

SOUTH AFRICA / JUDGMENT

Ward v Van Der Westhuizen (40834/2008) [2010] ZAGPPHC 157 (19 October 2010)

[2010] ZAGPPHC 157**COURT**

North Gauteng High Court, Pretoria

BEFORE

Du Plessis

CASE / FILE NUMBER

40834/2008

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(NORTH****GAUTENG, PRETORIA)****Case****No: 40834/2008****Date****heard: 08/08/2010****Date****of judgment: 19/10/2010****In****the matter between:**

Nicholas

Ward.....PLAINTIFF

and

I

Van Der

Westhuizen.....DEFENDANT

JUDGMENT

DU PLESSIS J:

On 31 August 2005 the plaintiff was riding his motorcycle on a dirt road in the Schoemansville area. He collided with a branch lying in the road and sustained injuries. Contending that the collision and his resultant injuries were due to the defendant's culpable conduct, the plaintiff claims damages from the defendant. By agreement the trial proceeded for the determination only of the defendant's liability (the "merits" of the plaintiff's claim).

The plaintiff testified that on the day in question he and a few other people visited a mutual friend, Ms Alma Pretorius, who lived on a plot in Schoemansville. Travelling there on his motorcycle, he went past the place where the collision later occurred. Just before sunset, the plaintiff left the plot on his motorcycle to go and buy charcoal at a nearby cafe. The plaintiff said that when he left, it was dusk, nearly dark. As he was travelling along the dirt road leading to the cafe, he approached a dip ("drif") in the road. He described the condition of the road in the dip as particularly poor: Rainwater had eroded the road in the dip and there were potholes and corrugations. When he reached the dip, the plaintiff said, the road beyond the dip was completely dark. That was due to trees overhanging the road and to a lack of artificial lighting.

The plaintiff entered the dip and just as he came out, on the verge of the incline from it, he saw trees lying across the road. There was nothing he could do to avoid the trees and he crashed into one of them. He fell from his motorcycle and was injured. There were no signs warning oncoming traffic of the trees in the road. When he had used the same road earlier in the day, there were no trees in it. The plaintiff said that the tree he collided with was lying across the road on the verge of the dip as he came out of it.

After he had fallen, a man approached the plaintiff and asked him if he was all right. The plaintiff told the man that he just wanted to lie down for a while.

Later he asked someone to call Ms Pretorius. Thereafter Ms Pretorius and one Ms Dexter arrived. Being paramedics, the ladies stabilised the plaintiff on the scene and then took him back to Ms Pretorius's home. He had blood on him and at the house he cleaned himself and put on fresh clothes. The ladies then took the plaintiff to the Brits clinic. The clinic records show that he was admitted at 19h15.

It was put to the plaintiff in cross examination that the branch (neither trees nor a tree) he collided with was not lying on the

verge of the dip, but further down the road as he was travelling. He denied that. He could not recall that somebody (the defendant) had run into the road waving his arms so as to warn him of the branch in the road.

For the plaintiff Ms Dexter testified that she also visited Ms Pretorius on the day. She confirmed that the plaintiff left on his motorcycle to go and buy charcoal. According to Ms Dexter it was then dark already. A while later, the plaintiff called Ms Pretorius and told her that he had been involved in an accident. She and Ms Pretorius took their medical kit and went to the scene. It was completely dark and they drove with headlights on. At the scene they found the plaintiff standing just beyond the dip in the road. He was injured but she did not see any other injured person. They stabilised the plaintiff and took him back to Ms Pretorius's home. After he had washed and put on fresh clothes, they took him to the Brits clinic.

Ms Dexter also said that the condition of the road in the dip was poor. Beyond the dip, she saw a big branch in the road, covering about three quarters thereof. There were other branches in the vicinity and there were people working with the branches.

The defendant testified that he is the owner of plot 30, Schoemansville. His son lives on the plot while he (defendant) works in Dullstroom during the week and stays at the plot over weekends. With his permission, his son had instructed a contractor to remove trees on the plot where his son planned on cultivating vegetables.

On the day of the collision, a Wednesday, the defendant and his wife arrived from Dullstroom at about 17h30. An operator was busy removing the last of the trees with a front-end loader ("laaigraaf"). Immediately on his arrival the defendant, with his son in law who lives on the neighbouring plot, went to where the trees were being felled. When the two men arrived, the operator was busy removing the last tree. It was standing close to the fence that forms the boundary between the plot and the road where the accident later happened. A branch broke off, fell on the fence and across the road. This happened 102 meters away from the verge of the dip. (The defendant measured the distance later.)

