

SOUTH AFRICA / JUDGMENT

Truter v Road Accident Fund (54790/2017) [2017] ZAGPPHC 230 (1 June 2017) [2017] ZAGPPHC 230

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

54790/2017

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NO: 54790/2017

Reportable:	No
	Of
	interest to other judges: No
	Revised.
	1/6/2017
	In
the matter between:	JOHANN
	DE WET
	TRUTER PLAINTIFF
	and
	ROAD
	ACCIDENT
	FUND DEFENDANT

JUDGMENT

SARDIWALLA, AJ

Background:

[1] The plaintiff instituted an action claiming damages from the defendant arising from the bodily injuries sustained during a motor

vehicle collision that occurred on the 20th of July 2013. The accident occurred at approximately 15h30 on a gravel road in a forestry plantation, in the vicinity of White River and Nelspruit.

[2] The parties had on an earlier date agreed to a separation of merits and quantum. The court subsequently confirmed the separation of issues in terms of Rule 33(4) of the Uniform rules. Accordingly, the matter proceeded on merits only.

[3] It is an established principle in our law that, with one or two exceptions, the plaintiff always bears the onus of proving negligence on the part of the insured driver on a balance of probabilities.

[4] The plaintiff was riding a motorcycle and the driver insured by the defendant, a truck with sixteen passengers in the rear cab,

immediately prior to the collision occurred.

[5] The plaintiff, Mr. Mayers, is a motorcyclist that was part of the group of motorcyclist, traveling together with the plaintiff, when the collision occurred and Professor Lemmer, an accident reconstruction expert, testified on behalf of the plaintiff.

[6] The defendants' only witness was the insured driver, Mr. Mkasi, who frequently drove on this specific gravel road which he uses to transport employees to and from work at the plantation.

Common

facts:

[7] The parties are ad idem on the following facts:

[7.1] the collision took place on a gravel road and consequently, there were no road markings on the road;

[7.2] the plaintiff was riding on his motorcycle in the company of a group of other riders and that plaintiff was ahead of the entire group;

[7.3] there was no collision between the insured vehicle and the motorcycle on which the plaintiff was riding;

[7.4] the plaintiff's motorcycle was at a distance and diagonally opposite the insured vehicle and upon applying the brakes on his motorcycle, the plaintiff parted from the motorcycle and was flung, as a result of inertia and became lodged underneath the insured vehicle;

[7.5] the insured driver moved the truck after the incident by approximately a meter to safely dislodge the plaintiff from underneath the truck, this was done at the plaintiff's request;

Plaintiff's Version:

- [8] The plaintiff testified that on approaching a bend in the road, to his right, he saw a truck, travelling in his lane and in an attempt to avoid a collision with the truck he veered to his right, to try avoid the truck by passing it on his right hand side, as there was adequate space to do so. In the process of veering to his right, the motorcycle began to slide and he fell off the motorcycle and became lodged underneath the truck. He further indicated that he was driving approximately 40-50 km/h when the collision occurred.
- [9] Under cross examination the plaintiff denied that he was racing with his friends just before the collision, he further denied that he was riding with his head turned backwards towards his friends behind him with the front wheel of his motorcycle lifted in the air. He also denied knowledge of a notice board at the entrance of the road into the plantation specifically prohibiting motorcyclists from traversing the road. Plaintiff agreed under cross examination that the road was approximately seven meters wide.
- [10] Despite the defendant's version being put to the plaintiff and he being cross examined at length about whether or not he could not just have stopped rather than veering to the right, the plaintiff submitted inconsistent versions of what happened, eventually deciding on a version, as his final.
- [11] Mr. Mayers' testified that he was travelling behind the plaintiff at a distance of approximately twenty five meters. He saw the truck in the plaintiff's lane of travel. He says that the plaintiff swerved to the inside of the curve and so did the truck. Thereafter, Mr. Mayers says, his recollection is that the plaintiff must have utilized the front brakes on his motorcycle as his motorcycle began to slide and the plaintiff ended up under the truck. Mr. Mayers testified that he was travelling at approximately 40km/h when the collision occurred. He disagreed with the suggestion that the truck was stationary when the plaintiff rolled beneath it. Mr. Mayers testified that he had seen the entire incident and he stood by his testimony in this regard.
- [12] The plaintiff called Professor Lemmer, a collision reconstruction expert, to give an opinion on how the collision occurred. His testimony relates to a scientific explanation as how the plaintiff lost control of the motorcycle. He gave explanations regarding the difference between formulation of momentum and the application of same on a gravel road as opposed to a tar road.

