

SOUTH AFRICA / JUDGMENT

Van Rooyen N.O. OBO Viljoen v Road Accident Fund (2016/41654) [2017] ZAGPPHC 256 (1 June 2017) [2017] ZAGPPHC 256

COURT

North Gauteng High Court, Pretoria

BEFORE

L Adams

CASE / FILE NUMBER

2016/41654

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 2016/41654

Not

reportable

Not

of interest to other judges

Revised.

1

June 2017

In the

matter between:

VAN

ROOYEN, ADV MARYKE N O, as

Curator ad Litem

for and on behalf of:

VILJOEN: JAN ALBERT
Plaintiff
and
ROAD
ACCIDENT
FUND Defendant

JUDGMENT

ADAMS J:

[1]. The plaintiff is the duly appointed curator ad litem for and on behalf of Jan Albert Viljoen ('the patient'), who was seriously injured in motor vehicle collision at about 17H15 on Saturday, the 9th of May 2015, along the R510 Road between Northam and Thabazimbi, approximately 20 km from Thabazimbi ('the accident'). Plaintiff claims delictual damages for and on behalf of the patient from the defendant in terms of the provisions of the Road Accident Fund Act number: 56 of 1996, as amended ('the Act'). The damages arise as a result of the personal injuries sustained by the patient in the said motor vehicle collision.

[2]. At the commencement of the trial I was advised that the parties are in agreement that it would be convenient to separate the issues of the merits / negligence / liability from that of the quantum of the plaintiff's claim. I am in agreement with this submission. Therefore, at the behest of the parties, I ordered a separation of the issues in terms of the provisions of Rule 33(4), that the trial proceed on liability only and that the quantum of the plaintiff's claim be postponed sine die.

[3]. Immediately prior to the accident, the patient, whose date of birth is the [...] January 1961, which makes him 56 years old at present, was the driver of a motorcycle travelling from a place called 'Kwagga Put' towards Thabazimbi. At the time, he was on his way to visit his wife, who was in hospital, and was returning from a meeting which was supposed to have been held at the 'Kwagga Put', which was described by one of the witnesses as a Sport Café. The meeting had however been cancelled due to the fact that there was an insufficient number of attendees. Due to the serious nature of the injuries sustained by the patient in the accident, which included a serious head injury, he has no recollection of the accident and the events leading up to and following it.

[4]. The accident happened at about sunset seemingly in favourable weather conditions at a time when the visibility and light were satisfactory. The road surface was dry and the collision occurred at or near a curve in the road to the left hand side in the direction in which the patient was travelling. From photographs depicting the scene of the collision it appears that the road is a two – way tarred road, with one lane in each direction and a yellow line close to the left hand side of each of the traffic lanes. The yellow lines demarcate the edge of the road and the space to the left of the yellow lines is not wide enough to be regarded as 'emergency lanes'.

[5]. Prior to the collision in question, the insured vehicles, a white Nissan 4 x 4 type of light delivery vehicle and a white Opel Corsa, which was in fact being towed by the Nissan, were traveling in the opposite direction to that in which the patient's motorcycle was traveling. The traffic conditions on the day were rather favourable in that, according to the witnesses, there were not many cars on the stretch of road where the accident happened shortly before and during the accident.

[6]. When the patient's motorcycle and the Opel Corsa were supposed to pass each other, a collision occurred between them in that the two vehicles side swiped the one the other, with the impact damage to the right hand side of the Opel as well as to the right hand side of the motor bike. After the impact the insured vehicles were brought to a standstill some 195 meters pass the area of the impact and the motorcycle came to a halt some 273 meters beyond the area of the impact. The indications are that the patient had lost control of his motorcycle on impact although the bike was apparently still steered for the aforementioned approximately 273 meters to the point where it came to rest.

[7]. The evidence of the driver of the Opel Corsa, Boitumelo Moloi ('Moloi'), was that they were travelling at 'below 60km/h'. Her vehicle was being towed with a steel rope, which allowed for the two vehicles to move closer to each other if, for example, the towing vehicle applied brakes. She also confirmed that the ignition of her car, whilst being towed, was switched on, although the engine was not running because it had experienced mechanical problems, hence it had to be towed. This made braking and steering more difficult than usual as the 'power steering' of the vehicle as well as the 'pressure brakes' were not operational during the trip. She was however adamant that when the accident happened she was on her correct side of the road. As she put it: 'I kept to my lane. I do not recall going over to the right hand lane', and later: 'I was on my side of the road. That is what I can say'.

[8]. It is the plaintiff's case that the collision resulted from the fact that the Opel had moved onto the wrong side of the road and collided with the patient's motorcycle, whilst it (the motorbike) was travelling on its correct side of the road. The point of the impact, so it is claimed by the plaintiff, was on the correct side of the road for the patient.