When the branch fell across the road, the defendant heard a motorcycle approaching from the other side of the dip. He could hear that it was travelling fast and he ran towards the dip. When he was about 30 meters from where the branch had fallen (about 70 meters from the verge of the dip), the motorcycle came out of the dip. The defendant, halfway into the road, waved his arms to attract the attention of the motorcyclist. The handlebar of the motorcycle struck the defendant on his side. The rider lost control and rode into the branch in the road. The defendant confirmed that Ms Pretorius was phoned, that the ladies arrived and that the plaintiff was taken away. As to his own injuries, the defendant said that he suffered bruises and did not require medical treatment.

As to the light conditions, the defendant said that it was light at all relevant times, also when the ladies arrived. In his estimation the accident happened closer to 18h00 than to 18h30. Still pertaining to the light conditions and the time of the collision, the defendant said that the cafe where the plaintiff probably intended going to, closes at 18h00. The journey from Ms Pretorius's house to the scene takes about 2 to 3 minutes. The defendant wasn't sure for how long the ladies remained on the scene, but the contractors started to remove the branch from the road while they were still there. Removing the branch would have taken about 10 to 15 minutes and the

operation was completed before the ladies had left. The distance between Ms Pretorius's house and the Brits clinic is about 20 km and the drive there would have taken about 20 minutes.

As to where in the road the branch was, the defendant said it definitely was not at the verge of the dip. There, he said, not his plot but that of his son in law borders the road. His plot starts only about 100 meters further, and that is where the branch fell.

The defendant's son in law, Mr E Visage, confirmed that he lives on the plot next to that of the defendant. He confirmed the defendant's

evidence that the two of them went to where the last tree was being felled and also the further evidence up to the point when the

plaintiff collided with the branch. Mr Visage also said that the motorcycle was, judged by its sound, going fast. Although it was then still completely light, he first saw it when it came out of the dip. He explained that their position next to the road prevented them from seeing the road on the other side of the dip.

Mr Visage said that after he had established that the defendant was all right, he went to where the plaintiff was lying just on the far side of the branch. He confirmed the plaintiff's evidence that when he (Visage) asked the plaintiff how he was, the latter said that he just wanted to lie down for a while. Visage waited and then asked whether he could not call somebody to help the plaintiff. From the plaintiff's telephone Visage called Ms Pretorius and shortly thereafter the two ladies arrived in a bakkie.

As to light conditions and time, Visage said that it was daylight at all times. He phoned Ms Pretorius some time after the accident, about ten to fifteen minutes he estimated.

From the time of the accident until the ladies arrived, it took about twenty minutes. The ladies remained on the scene for some time, possibly about 15 minutes or more. When they left, it was still daylight. Visage, however, did not recall that the branch had been removed before the ladies and the plaintiff left. Contrary to the defendant, his evidence was that the branch was only removed after the plaintiff had left the scene.

As to where the accident happened, the plaintiff's version cannot be correct. Mr Naude who appeared for him did not contend otherwise. The trees were felled on the defendant's property which is situated 102 meter from the verge of the dip, further down the road as the plaintiff travelled. It follows that the branch could not have fallen where the plaintiff said he collided with it. It is held that the branch was where the defendant and Visage said, and that it is there, 102 meters from the verge of the dip, that the plaintiff collided with the branch.

From what I have said it follows that the plaintiff's evidence as to where the accident happened is unreliable. I must point out that his evidence

that he saw trees lying in the road is also unreliable. The defendant and Visage's evidence that only one branch, albeit a large one, fell into the road, was not seriously disputed in the course of cross examination, and for good reason: It coherently and sensibly explained the events. It is improbable that the plaintiff could have made an honest mistake as to where the accident happened and as to whether there were many trees of one branch in the road.

The plaintiff did not deny that the defendant ran down the road and tried to warn him by waving his arms. When asked, the plaintiff's response was that he did not remember that. It is in my view improbable that the plaintiff would have forgotten about the presence of a man waving to him and whom he also struck with the handlebar of his motorcycle. The more probable explanation is that, having committed himself to a false version that the accident happened on the verge of the dip, the plaintiff remembers the incident but chose not to say so.

I do not find the defendant's and Visage's evidence that the former tried to warn the plaintiff in the manner they testified to

improbable. Viewed in the light of the plaintiff's improbable show of forgetfulness in this regard, I accept the defendant's version that he tried to warn the plaintiff by running down the road and waving his arms.

The question now is: Why did the plaintiff collide with the defendant? Because of his false version of where and how the collision with the branch took place, the plaintiff did not and could not explain his collision with the defendant. An explanation could be that it was dark and that the plaintiff did not see the defendant. I turn to that possible explanation.

