

SOUTH AFRICA / JUDGMENT

Sinqwebo v Road Accident Fund (701/01)

[2010] ZAECMHC 11 (14 January 2010)

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COURT

Eastern Cape High Court, Mthatha

BEFORE

Z.M. Nhlangulela

CASE / FILE NUMBER

701/01

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT: MTHATHA)
CASE NO: 701/01

In the matter between: SAMUEL SINQWENO Plaintiff
 And
 ROAD ACCIDENT FUND Defendant

JUDGMENT

NHLANGULELA J:

[1] The plaintiff instituted an action against the defendant claiming payment of R105 000, 00. The action arises from an accident in which the plaintiff was involved as a pedestrian on 01 August 1999. At the commencement of the trial Locke J granted an order by agreement of the parties separating the issues of liability and quantum so that only the issue of liability is to be determined at this stage. It was further agreed between the parties in terms of a pre trial minute and an order dated 06 December 2005 that the trial should

proceed on the basis that the defendant was at fault in causing the accident that occasioned the damages now being claimed by the

plaintiff; but such damages to be apportioned to the extent of contributory fault on the part of the plaintiff. Consequently, at this stage the parties seek determination of liability of the defendant in terms of the provisions of s 1 (1) (a) of the Apportionment of Damages Act 34 of 1956. The provisions of the subsection read as follows :

“Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”

[2] The trial on the issue of liability was commenced before Locke J who, unfortunately, later passed on. At the time of his death the parties had concluded adducing evidence of the plaintiff, one Mr Khayaletu Ncaphayi and defendant. Mr Ncaphayi was a policeman who drew a sketch plan and key thereto. He also took a written statement of the plaintiff. The witness who testified on behalf of the defendant was Mr Vusumzi Gwazela, the driver of the truck that collided with the plaintiff. The truck of Mr Gwazela was

insured by the defendant in terms of the Road Accident Fund Act 56 of

1996. The evidence has since been transcribed and placed before me. When the parties appeared before me on both 13 October 2009 and 19 November 2009 they requested that the hearing of evidence should not be commenced de novo but that the record of proceedings before Locke J together with the heads of argument should be used without a need of recalling the witnesses. Such an approach was acceptable to me because it mitigates the costs of litigation and ameliorates unnecessary

inconvenience to the witnesses. Accordingly, I allowed the parties to address the Court on the points raised by them in the heads of argument. I next deal with the addresses with reference to evidence and the law applicable thereto.

[3] On 1 August 1999 at about 15h00 the plaintiff was a passenger in a 10 tons truck which was driven by one Mr Mangala, already deceased at the time of the trial, on a flat and dirt rural road in Khotyana Location, Mqanduli. It was followed by the truck

of Mr Gwazela which is described as a 4 tons truck, Toyota Dyna (the insured vehicle). The weather was clear and the surface of the road was dry.

[4] In terms of a written statement of Mr Gwazela, which was discovered by the defendant in terms of the rules of this Court, the insured vehicle kept a following distance of approximately 70 metres behind Mr Mangala's truck for some time until the collision took place. Mr Gwazela then noticed that Mr Mangala's truck was reducing speed as it was leaving the road until it reached

a standstill on the left hand side of the road. The plaintiff alighted from Mr Mangala's truck, walked in front of it and

commenced crossing the road towards the opposite side of the truck. As he was crossing he heard Mr Mangala shouting a warning that he must leave the road as the insured vehicle, which was due to pass, had advanced too close to him. Mr Gwazela also heard Mr Mangala shouting to warn him of the presence of the pedestrian crossing the road in front of him. According to the

plaintiff the insured vehicle was at a distance of approximately 5 paces away from him when he saw it for the first time. Faced with a dilemma whether to run back or forward across the road he decided to run forward as it was safer for him to do so. As it was already too late for a collision between the plaintiff and the insured vehicle to be avoided the collision was bound to occur as it did. The only evasive step Mr Gwazela could take was to swerve the vehicle away from the plaintiff, albeit with partial success. As a result the plaintiff was hit on the leg and ribs against the back part of the trailer of the insured vehicle.

[5] The facts in paragraph 4 above are common cause. However, there are other facts, which are directly relevant to the plaintiff's contributory fault, that were disputed. The disputed facts relate to the question whether there was a cloud of dust on the road just before and during the occurrence of the collision. On that question the plaintiff testified that the sole cause of the collision was the driving of Mr Gwazela in that despite the existence of a cloud of dust, emitted due to the negligent driving of both Mr Mangala's truck and the insured vehicle on a dry surface of the dirt road, he failed to reduce speed so as to be able to keep a proper look out for objects and people ahead of him. Further, when warned of the presence of the plaintiff on the road, he

failed to take such evasive action as would prevent the collision from occurring. On the contrary, Mr Gwazela testified that a cloud of dust was never present on the road, thus suggesting that there was no obstruction which necessitated him to expect that the plaintiff would be on the road at the time of passing the stationary truck of Mr Mangala. He stated further that the road was so clear that he could even see school children who were on the side of the road ahead of him. He suggested, and it was contended on his behalf during argument, that the plaintiff just emerged from the front of Mr Mangala's truck and ran into the road being careless of the presence of the insured vehicle on the road, hence the unsuccessful attempt by Mr Gwazela to swerve away from the plaintiff.

