SOUTH AFRICA / JUDGMENT

Senne v Road Accident Fund (RAF288/15) [2017] ZANWHC 95 (16 November 2017)

[2017] ZANWHC 95

COURT
North West High Court, Mafikeng

BEFORE
T Djaje

CASE / FILE NUMBER
RAF288/15

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE
NO. RAF 288/15
In

the matter between:

KATLEGO
GEORGE SENNE
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

DJAJE J

[1] The Plaintiff is claiming damages from the Defendant for personal injuries arising from a collision between his motor cycle and the motor vehicle of the insured driver. The parties agreed at the beginning that the merits and quantum be separated. This matter is therefore only on merits.

[2] On 25 June 2013 the Plaintiff was the driver of a motor cycle on his way from Rustenburg to Thembelani mine. It was around 05h00 in the morning and he collided with a taxi being driven by the insured driver. As a result of the collision his motor cycle was damaged and he suffered injuries as a result of which he was hospitalized.

Evidence

[3] The Plaintiff's version is that on the day of the collision he was driving at 40-50km/h on the straight portion of the road. He had just left a stop sign, drove over a speed hump and was approaching a curve when he saw one light emerging from the opposite direction. He could not see if it was a motor cycle or a vehicle. He collided with the said object and he lost consciousness. He only regained consciousness at the hospital and could not remember how the collision happened. He testified that the light was too bright and that resulted in him losing control of the motor cycle. He was unable to say whether the point of impact was on his side of the road or the other side of the road. According to the Plaintiff the distance from the stop sign that he had just left to the point of impact is 50-60 meters and he was ascending as the road was hilly.

[4] During cross examination the Plaintiff admitted that on the day of the collision he was driving the motor cycle without a valid driver's licence. He also conceded that it is possible that the insured driver is the one who drove through humps and a stop sign, and not him as earlier testified that the point of impact was after the curve and not before it as he had initially testified further. He conceded that it is possible that the insured driver tried to avoid him by swerving to the left and his motor cycle hit the insured driver's vehicle on the front right side. At the end of his evidence he made a concession that there is a possibility he is the one who made a mistake in causing the collision.

[5] The insured driver testified on behalf of the Defendant. He confirmed that he was driving a taxi on 25 June 2013 transporting workers on the Thembelani mine road. He testified that close to the curve he saw a light approaching him from the opposite direction coming directly to his side, he then tried to avoid it by swerving his vehicle to the left side of the road. He only realised that it was a motorcycle when it collided with the right front part of his vehicle. He disputed that his lights could have distracted the Plaintiff as they were not facing his direction but facing the outside of the road as he was on a curve. It was further his testimony that he could not have been driving at a high speed as he had just driven over

speed humps and the road was ascending.

[6] In cross examination he confirmed that his head lights were on but they could not have been too bright as it was not too dark. When asked to estimate the speed he was driving at, he responded that he was driving his vehicle at the speed of 30km/h. It was his version that he was not negligent in any way on the date of the collision but rather that the Plaintiff lost control of his motor cycle and collided with his vehicle on his side of the road.

[7] The issue for determination is whether the insured driver negligently caused the collision on 25 June 2013 or contributed in any way to the said collision.

[8] The submission for the Plaintiff was that the Defendant chose not to call any of the passengers who were conveyed in the insured driver's vehicle thus leaving the evidence of the insured driver uncorroborated. This according to counsel for the Plaintiff resulted in the evidence on behalf of the Defendant being irrational, hopeless and impractical in relation to the sequence of the events on the day of the accident. It was argued that the insured driver could not give a factual explanation of how the accident happened, in that he could not remember if his head lights were bright or not and at what point could he realise that the object approaching him from the opposite direction was a motor cycle.

[9] It is the Plaintiff's case that the insured driver's negligence contributed materially to the accident in that he drove his vehicle with bright lights disregarding other road users. Further that his version of trying to avoid the accident should be disregarded as it is marred with undoable sequence of events.

[10] It was submitted by the Defendant that there are two mutually destructive versions in respect of the events leading to the

accident, the point of impact and what and/or who caused the accident.

[11] According to the Defendant the accident was caused solely by the negligence of the Plaintiff by losing control of his motorcycle and colliding with the insured driver of his side of the road. It is the Defendant's argument that if the Plaintiff's version is to be accepted that the insured driver's lights were on bright, the Plaintiff failed to show what precautions he took in order to avoid the accident. Unlike the insured driver who testified that he swerved to the left to an extent that his vehicle was partly outside the road. The Defendant argued that the Plaintiff should have applied flashlights to stop the insured driver from obstructing him with the bright lights if that is what happened. Further that even if it could be found that the insured driver's lights were bright, his testimony that the lights were not facing directly at the Plaintiff but in the bushes is logical as the accident happened on the curve.