The first difficulty with ascribing the collision with the defendant to darkness is that the plaintiff said that he had his light on. In fact, he said that the motorcycle's light comes on when it is started. If for some reason the defendant was invisible despite the light, the plaintiff should have told the court about it.

In any event, I hold for the reasons that follow, that the plaintiff did not prove that it was dark at the time of the collision. The parties' respective versions as to the light conditions are mutually exclusive or destructive. It follows that the plaintiff "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 ... false or mistaken and falls to be rejected". (*National Employers' General Insurance Co Ltd v Jagers* 1984(4) SA 437 (E) at 440E to 441A; *Baring Eiendomme Bpk v Roux* [2001] 1 399 (SCA) at para. 7).

As to the probabilities, the parties agreed that on the day in question at the relevant place, sunset was at 17h56. They also agreed that "'sunset' is the moment the top edge of the sun is just below the horizon, and that it is still quite light then". There are insignificant differences, but all the evidence is to the effect that it would have taken the plaintiff about 2 to 3 minutes, less than 5 minutes, to cover the distance between Ms Pretorius's house and the scene of the accident. On that basis, the plaintiff must have reached the scene of the accident just before or just after 18h00. That accords with the defendant's evidence that the accident took place closer to 18h00 than to

18h30. While it is idle to speculate about the exact light conditions, it could not have been completely dark as testified to by the plaintiff. Ms Dexter's evidence that it was already dark when the plaintiff left for the cafe can also not be correct, especially in view thereof that the plaintiff himself said differently. It is an objective fact that the plaintiff registered at the Brits clinic at 19h15. It serves no purpose, however, to try and calculate from that time backwards when the accident happened. I say that because there are too many unknown time lapses: After the accident, Visage first went to see if the defendant was all right before he went to where the plaintiff was; the plaintiff then told Visage that he just wanted to lie down for a while, and time elapsed before Visage phoned Ms Pretorius; it must have taken Ms Pretorius and Dexter some time to gather their medical kit, go to the bakkie and start off to the scene; the ladies stabilised the plaintiff on the

scene before they left with him and that took time; for the plaintiff to have washed and put on fresh clothing took some time. In my view the fact that the plaintiff arrived at the clinic at 19h15 does not show that it was probably dark when the accident happened.

The plaintiff testified that trees on the northern side of the road (he was travelling from east to west) threw shadows over the road and made it completely dark. I accept that the setting sun may have cast shadows over the road, but the evidence that the road was completely dark is improbable.

I have already pointed to different aspects in which the plaintiff's evidence is unreliable. Ms Dexter's evidence as to the light

conditions cannot be accepted. The evidence of defendant and Visage that it was light at all relevant times is neither inherently

improbable nor do the objective facts show it to be improbable.

In the result, the plaintiff did not prove that it was dark at the time of the accident. At best for him, it was a few minutes after sunset and the light might have been failing under the trees next to the road. That, however, does not account for the plaintiff's failure to see the defendant warning him. The defendant, incidentally, was on the southern side of the road and not under the trees.

A general observation as to the credibility of the witnesses is called for. For reasons I have given, I find the plaintiff and Ms Dexter to have been unreliable. I am satisfied that in some respects the plaintiff was deliberately not telling the truth. He was not an impressive witness. As for the defendant and Visage, they both impressed me as reliable. The latter did at times, especially when asked about time lapse, say that he did not know. In my view that does not negatively reflect on his credibility. It rather indicates that he gave the facts as he knows them.

To sum up, it is held that it was not dark when the accident happened. The plaintiff emerged from the dip, struck the defendant who was trying to warn him of the branch in the road by waving his arms. When he struck the defendant, the plaintiff lost control of his motorcycle and collided with a branch that had just fallen across the road. The branch was lying in the road about 102 meters from where the plaintiff emerged from the dip.

The plaintiff seeks to hold the defendant liable on three alternative bases. I shall deal with each in turn.

In the first place the plaintiff pleads that the branch (the pleading refers to trees) was lying in the road as a result of the defendant, or persons working on his instructions, cutting trees down on the plaintiff's property. In the circumstances, the pleading alleges, the defendant negligently omitted to act in a way that would have prevented the plaintiff from colliding with the branch. The plaintiff did not prove that the defendant cut the trees nor that it was done on his instructions. The uncontroverted evidence is that the plaintiff's son, with his permission but not on his instructions, instructed an independent third party to remove the trees. It follows that the plaintiff cannot be held liable on this basis, and I find it unnecessary to deal with the alleged grounds of negligence.

