE OF MR. PERCY BOGOPANE.

18. The plaintiff called Mr. Percy Bogopane. Under oath, he testified that at current moment he is unemployed. At the time of the accident he was working as a bartender at Coconut Club in Rustenburg. He testified that on the day in question he was driving a Corsa lite vehicle heading to Tsitsing. He was driving at a speed limit of about 70-80 km per hour when he noticed a bakkie in front of him. He said that he was overtaken by a motorcycle, which was not driving fast. He tried to overtake the bakkie that was in front of him. He surmises that the driver of the bakkie did not observe or did not notice the motorcycle and he veered to the right, colliding with the motorcycle in the process.

19. This witness stated further that he did not stop but gave chase to the bakkie over a long distance, trying to stop him in vain. He returned to the scene and found paramedics whom he furnished with his details. According to this witness, the driver of the Bakkie was at fault.

20. Plaintiff avers that Mr. Bogopane proved to be a consistent and reliable witness, who did not contradict himself in any manner. It ought to be considered that this witness had no vested interest in providing assistance. He answered all questions in an open and honest manner. He testified that he did not know the plaintiff prior to the collision and that he made a statement and provided his details to the attending paramedics because he had seen what had happened.
21. Of his own accord, Mr. Bogopane deposed to an affidavit with the SAPS, detailing his version of events. This happened a mere six weeks after the accident. His version in the statement, and his oral evidence in the witness stand, was consistent with, and corroborated that of the plaintiff. The defence took issue with the fact that Bogopane did not obtain the license number of the bakkie, despite having “chased” it for several kilometers after the accident. However, under re-examination, this witness explained that he was too far back from the suspected vehicle to see the license plate.
22. The defence counsel asked repeated questions relating to the colour of the bakkie and whether it was carrying a load or not. But he did not put it to the witness that his version differed from that of the plaintiff, who claimed that there was scaffolding on the back of the bakkie. As such, the witness was never directly questioned about this contradiction. Consequently, no inferences can be drawn therefrom.
23. Under cross-examination, this witness independently confirmed that the colour of the plaintiff’s helmet was orange; exactly as described by the plaintiff during cross examination when asked by counsel for the defendant. Plaintiff contends that the obvious conclusion to be derived from this is that the witness was on the scene. The witness as he described, bearing in mind that he had not known the plaintiff prior thereto and would not have known what colour his helmet was otherwise.
24. This witness was candid in his testimony. He clearly identified that the bakkie collided into the right hand side of the motor cycle, whilst it was overtaking him. He stated that the bakkie did not stop after the collision; neither did it stop when he attempted to stop the bakkie. The witness stated that he also flashed his lights and hooted to draw the attention of the driver. He said that the bakkie eventually sped off; so much so that he could not catch up with it.
25. The witness stated that there is nothing the plaintiff could have done to avoid the collision. He said that the sole cause of the collision was the driver of the bakkie, in that he had failed to observe the plaintiff attempting to overtake him. The plaintiff contends that he has sufficiently discharged the onus of proof resting upon him and the defendant failed to adduce any evidence to controvert the evidence against it. In addition, the defendant is required to demonstrate in what respects it alleges that the plaintiff was negligent thereby, satisfying the requirements for contributory negligence to be proven against the plaintiff.