[13] His testimony was that the plaintiff saw the insured vehicle for the first time about 40 meters away. This is per the pointing out done at plaintiffs instance during the inspection-in-loco. He further testified that the plaintiff needed twenty eight meters to stop his motorcycle, that is, if the truck had stopped

immediately.

[14] Professor Lemmer further testified that a motorcycle can stop more rapidly and faster than a motor vehicle. This was said when questioned by the Court. On the principle of inertia the witness could not explain as to why the plaintiff not follow the direction and speed of the motorcycle if this principle accepted.

[15] The Professor was questioned at length on his report by the Court and on his assumptions and the factors used in his calculations. Of significance was his evidence that the factor used between a tar road and a gravel road is 0.2%. He however conceded that the factor may not be accurate depending on the exact nature and conditions of the road surface.

[16] Professor Lemmers' report was pursuant to an inspection-in-loco of the scene of the collision. Interestingly enough, his observation during the inspection-in-loco he did not notice the blind rise as suggested in the photographic evidence and he maintained that the visibility for both driver and rider was approximately 50 meters and they would have seen each other from approximately, 40 meters. In his expert opinion though, they could have stopped within twenty eight meters after becoming aware of the danger.

Defendants' Version:

[17] Mr. Mkasi was the only witness for the defendant. Mr. Mkasi's evidence in chief was to the effect that he was travelling in his lane of travel when he saw the plaintiff approaching from the opposite direction, in the middle of the road, executing a "wheelie", and looking behind him. Mr. Mkasi further testified that when the plaintiff put down the front wheel of the motorcycle, he lost control and fell off his motorcycle, sliding on the gravel and ending up underneath the truck. Mr. Mkasi testified that he traverses the road daily, transporting workers and he has never seen motorcycles on the road. He confirmed that there is a notice board at the entrance of the plantation restricting motorcyclists from using the road.

[18] Mr. Mkasi further testified in regard to the precise moment when he had seen the plaintiff and that it was when the plaintiff was about to enter the curve in the road and was about fifteen meters away. It was at this moment when he stopped the truck whilst the plaintiff was still approaching, riding the motorcycle as stated above, with its front wheel up in the air and looking backwards at his friends. Mr. Mkasi testified that the width of the road was adequate for two motor vehicles to pass each other either side. Mr. Mkasi confirmed that he was on the correct side of the road and that no collision occurred between the truck and the motorcycle but that when the plaintiff put down his front wheel, he lost control; fell off his motorcycle and ended up underneath the truck.

[19] The insured driver was cross-examined extensively on the discrepancies between his evidence and his statement to the police.

His response was that his statement was taken by the police several years ago and he cannot remember the finer details of the collision anymore. He further testified in this regard that the statement was not read back to him but the contents thereof were simply explained to him by police.

Photographic evidence:

[20] I would be remiss in not dealing with the black, unclear and useless photographs, tendered in the plaintiffs pleadings bundle at pages 22, 23 and 24. These photographs were indistinct, as they appeared to be photocopies of the original photos. There was no adequate explanation as to why the originals were not available. However, during the Courts questioning on Professor Lemmers' report, a color photo that was attached to the report, where referred to. At that stage of proceedings, I ordered the plaintiffs to produce all the colored photographs and adjourned the Court, as I was of the view that if one of the color photos is available, the others must be available and they are vital in the matter.

[21] Notwithstanding the denial of the existence of the photographs, three clear color photos were produced to Court within an hour of the adjournment, by the plaintiff.

[22] The following was evident from the color photographs submitted:

[22.1] that the road was wide enough for two vehicles to pass each other;

[22.2] the truck was on the extreme left hand side of the road as depicted in the photo and would have been easy to pass;

[22.3] there was adequate visibility for both drivers to observe the other, prior to the collision;

[22.4] there were several motorcyclists on the road;

[22.5] that the gradient of the road was a gradual decline;

[22.6] there was visible loose gravel on the road;

[22.7] there was reasonable visibility around the bend for the insured driver and the rider to notice each other in time.