The second basis upon which the plaintiff seeks to hold the defendant liable appears from a reply to the defendant's plea. Although the plaintiff's case should have been made out in his particulars of claim, Mr Pieterse for the defendant made no point thereof. The plaintiff contends that, if an independent contractor removed the trees, (which was the case) the defendant had a legal duty of care not to allow a situation dangerous for road users to arise in the road next to his property. According to the plaintiff, the defendant negligently breached that duty of care by omitting to take steps to prevent injury to road users, including the plaintiff.

In support of his argument that the defendant should be held liable on this basis, Mr Naude referred me to the judgments in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991(1) SA 1 (AD) and to the dissenting judgment in *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009(1) SA 265 (SCA). Those judgments are, with respect, instructive as to when an omission to act would be regarded as unlawful. They, however, deal with the legal duty to act ("the duty to take care") of a person who instructs an independent contractor to create a potentially harmful situation. In this case, the defendant did not instruct the contractor to remove the trees. Therefore, the judgments referred to do not afford authority for the proposition that the defendant must in this case be held liable for an omission to prevent harm.

It is settled law that a person who creates a potentially harmful situation must, depending on the facts, guard against the situation

causing harm to others. Put differently, if a person creates a potentially harmful situation, it may,

depending on the facts, be unlawful for him not to ensure that the harmful situation doesn't cause harm to others. (See the majority judgment in the Chartaprops 16-case (supra). In this case the defendant did not remove the trees and therefore did not create the situation that the plaintiff contends was potentially

harmful.

I have not been referred to authority for the proposition that an owner of immovable property, by virtue only of his ownership, has a legal duty to prevent harm being caused by activity on his property. But that is not the end of the matter. I assume that there are circumstances where the law requires of an owner to prevent harm caused by activity on his immovable property. Put differently, it may, depending on the facts, be unlawful for an owner not to prevent harm being caused by activity on his immovable property. Such an omission to act (prevent harm) will only be unlawful if, firstly, the harm is reasonably foreseeable. For the omission to be unlawful, the owner must in the second place be in a position where it can reasonably be expected of him to act (prevent harm). (See the Langley Fox-judgment (supra) at 11E to 12J).

In this case the defendant was not present when the work to remove the trees commenced. There is no evidence that he knew how the contractor that his son had appointed was going to do the work. In the circumstances, he could neither have foreseen that the work might cause harm to road users, not, having been absent, could he have acted to prevent harm.

The defendant was present when the last tree was felled. I assume in the plaintiff's favour that he was in a position to prevent foreseeable harm by, for instance, instructing the operator of the front-end loader to go about his business differently. There is no evidence, however, that it was reasonably foreseeable that the removal of the tree could cause a hazard in the road. More in particular, there is no evidence that it was reasonably foreseeable that a branch could break off and fall into the road. In this regard there is not even evidence of how the operator went about removing the tree. I conclude that it was not unlawful for the defendant not to act before the branch broke off in order to prevent harm to road users.

Once the branch broke off and fell into the road, the defendant immediately took action to warn the oncoming plaintiff. There is no evidence that he could or should have acted differently and more effectively. To the extent that he may have had a duty to act, he did.

It is concluded that the defendant cannot be held liable on the second basis.

The third basis on which the plaintiff seeks to hold the defendant liable appears from a second reply that the plaintiff filed in response to the defendant's plea. This basis for liability is premised thereon that the court finds, as it has,

that the defendant was a pedestrian and that the plaintiff collided with him. On that premise, the plaintiff contends, the defendant is still liable because he negligently:

- Failed to have due regard to the plaintiff's rights as a road user;
- failed to keep a proper lookout;
- failed to take cognizance of the traffic on the road;
- entered to road at a stage when it was dangerous to do so; Apart from the last one, with which I shall deal in more detail, there is no substance in any of the alleged grounds of negligence. The defendant did have due regard to the plaintiff's rights and took cognizance of his presence. That is why he tried to warn him. There is no evidence that the defendant did not keep a proper lookout. On the contrary, he was acutely aware of the plaintiff's presence on the road and saw him as soon as he came out of the dip.

As to the allegation that the defendant entered the road at a dangerous moment, the plaintiff did not say so. On the defendant's and Visage's versions the former was not completely in the road and his presence on the side of the road was justified by the circumstances. There are on the evidence two possible causes for the collision. Either the plaintiff was travelling too fast or he was not looking where he was going. I need not find, however, whether the plaintiff's negligence caused the collision. The plaintiff did not prove that it was the negligence of the defendant that caused the collision.

In the result, the following order is made: The plaintiff's claim is dismissed with costs.

B.R. Du Plessis

Judge of the High Court

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