26. Plaintiff submits that in the absence of any evidence in that regard, the claim cannot be apportioned and the plaintiff is entitled to 100% of its proven or agreed damages. In other words, the defendant has not discharged the onus of rebuttal. Plaintiff successfully proved that the insured driver was negligent.
27. In the case of *Stacey v Kent*[5], Kroon J stated the following: “Where a matter is one where the maxim *res ipsa loquitur* is of application (ie where the mere fact of a particular occurrence warrants an inference of negligence and where the occurrence is due to a thing or means within the exclusive control of the defendant - *Cooper Motor Law* vol 2 at 99) the principles applicable are the following: the rule gives rise to an inference, not a presumption, of negligence. The court is not compelled to draw the inference. The inference does not shift the burden of disproving negligence on the defendant but casts an evidentiary burden on the defendant to supply some degree of proof in rebuttal of the inference (*Engelbrecht vs Vehicle Accident Fund Namibia*). At the end of the case the enquiry is where, on all the evidence, the balance of probabilities lies. If it is in favour of the party bearing the onus on the pleadings, he succeeds; if not, he fails. Once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary; he must tell the remainder of the story, or take the risk of judgment being given against him. How far the defendant's evidence need go to displace the inference of negligence arising from proof of the occurrence depends upon the facts of the particular case. Mere theories or hypothetical suggestions will not avail the defendant; his explanation must have some substantial foundation in fact and the evidence produced must be sufficient to destroy the probability of negligence inferred to be present prior to the testimony adduced by him. There is, however, no onus on the defendant to establish the correctness of his explanation on a balance of probabilities. The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.”
28. Despite cross-examination of the plaintiff's witnesses to refute the existence of the bakkie, or its maneuver to the right as the plaintiff overtook it, the evidence by the plaintiff could not be refuted. Neither did the defendant advance any plausible or was any explanation, plausible alternative to the plaintiff's version. The defendant further failed to rebut the presumption of negligence cast upon its insured driver insofar as his failure to stop and remain on the scene of the accident, as directed by the Road Traffic Act. The uncontested evidence is that the insured driver deliberately fled from the scene, despite concerted efforts to stop him.
29. Plaintiff therefore submits that his version stands to be accepted and that the sole cause of the collision was the negligence of the driver of the bakkie. He submits that the defendant ought to be held to be 100% liable to the plaintiff for his proven or agreed

damages.EVALUATION.

30. While the defendant disputes the version of the plaintiff, it did not lead evidence to contradict the version of the plaintiff. It merely surmises its version based on its own analysis of the state of the scene after the accident, and the versions of the various witnesses who testified for the plaintiff. On the other hand, the version of the plaintiff went unchallenged.
31. There is an eye-witness who is also an independent witness, who saw it when the accident took place. The version of this witness was not controverted by the defence. The court finds that the accident took place as contended by the plaintiff. In terms of s 17(1) of the Act, the Defendant is obliged to compensate any person (third party) for any loss or damage which a third party has suffered as a result of any bodily injury to himself or herself, or the death of any bodily injury to any other person caused by or arising from the negligent driving of motor vehicles whether or not the identity of the owner or driver of the motor vehicle that caused the accident is established.
32. In its endeavour to show that the plaintiff also contributed to the accident that took place, defendant did not adduce evidence. The plaintiff and the eye-witness gave court details outlining how the accident happened. The version of these witnesses was not challenged in any notable way by the defendant. Neither did the defendant succeed in its endeavour to implicate the plaintiff on any contributory negligence as a contributory factor where the accident is concerned that took place. The court finds that the negligence of the insured driver is the sole cause of the accident. For that reason, the defendant stands to be held to bear 100% liability for the accident.
33. The evidence of the Plaintiff is very central on enabling the court to arrive at a decision in this case. Together with the eye-witness;

Percy Bogopane, provided evidence on how the accident in issue took place. As a result, the court could make a determination on the aspect of negligence or contributory negligence as the cause of the accident. The court finds that the plaintiff is a necessary witness in this case.

34. In the result, the following order is made: ORDER.1. The issues of liability and quantum are separated.2. The Defendant is liable to the Plaintiff for 100% of the Plaintiff's proven damages. 3. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party within 14 days after taxation or agreement in respect of liability.4. The Plaintiff is declared a necessary witness.5. The issue of quantum is postponed sine die.

T.A. Maumela.Judge of the High Court of South Africa.

[1]. 1977 (3) SA 776 (A) at 780 B-H.

[2] . 1928 CPD 202, at 204.

[3]. 2008 ZASCA 152.

[4]. 2003 (6) SA 61 (SCA).

[5]. 1992 (4) SA 495 (C).

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