[22.8] it is significant to note that approximately 80 metres in front of the insured driver, there was a stationary Golf with five people standing next to it on the gravel to the left. On the other side of the road there was the stationary Isuzu and, further to the right, parked on the opposite gravel verge to the Golf.

[23] After having sight of the colour photographic evidence of the scene where the collision occurred, I can understand why these photographs were not initially produced when the plaintiff testified.

Mutually destructive versions:

[24] The approach, when facing mutually destructive versions was set out in the case of National Employers General Insurance Co Ltd v Jagers[1], by Eksteen AJP when he stated:

“... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.”

[25] The approach on mutually destructive versions as delineated above obtained a stamp of approval from the Supreme Court of Appeal in 2003 in the case of Stellenbosch Farmers’ Winery Group Ltd and Another v Martell Et Cie and Others[2] , where the court restated the law as set out in the National Employer General Insurance co. Ltd case supra.

[26] The test propounded by Wessels JA in National Employer’s Mutual General Insurance Association v Gany[3] is to the effect that “where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rest is true and the other false”.

[27] The principles extracted from these two cases are that when there are mutually destructive versions before court, the plaintiff’s onus of proof can only be discharged, if he proves his case on a preponderance of probabilities and that the prerequisite, that a court must be satisfied that the plaintiff’s version is true and that of the is defendant false, in order for the plaintiff to succeed in discharging his onus of proof, is only applicable in cases where there are no probabilities one way or the other.[4]

[28] The plaintiff was not a very impressive witness, who’s evidence had material inconsistencies which remained unexplained

further contradictions as he tried to explain them whilst testifying. He entangled himself in incomprehensible explanations, making it difficult for anyone to understand as to which version he was exactly standing by. The version he finally chosen is improbable, to be able to conceive it as the truth. In certain instances during cross examination he was so obviously

untruthful making the testimony of the plaintiff wholly unreliable and not credible.

[29] It is further apparent from the photographic evidence that the plaintiff must have had an unrestricted view down the road ahead of him for more than 1,5 kilometers, as he crested the rise and that in this vista he would have been able to see both the stationary insured vehicle in the oncoming lane and the insured vehicle. There was however no evidence as to the distance between the crest and the stationary Insured vehicle and more importantly, as to where the insured vehicle would have been at that point. There is no evidence as to the distance between the Insured vehicle and the crest or the dip tendered.

[30] The insured driver, on the other hand, denies that he drove negligently and on the incorrect side of the road and that such

alleged negligence was the cause of the ensuing damages now claimed by the plaintiff. He states that he was confronted with a situation

of sudden emergency and he had to make decisions that were apt for the prevailing moment and spontaneously applied the brakes of the truck.

[31] Considering the approach formulated in considering mutually destructive versions in the cases above, I find that the plaintiff

failed to convince this Court on a preponderance of probabilities and in considering the plaintiff's version against the general probabilities, that his version of events is the truth. On the other hand the insured driver was a credible and truthful witness, although his statement to the police differed to his testimony in Court, marginally and there was not a substantive difference but merely on certain insignificant details taking into consideration that the collision took place more than three and a half years ago, the testimony of the insured driver is accepted as credible and a more probable reflection of the events surrounding the collision on that day.

Negligence:

[32] For the defendant to be liable for the damages of the plaintiff on the basis of negligence the plaintiff have to demonstrate that:

[32.1] a reasonable person in the position of the insured driver –

- i. would have foreseen the reasonable possibility of his conduct injuring another in his person or property and subsequent causing him patrimonial loss; and
- ii. would have taken reasonable steps to guard against such occurrence; and

[32.2] the defendant failed to take such steps.[5]

[33] The general rule is that a driver of a motor vehicle who is faced with an oncoming vehicle which has swerved and entered its incorrect lane of travel resulting in a possible collision must, as a general rule, avoid swerving to the incorrect lane as his primary course of action[6]. It is important that each case be judged on its own merits.

