

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)**

CASE NO: 1342/03

In the matter between:

RAYMOND DYSEL

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

EBRAHIM J:

Introduction

1. In this action the plaintiff claims damages from the defendant, pursuant to the provisions of the Road Accident Fund Act, 56 of 1996, for bodily injuries he sustained in a motor accident that occurred on 26 June 2000 in Kurland

Road, Perseverance, Port Elizabeth. In the said accident a motor vehicle with the registration CGZ 104 EC ('insured vehicle'), driven by Zwelidumile Raymond Mgwali, collided with a motorcycle with the registration CMP 434 EC ('motorcycle'), being ridden by the plaintiff.

2. At the commencement of the trial Mr Niekerk, who appeared for the defendant, applied in terms of Rule 33(4) of the Rules of Court for a separation of the determination of the merits and quantum. Mr Paterson, who appeared for the plaintiff, opposed the application. After hearing argument, the Court granted an order that the merits be determined first and that quantum stand over for determination at a later stage.

The plaintiff's case

3. The plaintiff testified that on the morning of 20 June 2000 he was proceeding from his home to his place of employment in Perseverance on his motorcycle. The headlight of the motorcycle was on as it was dark and illuminated the road ahead of him. He stated that the headlight came on automatically when the engine was started and could not be switched off while the engine was running.
4. In Kurland Road, he observed the insured vehicle approaching from the opposite direction on its correct side of the road. The right-hand side

indicator light was flashing, signalling the driver's intention to turn right to enter the driveway of a Total garage ('garage'). Since the driver of the insured vehicle intended turning across his path of travel he expected the driver to let him pass before executing the turn. When the driver did not do so, the plaintiff swerved to his left to avoid a collision. Despite this, the insured vehicle collided with his motorcycle. He was thrown onto a grassed piece of land adjoining the pavement. The motorcycle came to rest partially on the pavement and the road at the entrance to the driveway of the garage. The insured vehicle did not stop immediately but only after it had entered the driveway of the garage.

5. The collision occurred at about 5:45am and the point of impact was on the tarred road surface. Since there was a stop street, a short distance ahead of him the plaintiff had reduced speed to approximately 40km per hour. He was unable to estimate the speed of the insured vehicle. Due to the injuries he sustained he was taken to hospital for treatment.
6. Cross-examined by Mr Niekerk, the plaintiff stated that the damage to the motorcycle was on the right side and not at the front. The impact had been on the right sides of the insured vehicle and the motorcycle. If he (the plaintiff) had not swerved to the left, the insured vehicle would have collided more directly with his motorcycle. He confirmed that the right-hand side

indicator of the insured vehicle was flashing. There were no vehicles behind him and only the insured vehicle was approaching from the opposite direction. The streetlights in Kurland Road ended a short distance away from the garage. However, the lights beneath the canopy of the driveway of the garage illuminated the road surface.

7. Mr Niekerk conveyed to the plaintiff that Mr Mgwali was executing a right-hand turn into the driveway of the garage as he intended purchasing petrol. The plaintiff did not dispute this. Mr Niekerk put to the plaintiff that Mr Mgwali would testify that he did not see the motorcycle as it did not have any lights. Mr Mgwali alleged that the motorcycle had not been fitted with a headlamp unit. He had inspected the motorcycle and looked in the vicinity after the collision but did not find one. The plaintiff was adamant however that there was a headlamp on the motorcycle.
8. During re-examination, the plaintiff said that some of the roads were unlit and he would not have ridden the motorcycle if it did not have a headlight. The insured vehicle collided with him and he did not ride into it.
9. Gerrit Johannes Vosloo, an inspector in the SA Police Services, testified that he attended the scene of the accident in Kurland Road, Perseverance at 6:00am on 26 June 2000. He inspected the insured vehicle and the

motorcycle and observed that the motorcycle had a headlamp unit. The motorcycle's mirrors, indicators and right-hand side panels were damaged and the damage to the insured vehicle was to its right front and right mid-front. Later he completed an Officer's Accident Report (OAR) form.