Law

[12] 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.

[13] Holmes JA also said the following in the matter of Sardi and Others v Standard Bank & General Insur. Co 1977

(3) SA 776 (A) at 780 B-H:

"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."

[14] In determining the causal nexus between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff, Van Oosten J, in Miller v Road Accident Fund [1999] 4 All SA 560 (W), at 565I, formulated the inquiry as follows:

"Two distinct enquiries arise, which were formulated by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680

(A) at 700E–I as follows:

"The first is a factual one and relates to the question as to whether defendant's wrongful act was a cause of the plaintiff's

loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[15] As far as the issue of two irreconcilable versions is concerned in the case of Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others 2003 (1) SA 11 (SCA) Nienaber JA stated the following at 14I-J – 15A-D:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

(b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his own version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii),(iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. 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. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

Analysis

[16] There are two irreconcilable versions in this matter. The Plaintiff's claim is that the collision he was involved in was as a result of the negligence of the insured driver by having his motor vehicle lights bright and as such destructing his view. There are no other witnesses who testified for the Plaintiff to corroborate his version that the insured driver had his lights bright at his direction. The Plaintiff lost consciousness after the accident and could not testify about the positions of the motor vehicle of the injured driver and his motorcycle after the impact.

[17] It is important to mention that no expert witness was called to explain the effect of the speed at which the Plaintiff was travelling on the collision itself. The Plaintiff testified that he was travelling at 40-50km/h whilst the insured driver stated that his speed was 30km/h. It can be deduced that both the Plaintiff and the insured driver were not travelling at high speed and should have been able to avoid the collision. It is the Plaintiff's case that the collision happened before the curve when he saw a bright light and lost control of his motor cycle. He was not able to testify what he did to try and avoid the collision as he was not travelling at a high speed. During cross examination he could not dispute the version of the insured driver as indicated on the sketch plan that the collision happened at the curve. The sketch plan that was handed in as exhibit shows that the point of impact was at the curve. It further shows

that before the collision, the insured driver's vehicle was at the start of the curve. According to the version of the insured driver the Plaintiff did not curve but drove straight onto his side of the road and collided with him. On the sketch plan the point of impact is indicated as being on the insured driver's side of the road.

[18] The Plaintiff was asked during cross examination if he insists that the insured driver caused the collision and his response was that the only thing he saw was a light and he does not know what happened. He was asked further if he still maintains that the negligence of the insured driver is the sole cause of the collision and his response was "I don't know maybe the mistake was made by him or me". In his affidavit he indicated that the insured driver was travelling at an excessive speed and he lost control of the vehicle at a curve and collided with him. This is in contradiction with what he said in his evidence in court that he only saw a light and does not know what happened. This makes the version of the Plaintiff improbable and inconsistent.

[19] The insured driver on the other hand testified that when he saw the light approaching at the curve he swerved his vehicle to the left side of the road to an extent that the left tyres were no longer on the tarred road. This evidence is corroborated by what is indicated on the sketch plan. It was also the evidence of the insured driver that he tried to avoid the collision by swerving his vehicle to the left side of the road but the Plaintiff's motor cycle drove straight onto his side of the road and collided with him. It is clear from the sketch plan that before the collision, the insured driver's vehicle was facing straight on the outside of the left side of the road. This makes his version that his lights were not facing the direction from where the Plaintiff was coming, probable.

[20] After considering all the evidence on behalf of both the Plaintiff and the Defendant I find that the plaintiff has not succeeded in proving on a balance of probabilities that the insured driver negligently caused the collision on 25 June 2013. In the result the Defendant cannot be held liable for any damages suffered by the Plaintiff as a result of the said collision.

Order

[21] Consequently, I make the following order:

1. The plaintiff's claim is dismissed with costs.

J T DJAJE

JUDGE OF THE HIGH COURT

APPEARANCES

COUNSEL FOR THE PLAINTIFF : ADV K L MMANASOE

COUNSEL FOR THE DEFENDANT : ADV M MOAGI

DATE OF HEARING

: 19 SEPTEMBER 2017

DATE OF JUDGMENT

: 16 NOVEMBER 2017

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