

SOUTH AFRICA / JUDGMENT

Van Eeden v Road Accident Fund (19294/17) [2018] ZAGPPHC 685 (14 September 2018)

[2018] ZAGPPHC 685

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Schyff

CASE / FILE NUMBER

19294/17

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT

REPORTABLE

(2)

NOT OF INTEREST TO

OTHER JUDGES

(3)

NOT REVISED

CASE NO: 19294/17

14/9/2018

In

the matter between :

KNH
VAN
EEDEN
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

Heard:

7 September 2018

Delivered: .14 September 2018

JUDGMENT

Coram; VAN DER SCHYFF. AJ

Introduction

- [1] The plaintiff in this matter was injured on 28 February 2014 in a motor vehicle accident in Seder Avenue, Kathu, Northern Cape Province. He was a pedestrian.
- [2] At the outset of the hearing the parties applied for a separation between the issues of merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court. This application was granted.
- [3] The plaintiff was the only witness who testified. It was evident from the evidence lead, the cross examination and both counsels' closing argument that the issue of negligence was the only point of contention between the parties, although defendant's counsel also addressed the fact that the plaintiff was injured in 2012 at his workplace during cross examination.
- [4] The plaintiff testified that he, his wife and their daughter were walking along Seder Avenue in the afternoon around 17h00. The sun was still shining. The road is wide. There were no other traffic and no other pedestrians on the road. They were facing the oncoming traffic. Plaintiff was walking in front pushing his baby boy in a pram. His wife walked behind him. His daughter was walking on the pavement next to him. The pavement was very narrow. The plaintiff and his wife were walking in the road but near the pavement curb stone.
- [5] A car suddenly approached from the front. There is a slight turn to the left if one is approaching from the front. The car was speeding and as it went over a speed bump in front of them, it came directly towards them. The plaintiff's wife jumped out of the road onto the pavement. The plaintiff could not exit the road in time since he could not get the baby's pram on the pavement. He shielded the pram and was hit by the vehicle. As a result the plaintiff sustained injuries to his shoulder, his side and his leg.
- [6] During cross examination counsel for the defendant put it to the plaintiff that there is an inherent risk associated with walking in a road, and the plaintiff agreed. In answer to a question put to him the plaintiff testified that he was between 4-5 m from the vehicle before he saw the vehicle. It was then put to the plaintiff that he would have noticed the vehicle earlier if he was vigilant and kept a proper look out. It was put to the plaintiff that he was not observant enough and could have avoided the accident if he saw the vehicle in time to move out of the way. The plaintiff got very emotional at this point and denied that he could have moved out of the way without leaving his son unprotected. He testified that he moved out of the way as far as possible and was on the edge of the road when he was hit. He also testified that he was keeping a proper lookout and was observant of his surrounding environment

and could not see the vehicle earlier than he did.

- [7] Defendant's counsel questioned the plaintiff pertaining to the fact that he was injured in 2012 at his workplace while he was working . It was clarified under re-examination that despite the injury sustained in 2012, the plaintiff passed a medical examination in 2014 before he was issued with a Code 14 driver's licence that enabled him to drive heavy vehicles of up to 34 ton.
- [8] During closing argument plaintiff 's counsel argued that the evidence is clear and that the plaintiff was not negligent in the circumstances.

Negligence could be contributed to the insured driver. The law requires that the plaintiff proves 1% negligence on the part of the defendant for the plaintiff to succeed with his claim. If the defendant wants to rely on contributory negligence, the onus is on the defendant to prove such. On the evidence lead the defendant did not succeed in proving any contributory negligence on the part of the plaintiff.

- [9] Defendant's counsel argued in closing that the plaintiff admitted that there was an inherent and potential risk associated with walking in the road . One would have expected the plaintiff to be extra observant. He requested the court to find that the defendant was 20% negligent.
- [10] Regulation 316 of the Regulations to the National Road Traffic Act, No 93 of 1996, published in GNR 225 of 12 March 2000 (as amended) prescribes that "whenever a sidewalk or footpath abuts on the roadway of a public road, a pedestrian shall not walk on such roadway except for the purpose of crossing from one side of such roadway to the other or for some sufficient reason".
- [11] It is common cause that the plaintiff and his family were not crossing the roadway. He was walking in the road "for some sufficient

reason"- namely that the pavement was too narrow for him to walk on with the pram. It is in addition settled law that the breach of a statutory duty created by legislation regulating road traffic cannot simply be equated to negligence. It is equally settled that road traffic legislation does not displace the common law test for negligence.[1]

- [12] In light of the fact that a plaintiff needs to prove only 1% negligence on the side of the insured driver to succeed with a claim against the Fund (*Tsotetsi v RAF* (72217/2009)

[2016] ZAGPPHC 36), the duty is on the defendant to adduce evidence to the contrary or take a risk that judgment be given against him - *Ntsala v Mutual & Federal Ins Co Ltd* 1996

- (2) SA 184 (T) 190, *Alberts v Engelbrecht* 1961 (2) SA 644 (T).

- [13] The onus to aver and to prove contributory negligence rested on the defendant. The only ground of contributory negligence that may

possibly be attributed to the plaintiff was a possible failure to keep a proper lookout, although the evidence does not support a finding of this nature. In this regard the pertinent legal position as outlined in GUARDIAN NATIONAL INSURANCE CO LTD v SAAL 1993 (2) SA 161 (C) by Cooper J applies. The headnote captures the gist of the decision quite well as follows:

"Held, that in order to recover damages against the appellant the onus had been on the respondent to prove on a balance of probabilities that M had driven negligently and that his negligent driving had caused or contributed to the collision.

Held, further, that the finding by the trial Court that M had not been keeping a proper lookout at the time of the collision was not sufficient to render the appellant liable, since respondent had to prove that M's failure to keep a proper lookout was causally connected with the collision, the critical question being whether M ought reasonably to have become aware thereafter, at a stage when effective avoiding action could still be taken, that the pick-up truck was not going to stop.

Held, further, that the respondent had to prove that, had M reacted when the reasonable man would have reacted, the collision would probably not have occurred.

Held, further, that on M's version of the collision, and because respondent suffered from amnesia, the precise speed at which the vehicle was travelling when it entered the intersection and at what stage he intended doing so could not be established, and unless these facts could be established on a balance of probabilities, the Court could not find that, if M had reacted as a reasonable man would have, the collision would not have occurred."

[14] On the evidence before me I cannot find that the plaintiff was contributory negligent.

ORDER

In the result the following order is made:

- [1] The issues of merits and quantum are separated in terms of Rule 33(4) of the Uniform Rules of Court:
- [2] The issue of quantum is postponed sine die;
- [3] The collision under consideration was caused solely by the negligence of the insured driver;
- [4] The defendant is liable for 100% of the plaintiffs agreed upon or proven damages;
- [5] The defendant is to bear the costs of this hearing on a party and party scale.

EVAN DER SCHYFF

ACTING JUDGE OF THE GAUTENG DIVISION. PRETORIA

Heard on:

7 September 2018

For the Plaintiff / Applicant : ADV DE KLERK

Instructed by:

GERT NEL INCORPORATED

For the Defendant/ Respondent : ADV TSHABALALA

Instructed by:

TAU PHALANE INCORPORATED

Date of Judgment:

14 September 2018

[1] Burchell JM Principles of Delict 3rd ed JUTA, 46.

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