10. The plaintiff and Mr Mgwali furnished him with their respective versions of how the collision occurred. According to both versions, Mr Mgwali was executing a right-hand turn in order to enter the premises of the garage. Mr Mgwali had told him that he did not see the motorcycle approaching as it did not have its lights on. The plaintiff, on the other hand, said that the motorcycle's lights were on.

11. Inspector Vosloo confirmed that the streetlights in Kurland Road ended about 100m before the garage. There were lights at the garage but these did not illuminate the road surface. He was an experienced driver and estimated that the lights of a motor vehicle would allow one to see for a distance of between 50 to 100 metres in front of one's vehicle.

12. Mr Niekerk confined his cross-examination to two issues. These related to the location of the damage on the insured vehicle, and that the point of impact was on the tarred road surface and not the driveway of the garage.

13. During re-examination, Inspector Vosloo confirmed that the point of impact was nearer the driveway of the garage than the traffic line in the centre of the road. The point of impact was two-thirds of the distance from the centre line to the entrance of the garage's driveway. He had observed broken pieces from the vehicles on the road and these indicated the point of impact. Replying to a question from the Court, he said that Mr Mgwali had not told him that the motorcycle did not have a headlamp unit.

14. Stanley Kobus Meyer testified that he knew the plaintiff. He was the previous owner of the motorcycle and sold it to the plaintiff. About a month before the accident the motorcycle had undergone a roadworthy test. He replaced all four indicators and a tyre and fitted two white reflectors above the mudguard of the front wheel. He confirmed that the motorcycle was fitted with a properly functioning headlamp. When the engine of the motorcycle was started, the headlight switched on and could not be switched off while the engine was running. Mr Niekerk did not cross-examine this witness.

15. After the testimony of this witness, Mr Paterson handed in, with the agreement of Mr Niekerk, details of measurements relating to the scene of the accident. This concluded the case for the plaintiff.

The defendant's case

16. Zwelidumile Raymond Mgwali was the only witness for the defendant. He testified that he drove the insured vehicle on the morning of 26 June 2000. He was proceeding to Volkswagen SA in Uitenhage with three passengers in the car. After turning left into Kurland Road, he activated the right-hand side indicator to signal he was turning into the garage. Prior to executing the turn to the right, he looked for oncoming traffic but there was none.

17. While turning, Mr Mgwali heard a big bang but did not see anything. He stopped and had to force the driver's door open before alighting from the vehicle. Someone was shouting. A motorcycle, which he had not seen previously, was lying at the entrance of the driveway of the garage. A motorcyclist was lying on the pavement and he went to his assistance. The accident occurred at 5:30am and the point of impact was on the tarred road surface in the lane for oncoming traffic.

18. Cross-examined by Mr Paterson, Mr Mgwali said his passengers were work colleagues and were available to testify. The accident did not occur at 5:45am but about 5:30am. Did not know why the attorney had not disputed the time. He did not see the motorcycle as its headlight was not on. He told the policeman the motorcycle did not have a headlamp but the policeman did not check to see if the headlight was working.

19. When Mr Paterson asked why it had been put to Inspector Vosloo that the motorcycle did not have a headlamp unit, Mr Mgwali said the attorney misunderstood him. The trial particulars furnished by the defendant incorrectly stated the motorcycle had not been fitted with a headlamp. On 23 January 2006 he explained to the attorney that the headlight had not been on. He did not tell him that the headlamp was missing. He also conveyed this to the attorney before Inspector Vosloo testified. He spoke to the attorney at court at 1:00pm the day before but then said it was either 2pm or 3pm. He had not told the attorney that he looked on the ground for the headlamp unit. The attorney had misunderstood him.