[9]. On the other hand, the defendant maintains that it was the motorcycle which traversed onto its incorrect side of the road where it collided with the Opel of Ms Moloi, being towed by the Nissan Bakkie.

[10]. I suppose that there is also the possibility that the collision in fact happened on or in the vicinity of the middle line as a result of both the vehicles having travelled too close to the middle of the road. However, there is no evidence in support of this scenario.

THE EVIDENCE

[11]. A friend of the patient, Mr Erasmus ('Erasmus'), gave evidence that prior to the accident he was following the patient at a distance of between 80 to 100 meters. They had left the Sports Café at more or less the same time, and the accident had happened about 1.5 kilometres from the

Café, which means that they had hardly started on their journey when tragedy struck. At some point he noticed the insured vehicles approaching from the opposite direction. When he first noticed these vehicles he got the impression that the back vehicle intended overtaking the front one. At that stage he did not realise that the front vehicle was busy towing the back one. At some stage he noticed the back vehicle move onto the right side (from their point of view), which forced him (Erasmus) to take evasive action. Shortly thereafter he noticed a cloud of dust further ahead on the right hand side of the road. It later turned out that this was his friend, the patient, careering off the road after having impacted with the Opel Corsa.

[12]. Early the next day Erasmus and his wife returned to the scene of the action to look for money, which a friend of theirs had lost on the evening of the accident, and a gold chain. Quite fortuitously his wife then saw spatters of fresh blood in the vicinity where the impact occurred. It happened to be on the side of the road along which the patient had been travelling the previous day when the accident happened. The wife then took photos of the blood spots on the road. Both Erasmus and his wife were unequivocal and very clear that, according to them, that could only have been the blood of the patient.

[13]. As it turned out, this piece of evidence formed the basis for the opinion of the plaintiff's accident reconstruction expert, Barry Grobbelaar ('Grobbelaar'), who concluded that this indicates that the accident happened on the correct side of the road for the patient. The evidence of Grobbelaar was that, in the absence of any other physical evidence, and if the evidence of the blood on the road is disregarded, it would be difficult for him to express an opinion as to where on the road the impact occurred.

[14]. The evidence of Erasmus and his wife are in the main uncontested and unchallenged.

[15]. On behalf of the defendant, the two insured drivers, Boitumelo Moloi ('Moloi') and Timothy Nyamaropa ('Nyamaropa'), testified that when the accident happened they were on their correct side of the road, and that the accident resulted from the fact that the patient was traversing onto his wrong side of the road.

[16]. Moloi was taken to task in respect of two issues. Firstly, it was put to her under cross – examination that she at no stage in her evidence and in her statement to the police said that the motorcyclist had moved onto his incorrect side of the road. This, so it was suggested to her, indicates that she is not able to say with any conviction that the patient had in fact crossed onto her side of the road, which caused the accident. Secondly, there had been a number of transgressions of the National Traffic Regulations by her and Nyamaropa during the towing of the vehicle. For example, they were exceeding the prescribed speed limit of 30km/h, the towed vehicle did not have effective brakes and steering, and the tow rope was, according to her version, longer than what the regulations prescribed.

THE LAW

[17]. I have before me 2 (two) mutually destructive versions of how the collision in question occurred.

[18]. According to the plaintiff and her witnesses, the Opel Corsa moved onto the wrong side of the road and collided with the motorcycle of the patient. The defendant's version is that the collision resulted from the fact that motorbike, whilst negotiating the curve, moved onto the wrong side of the road and collided with the Opel.

[19]. It must be decided whether, on all the evidence, the plaintiff's version is more probable than the defendant's.

[20]. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*, 2003 (1) SA 11 (SCA) at para 5, the Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain, as far as possible, where the truth lies between conflicting factual assertions:

‘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 probability or improbability of each party's version on each of the disputed issues.

In light of the 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. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail’.

[21]. Also in *National Employers' General Insurance Co Ltd v Jager*, 1984 (4) SA 437 (ECD), at 440D-441A the court remarked as follows:

‘It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless 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's, 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.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities’.

[22]. Also, in *Govan v Skidmore*, 1952 (1) SA 732 (N), the following principle was enunciated:

‘In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence ... by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.’

APPLYING THE LAW IN CASU

[23]. I reiterate that I have before me two mutually destructive versions of the incident in question. The version of the plaintiff is irreconcilable with that of the defendant. Accepting the one means of necessity a rejection of the other.