[6] As regards the difficulties encountered when crossing the road, the plaintiff testified that if the road was free from dust he would have been able to see the insured vehicle approaching him and in good time for him to escape being hit. When he saw the insured vehicle advancing towards him at a distance of about 5 paces it was too late for him to leave the road unscathed. He told the court that the only preventive step he took was to run quickly forward with the result that he was hit when he had reached the edge of the road on the opposite side of Mr Mangala's truck. On this version the plaintiff denied that he collided with

the back of the trailer of the insured vehicle stating that the insured vehicle was driven into the incorrect side of the road where it hit him on the edge of the road.

[7] In my view the presence or otherwise of a cloud of dust on the road is crucial for the determination of negligence on the part of the plaintiff.

[8] Mr Bikitsha and Mr Matoti appeared on behalf of the plaintiff and defendant respectively. They were unanimous on the submission that the plaintiff crossed the road because he was not aware that the insured vehicle was present on the road and traveling at a distance that

was too dangerous for him to escape being hit and injured. However, they differed on the reason that caused him not to see the insured vehicle. Mr Bikitsha contended on behalf of the plaintiff that it was a cloud of dust that caused the plaintiff not to see the insured vehicle. On the other hand Mr Matoti contended that the plaintiff simply threw himself into the insured vehicle. These varied approaches originate from the conflicting

versions of the plaintiff and Mr Gwazela. To resolve the conflict I must apply the test that was formulated in the case of Stellenbosch Farmer's Winery Group and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) at para [5]. There it is stated that for a court to come to a conclusion on the disputed factual issues it should make findings on the credibility of witnesses, their reliability and probabilities.

[9] On the issue of credibility, I find it difficult to understand Mr Gwazela because his evidence on the dust issue is internally contradictory. On the one hand he was able to see the school children on the side of the road but on the other hand he could not see the plaintiff on the road until he received a warning from Mr Mangala. I also find that he was unreliable as a witness

because he failed to explain why he was unable to see the plaintiff in front of him yet he claimed to have maintained a following

distance of 70 metres and driving at a moderate speed. Consequently, his version that there was nothing that obstructed his vision is improbable. I prefer the version of the plaintiff that there was a cloud of dust on the road which obstructed the visions of both the plaintiff and Mr Gwazela. The submission by Mr Matoti that Mr Gwazela had no reason to expect a person on the road ahead of him serves to explain the predicament Mr Gwazela found himself into due to failure to regulate the speed of the insured vehicle in accordance with the demand of the obstructing cloud of dust.

[10] Mr Bikitsha's submission that the plaintiff was negligent in crossing the road on the face of a cloud of dust that had denied him an opportunity to see the insured vehicle is sound. The plaintiff, as a pedestrian crossing the road, has his fair share of obligations towards

motorists. In the case of Beech v Setzken 1928 CPD 500 at 504a it was stated that a pedestrian intending to cross a road should do so at an opportune moment and must exercise reasonable care. Further, he must use his senses to ascertain whether any motor vehicles are approaching. He should keep a proper lookout. That is, he should acquaint himself with the vicinity and scan the road so as to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety. Also see W.E. Cooper: "Delictual Liability In Motor Law," Juta, 1987 where these obligations are discussed in full. In my view a reasonable pedestrian on that road sensing and seeing the insured vehicle approaching would be expected to wait to for the dust to disperse before crossing the road. But the plaintiff in this case neither sensed nor saw the insured vehicle approaching towards him before crossing the road. Nevertheless, I find that his assumption that there would not be a vehicle behind a cloud of dust which had obscured his vision is sufficient fault on his part warranting a reduction of damage. Accordingly, I find that the cause of the

collision and the resultant damages suffered by the plaintiff were due to the fault of both Mr Gwazela and the plaintiff. In terms of the provisions of s 1 (1) (a) of the Appointment Of Damages Act 34 of 1956 (the Act) such damages as may be awarded in his favour must be reduced to the extent of the plaintiff's own fault in relation to the damage.

[11] The next issue to be considered is the method of assessing the degree of fault in respect of each of the parties to the damage. The plaintiff is a single wrongdoer against whom the defendant seeks apportionment. Therefore, the provisions of s 1 (1) (a) of the Act is applicable. The application of this section is not a simple matter. This is apparent from the interpretations

given to the subsection by the erstwhile Appellate Division in two important cases of South British Insurance Co. Ltd V Smit 1962 (3) SA 542 (A) and Jones NO v Santam Bpk 1965 (2) SA 542 (A). As regards the meaning of the subsection, the court of appeals in South British Insurance, *supra*, stated at 835H as follows :

" ... it is, I think, plain from a consideration of the section as a whole that what the Court has to measure is the conduct of all parties whose fault caused the damages. Postulating a single defendant, the determination of the 'degree in which the claimant was at fault in relation to the damage' will also automatically determine the degree in which the defendant was at fault in relation to the damage."

