SOUTH AFRICA / JUDGMENT

Uithaler v Road Accident Fund (1847/09) [2011] ZAECPEHC 19 (26 May 2011)

[2011] ZAECPEHC 19

COURT
Eastern Cape High Court, Port Elizabeth

BEFORE
J.M. Roberson

CASE / FILE NUMBER
1847/09

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE - PORT ELIZABETH)

CASE NO:1847/09

DATE HEARD: 28/04/2011

DATE DELIVERED: 26/05/2011

In the matter between

WESLEY JOHAN JULIUS UITHALER .....Plaintiff

and

ROAD ACCIDENT FUND .....Defendant

JUDGMENT

ROBERSON J:-

[1] The plaintiff instituted action against the defendant for payment of damages, following a collision in which he was struck by a motor vehicle (“the insured vehicle”) and suffered certain bodily injuries. He alleged that the sole cause of the collision was the negligence of the driver of the insured vehicle.

[2] By agreement the issue of negligence was separated from other issues and the trial proceeded on the issue of negligence only. Essentially what the court had to determine was whether or not the plaintiff was negligent, and to what extent.

[3] The collision occurred on 30 June 2007, between nine and ten o'clock at night, on the Graaff Reinet Road, Uitenhage, which is one of the main roads in Uitenhage. It was not in dispute that the plaintiff had been a passenger in a maroon CitiGolf ("the Golf") which ran out of petrol, and that he, the driver, and the other two occupants had alighted from the Golf and started to push it towards a petrol station, which was some distance further on in the direction in which they had been traveling, and had been pushing the Golf. Photographs of the scene showed that the road had two lanes of travel in each direction and that for vehicles traveling in the direction in which the Golf had been traveling, there was a straight stretch of road leading at an incline up to a robot controlled intersection with a road on the left hand side which led into a shopping complex. Vehicles could enter and exit this side road at the point of the intersection. Before and beyond this intersection there was a red line on the road for vehicles traveling in the direction of the Golf, indicating a no stopping zone. The petrol station was further on from this

intersection. There were street lights at intervals on the opposite side of the Graaff Reinet Road. The total width of the road (all four lanes) was approximately 18 metres.

[4] The plaintiff testified that he and the other three occupants of the Golf had attended a festival at Kirkwood where they had all consumed alcohol, although the driver, Graham Forbes, had only had one drink. The other two occupants were James Byleveldt and Malcom Adams. The Golf ran out of petrol a short distance before the robot controlled intersection. The Golf was in the left hand lane, next to the pavement. As soon as it stopped, its lights and hazard lights were switched on. The road was quiet and there were no other vehicles. The area was well lit by the street lights and by lights from shops in the shopping complex, although later he conceded that those lights did not light the road. He was positioned at the left rear of the Golf as it was pushed, and Adams

was at the right rear. He and Adams were in between the lights of the Golf, in order to make sure that the hazard lights were visible, but they were not in physical contact. Forbes and Byleveldt were at the front of the Golf, and Forbes was holding the steering wheel in order to control the Golf. The pace at which they pushed the Golf was not slow, but not faster than a walking pace. The four of them were big men and the Golf moved as they pushed. When they were at a position alongside a drain on the left hand side of the road, a short distance beyond the intersection, he heard a bang. He had now and then looked behind him but he did not see or hear the insured vehicle before impact. Prior to the bang it was not raining, and the road was dry, but while he was lying on the ground, it began to rain. In his statement to the police he said with regard to the weather conditions that it had rained heavily and the road was wet.

[5] Byleveldt testified and confirmed that he was at the front left of the Golf when it was being pushed. It was raining heavily and the road was wet. The plaintiff was a little distance from the light on the left rear of the Golf, with part of his body over the light. Adams was at the right hand rear corner of the Golf, with one arm around the side of the Golf and the other on the light. He did not think it was difficult to see the Golf because the road was clear and there were street lights, and drivers of vehicles behind them would have seen the lights of

the Golf. They would push the Golf for a certain distance, stop for a rest, and resume pushing. They stopped just past the shopping complex and then started again, and that is when he heard the bang. He did not see how the collision occurred because he was looking in front of him. After the collision he spoke to the driver of the insured vehicle and was of the view that he was under the influence of alcohol because there was a smell of alcohol coming from the insured vehicle. The driver said nothing and after struggling to change gear, drove away from the scene to the petrol station. They ran after him but by the time they got there he had already gone.

[6] No witnesses testified for the defendant.

[7] The plaintiff was not an impressive witness. He was reluctant at times to concede obvious facts and fashioned his evidence to achieve the maximum factors in his favour, for example that it only began to rain after the impact, that they kept the Golf moving, that light from the shops in the shopping complex lit the scene, and that he and Adams were positioned behind the Golf so that the lights were completely visible. Not only did he tell the police that it was raining heavily and the road was wet, but this was also Byleveldt's evidence. The plaintiff's evidence about how he and Adams were positioned behind the Golf was in my view improbable and difficult to envisage. Byleveldt's evidence of their positions was far more probable and realistic, as was his evidence about resting every now and then while they were pushing.