[34] There is no doubt that the plaintiff was obliged to take evasive action under the circumstances to avoid a collision. One

possibility was to swerve away from the oncoming vehicle to the left but according to the evidence the terrain to the left was hazardous. There was loose gravel, a culvert, trees and a fence. However, in accordance to the evidence accepted by this Court, the plaintiff was the author of his own misfortune, as he had not noticed the insured drivers' vehicle timeously as he looking backwards instead of keeping a proper look out on the road ahead.

[35] As alluded to above, the distance between the insured vehicle and the plaintiffs' motorcycle at the point where the former, according to the plaintiff, failed to return to his correct lane was, at best for the plaintiff, somewhere between 50 meters and a maximum of 100 meter. That is accordingly accepted as the distance between the vehicles when the plaintiff could first, reasonably have realized that the oncoming vehicle was not returning to its correct lane. According to the evidence of Professor Lemmer, the plaintiff would have required at least twenty eight meters to bring his motorcycle to a stop .I take cognisance that the insured driver also immediately applied brakes. However, the Plaintiff could not explain why he did not merely stop his motorcycle timeously. Plaintiff was not ,in all probality, not keeping a proper lookout of the road and road users ahead of him as he was looking backwards at his friends. The evidence by Professor Lemmer, therefore is rendered irrelevant on this aspect, as it is based on an assumption that both the plaintiff and the insured driver where keeping a proper lookout as required from a reasonable driver of the road ahead.

[36] It is clear from the evidence that the plaintiff was plunged, by his own negligence, into a situation of sudden emergency, that he had no more than a second within which to escape that emergency and that he effectively was given a choice between facing the danger, or veering away from it and hoping that it would not follow him. He did the latter which caused the motorcycle to slide and the plaintiff to part from the motorcycle and ending up under the insured drivers' vehicle.

[37] In stark contrast the to behavior of the Plaintiff, the driver of the truck when faced with the sudden emergency was able to stop his vehicle[7]. The insured driver had adequate time to react in the situation as he was keeping a proper lookout on the road whilst the plaintiff was remiss in his duty and therefore he had very limited to virtually no time at all to react to the sudden emergency. This reaction by the plaintiff, that caused him to swerve to the right, cannot be regarded as an error of judgment as a reasonable man in the circumstances would have been keeping a proper lookout of the road ahead.

[38] In *Ntsala and Others v Mutual & Federal Insurance Co Ltd*[8] Els J stated the following at 192G - H:

Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split second or a second to consider the pros and B cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision.'

[39] The only probable and reasonable explanation, for reasons stated above, for the cause of the collision is explained in what was accepted by this Court in the testimony of the insured driver.

In the result, I make the following order:

- (a) Plaintiff's claim is dismissed.
- (b) The Plaintiff shall bear the costs of the action.

HEARD ON:

2 DECEMBER 2016

DATE OF JUDGMENT: 31 MAY 2017

Appearances:

For the Plaintiff:

Adv. Dredge

Instructed by:

Gert Nel Inc.

For the Defendant:

Adv. Cajee

Instructed by:

T M Chauke Inc.

[1] 1984 (4) SA 437 (E) at 440D-G.

[2] 2003 (1) SA 11 (SCA) at 14I-15E.

[3] 1931 AD 187 at 199.

[4] See also: African Eagle Life Assurance Co Ltd v Cainer 1980

(2) SA 324 (W).

[5] See in this regard the case of Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E-G.

- [6] See *Kleinhans v African Guarantee and Indemnity Co Ltd* 1959
- (2) SA 619 (E) at 624D-624F; *President Insurance Co Ltd v Tshabalala and Another* 1981 (1) SA 1016 (A) at 1018F - H and 1020C; *Burger v Santam Versekeringsmaatskappy Bpk* 1981 (2) SA 703 (A) at 708A.
- [7] See *Bruger v Santam Versekeringsmaatskappy Bpk* 1991
- (2) SA 703 (A) where the steps taken by a reasonable driver approaching a motor vehicle over a considerable distance, which opposite approaching motor vehicle had been veering onto the wrong side of the road, is stated as the driver would apply the brakes, move his motor vehicle to the left as far as possible and hoot continuously.
- [8] 1996 (2) SA 184 (T)
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