Briefly stated, the case of South British Insurance is authority for the view that an assessment of the degree of the claimant's fault automatically determines the degree of the defendant's fault. See Cooper at 295, *supra*. In the case of Jones NO, *supra*, this view was reassessed and clarified that what the Court has to measure is not the fault on the part of the claimant only but the fault of both the claimant and defendant should be measured and compared so that it may be determined how far the fault or negligence of each combined with the other to bring about the damage in issue. The court of appeals in Jones NO said the following at 555EH:

"A determination of the degree of fault on the part of the claimant does not by itself 'automatically determine the degree in which the defendant was at fault in relation to the damage'; the court must first also determine in how far the defendant's 'acts or omissions causally linked with the damage in issue, deviated from the norm of the bonus paterfamilias'. It is on the basis of comparison between the respective degrees of negligence of the two parties (or several parties if there be more than one claimant or defendant) that the court can determine in how far fault or negligence of each combined with the other to bring about the damage in issue."

Also see the case of Harrington NO And Another v Transnet Ltd And Others 2007

(2) SA 228 (C) at 253H where it is shown that the interpretation by the Appellate Division has been applied consistently over many years.

[12] On the issue of the degree of contributory fault, Mr Bikitsha submitted that where it is found that the degree of fault on the part of a motorist is greater than that of the pedestrian the court, based on the authority of the case of A.A. Mutual Insurance Associated Ltd v Maqula 1978 (1) SA 805 (A), should apportion 75% blame against the motorist. This principle derives

from the case of Jones NO, supra. He contended that on the facts of this case the fault of Mr Gwazela is more than that of the plaintiff. I agree with the submission of Mr Bikitsha. Mr Gwazela should have reduced the speed of 70km per hour the moment that he realized that the Mr Mangala's truck in front

had reduced speed to park on the side of the road. A cloud of dust that was formed due to application of brakes by Mr Mangala resulting in obstruction should again have served as a clear indicator that Mr Gwazela must reduce speed even further. The following was stated appositely by the highest court of appeals in *Nogude v Union And South West Africa Insurance Co. Ltd* 1975

(3) SA 685 (A) at 668AC.:

"A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions..."

Driving with 'virtually blinkers on' (*Rondalia Assurance Corporation of S.A. Ltd v Gonya*, 1973 (2) S.A. 550 (A.D.) at p 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case."

The manner in which Mr Gwazela drove the insured vehicle did not accord with the standard as envisaged in the case of *Nogude*.

[13] In the case of *Sanlam Versekeringsmaatskappy Bpk v Swart* 1987 (4) SA 816 (A) it was stated that a motorist driving his motor vehicle behind a cloud of dust caused by another motor vehicle in front should regulate his driving in such a manner that he is in a position of dealing with any unusual circumstances arising. Having failed to regulate his driving in accordance of the demand of a cloud of dust, I find myself unable to accept the submission made by Mr Matoti that it was reasonable for Mr Gwazela to expect that the plaintiff would not be on the road. Further, it may be stated that had the plaintiff been the driver he would have attracted a greater obligation of ensuring that the insured vehicle behind him was kept constantly in check. But such is not the case here. The fact that Mr Gwazela drove the insured vehicle at a high speed even when he was confronted with a cloud of dust makes him more blameworthy for the damage that the collision caused to the plaintiff.

[14] Consequently, I find it appropriate to apportion the degree of fault between the plaintiff and defendant at 25% 75% respectively. Such apportionment is made on the considerations of justice and equity. See: *General Accident Versekeringsmaatskappy Bpk v Uijs* NO [1993] ZASCA 58; 1993 (4) SA 228 (A) at 234J235E.

[15] The plaintiff has made a compelling case for an order of costs to be made in his favour. However, there is a serious problem regarding the scale of costs because if the damages are proved to be R105 000,00 as claimed the defendant would be liable to pay R78 750,00. This figure may very well necessitate an award of costs at the magistrates' court scale. In the light of this

reality it would be prudent for the issue of the scale of costs not to be decided at this stage but to be left for determination by the court that is yet to deal with quantum.

[16] In the result the following order shall issue :

1. The defendant is found to be liable to pay 75% of such damages as may later on be proved by the plaintiff.
2. The costs attended to the determination of the issue of liability to be paid by the defendant but on a scale that will be determined by a court dealing with the issue of quantum.

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

HEARD ON : 19 NOVEMBER 2009

DELIVERED ON : 14 JANUARY 2010

Appearing for the Plaintiff : Mr E.S. Bikitsha of

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