[8] Byleveldt impressed me as a fair and to some extent impartial witness. He had obviously not colluded with the plaintiff to paint the most favourable scenario, nor did he embellish his evidence to suit the plaintiff. In my view he was an honest witness and his evidence was acceptable.

[9] Mr. Paterson, who appeared for the defendant, correctly accepted that the driver of the insured vehicle was negligent. This is clearly so, in that at the very least he failed to keep a proper lookout and failed to avoid a collision when by the exercise of reasonable care and skill he should have done so. Mr. Paterson submitted however that the plaintiff was negligent and that there should be an apportionment of 30% negligence on the part of the plaintiff, and 70% on the part of the driver of the insured vehicle.

[10] The argument rested on the plaintiff's duties as a pedestrian. It was submitted that the plaintiff did not conduct himself as a reasonable person in the particular circumstances: it was dark and raining heavily, he had his back to traffic, he was under the influence of alcohol, the Golf was in a no stopping zone, and it was an obstruction to traffic traveling in that lane. In those circumstances a reasonable person could not assume that he would be visible, and the plaintiff had failed to keep a proper lookout.

[11] In Frodsham v Aetna Insurance Co. 1959 (2) 271 (AD) at 278H-279A, Schreiner JA said the following with regard to the duties of a pedestrian walking in a roadway at night:

> *"Street lighting will be an element, but generally a pedestrian who at night walks in a roadway with his back towards the direction from which vehicles, if any, will come, is negligent unless he satisfied himself as often as is reasonable in the circumstances that no vehicle is bearing down on him from behind."*

See also Gaba v Minister of Police 1975 (2) 220 (ECD) and Vermaak v Parity Insurance Co. Ltd (in Liquidation) 1966 (2) SA 312 (W).

[12] However each case turns on its own peculiar facts. In the present case the plaintiff, although walking on the road surface in the path of travel of vehicles approaching from behind, was not merely a pedestrian choosing to walk from one place to another. He was pushing the Golf, which had effectively broken down, and was moving with the Golf, together with three others, when he was struck. The Golf's lights and hazard lights were on and the area was lit by street lamps. Even though it was raining, there was no evidence that visibility was poor. Byleveldt, whose evidence I accepted, was clear about the visibility. The Golf, together with the people pushing it, was to some extent an obstruction in its lane of travel, in the sense that it was stopping and starting, but because of its lights, hazard lights, and the street lights, would have been visible to a driver approaching from behind. In these circumstances I am of the view that a reasonable person in the position of the plaintiff would not have foreseen that the driver of a vehicle approaching from behind would fail to see the Golf and the persons pushing it, and not take avoiding action. In addition, there was not much traffic on the road, and a reasonable person in the position of the plaintiff would have expected that a vehicle approaching from behind in the left hand lane would not only see the Golf and the four persons pushing it, but would move into the right hand lane in order to move past it. I agree with the submission on behalf of the plaintiff that the Golf was

similar to a slow moving vehicle and that it made no difference whether the plaintiff was a passenger in it or pushing it. A driver

approaching from behind would normally overtake such a vehicle in the right hand lane.

[13] Even if the plaintiff had looked behind him, it is uncertain whether he would have seen the insured vehicle, and thus avoided the collision. The driver of the insured vehicle did not testify and it is therefore not known where he came from. The insured vehicle was therefore not necessarily approaching from a point where it would have been visible had the plaintiff kept a proper lookout.

[14] With regard to the submission that the plaintiff was under the influence of alcohol, there was no evidential basis for finding that the alcohol he had consumed had impaired his judgment or influenced his behaviour.

[15] I am therefore satisfied that no negligence on the part of the plaintiff was proved and that the negligence of the driver of the insured vehicle was the sole cause of the collision.

[16] The following order is made:

[16.1] It is declared that the negligence of the driver of motor vehicle with registration number BMP 301 EC, was the sole cause of the collision which occurred on 30 June 2007, in which the plaintiff sustained bodily injuries.

[16.2] The defendant is ordered to pay the costs of the trial in respect of the issue of negligence, such costs to include the costs of an inspection in loco and photographs.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

Appearances

Plaintiff: Adv. L. Schubart SC, instructed by Johan Cronjé Attorneys, c/o Heine Ungerer Attorney, Port Elizabeth.

Defendant: Adv. N. Paterson, instructed by Karsans Incorporated, c/o Wilke Weiss Van Rooyen Inc., Port Elizabeth.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.saflii.org/za/cases/ZAECPEHC/2011/19.html

CASE PAGE https://chat.esheria.ai/case-law/south-africa/uithaler-v-road-unknown-topic-aecpehc-2011

Prepared on 12 October 2026 · Esheria