[24]. When regard is had to the guidance provided by our Courts, as indicated above, in approaching matters of this nature, my view is that there are a number of material discrepancies in the evidence for the defendant. To an extent criticism can be directed against its two main witnesses from a perspective of their credibility or indeed their reliability. Whilst I am not convinced that any of defendant’s witnesses were lying or being deliberately untruthful, Nyamaropa’s version was undoubtedly demonstrated to be inherently improbable in that it would have been physically impossible for him to observe, as he testified, the two motorcycles entering the road from Kwagga Put, from a distance of approximately 4 to 5 kilometres away. Even more unlikely is his version that the patient, for no apparent reason

travelled on the wrong side of the road for approximately 1 to 2 kilometres, straight into his oncoming vehicle. As regards, the

evidence of Moloi, I am of the view that, whilst she came across as being reasonably honest and open in testifying what in her view were the events that occurred on the 9th of May 2015, the criticism levelled at her testimony may very well be justified. Importantly, she was singularly equivocal in her claim that, on her version, the motorcyclist had moved onto her side of the road and collided with her vehicle.

[25]. Applying the principles in *National Employers' General Insurance Co Ltd v Jager* (supra), I am of the view that the probabilities in this matter favour the plaintiff. I say so for the following reasons.

[26]. The blood splatter was found on the correct side of the road from the point of view of the patient. This, applying simple logic, suggests that the impact was on the patient's side of the road, as confirmed by the expert evidence of Grobbelaar. The uncontested and unchallenged evidence of Erasmus, who impressed me as an honest witness, who was quite prepared to concede, reasonably so in my view, that he did not in fact witness the actual collision, was to the effect that on his approach to the point of the collision, he noticed the Opel moving onto its incorrect side of the road.

[27]. A possible explanation for the Opel vehicle veering onto the wrong side of the road can be found in the fact that it was being towed without an effective steering and brakes that were harder to operate than usual, coupled with the fact that Moloi's view to her front was completely obscured by the Nissan which was towing her. In those circumstances, it is probable that she could have veered or straddled unintentionally onto the wrong side of the road.

[28]. There is also merit in the submission by Mr Cilliers, who appeared on behalf of the plaintiff, that Moloi at no stage, be it in her viva voce evidence in court or in her statement to the police, state unequivocally that the motorcyclist moved over into her lane and caused the collision. This, so the argument went, indicates that Moloi does not know where on the road she was when the accident happened.

[29]. In my view, and having regard to the above considerations and the probabilities in their totality, the version of the plaintiff is more probable than that of the defendant. Therefore, as per the dicta in the *National Employers' General Insurance Co Ltd v Jagers* matter (supra), I am satisfied that the plaintiff's evidence is true and that the defendant's version is false.

FINDINGS

[30]. In the premises, I intend finding in favour of the plaintiff as far as the liability issue of the matter is concerned. The insured driver was negligent

and her negligence was the sole cause of the collision in question and the subsequent injuries of the patient.

[31]. At the hearing of the matter, I was presented with a draft order, the contents of which, according to Ms Rabaji, who appeared for the defendant, is acceptable to the defendant subject to my ruling on the issue of negligence. I will therefore incorporate the prayers of the said draft order into my order.

order

Accordingly, I make the following order:

1. The issues of liability and quantum are separated in terms of Rule 33(4) and the issue of quantum is postponed sine die.
2. The defendant shall compensate the plaintiff (in her representative capacity on behalf of Jan Albert Viljoen) for 100% of his proven or agreed damages.
3. The defendant shall pay the plaintiff's taxed party and party costs on the High Court scale which costs, will inter alia include, but not limited to:
 - 3.1 The cost of obtaining the expert report of Mr B Grobbelaar (Reconstruction Expert) inclusive of his attendance upon the inspection in loco and his attendance at Court on 29th May 2017;
 - 3.2 The reasonable travelling and accommodation costs of the following witnesses (who are declared necessary witnesses) and who attended Court on the 29th May 2017:
 - 3.2.1 Mr F Erasmus;
 - 3.2.2 Mrs D Erasmus; and
 - 3.2.3 Mr C van Rooyen.
 - 3.3 The costs of Senior and Junior Counsel;
 - 3.4 The costs pertaining to the Curatrix ad Litem, including, but not limited to, the appointment and any costs pertaining to the fulfilling the duties as the Curatrix ad Litem and including for appearance in Court.
4. The costs shall be paid into the trust account of Stone Attorneys, the details whereof are as follows: Bank name: Nedbank, Account Name: Stone Attorneys Trust Account, Branch Code: 160 445, Branch Name: Andries Street, Account no: [...], reference no: 4325/V Stone

L ADAMS

Judge of the High Court

Gauteng Division, Pretoria

HEARD ON: 29th, 30th & 31st May 2017 JUDGMENT DATE: FOR THE PLAINTIFF: 1st June 2017
Adv J Cilliers SC, with Adv Joubert INSTRUCTED BY: Stone Attorneys FOR THE DEFENDANT: Adv
Rabaji INSTRUCTED BY: Maluleke Msimang & Associates

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