20. Mr Mgwali claimed the policeman checked to see if the headlight was working. He could not explain why this was never put to Inspector Vosloo. He denied he was changing his story continuously. He could not say from which direction the motorcycle came or at what speed it was travelling but insisted he had looked for oncoming traffic. He reiterated he had not seen the motorcycle or its reflectors or heard it approaching and did not dispute it had come from the opposite direction. He estimated that the headlights of the insured vehicle enabled him to see a distance of 25 metres ahead.

21. He agreed it was dangerous to execute a right-hand turn if he had seen the motorcycle. He did not stop but only slowed down before turning. He

accepted he had to allow oncoming traffic to pass. He could not dispute that the headlight came on when the engine was started and could not be switched off while the engine was running. After cross-examination, Mr Niekerk closed the case for the defendant.

The plaintiff's and the defendant's submissions

22. I shall not detail the submissions made by the legal representatives for the plaintiff and the defendant. These should become apparent during the course of the ensuing analysis of the evidence.

Facts that are common cause or not disputed

23. The following facts are either common cause or not in dispute:

23.1 Before the collision the motorcycle, ridden by the plaintiff, and the insured vehicle, driven by Mr Mgwali, were both on the correct sides of the road travelling towards each other.

23.2 Mr Mgwali had activated the right-hand side indicator of the insured vehicle to signal his intention to execute a right-hand turn.

23.3 As Mr Mgwali was turning across the line of oncoming traffic, he had to yield to such traffic.

23.4 Mr Mgwali did not stop, but only slowed down, before executing the turn to the right.

23.5 Mr Mgwali did not see the plaintiff's motorcycle prior to the collision.

Analysis of the evidence

24. At the end of the trial, the only issue that remained in dispute related to the headlamp of the motorcycle. In its Plea, the defendant stated that the front headlight of the motor cycle had not been on at the time of the collision. In a Request for Further Particulars for Trial, the plaintiff asked the defendant whether it denied that the lights of the motorcycle were in working order and working properly prior to the collision. The defendant's reply to this was, '[t]he plaintiff's motorcycle was unlit and not fitted with a headlamp at the time of the collision'.

25. The plaintiff impressed me as a witness. He gave a straightforward and honest account of the events. There was no suggestion that he was conveying anything else but the truth of what occurred. He did not seek to suggest that Mr Mgwaqli had not indicated his intention to turn right into the premises of the garage and readily admitted this was so. It is clear from his testimony that the motorcycle was fitted with a headlamp unit and the headlight was switched on and functioning properly when the collision occurred. The witness Meyer, who had the motorcycle tested a month before the accident for roadworthy purposes, corroborated his testimony regarding the headlight. Meyer also confirmed that the headlight switched on automatically when the engine was started and could not be switched off while the engine was running.

26. Inspector Vosloo provided further corroboration that the motorcycle was fitted with a headlamp. When he inspected the damage to the motorcycle, he had seen there was a headlamp. Mr Mgwali never told him that the headlamp unit was missing. The OAR report would have reflected this had he said so. He only alleged that the motorcycle's lights were not on.

27. There were contradictions, improbabilities and falsehoods in the testimony of Mr Mgwali regarding the headlamp unit. He claimed Mr Niekerk had misunderstood him when he told him the headlight of the motorcycle was not on. He denied that he informed him that it did not have a headlamp unit. His own testimony exposed his allegations as being false. He furnished contradictory and evasive replies to Mr Paterson during cross-examination. In the process, he constantly changed his story, as he could not provide logical answers.

28. The final confirmation, if any was necessary, that Mr Mgwali's evidence was untruthful came during argument. Mr Niekerk, to his credit, disclosed to the Court that the allegation in the trial particulars that the motorcycle was not fitted with a headlamp emanated from the instructions furnished to him. In the circumstances, there is no doubt that Mr Mgwali was manifestly untruthful in respect of this issue.

29. The plaintiff and the witnesses Vosloo and Meyer were honest and credible witnesses. They were unequivocal in their testimony concerning the headlamp. I find their testimony to be convincing and reliable and I have no hesitation in accepting it as the truth. The evidence tendered by the plaintiff proves that the defendant's allegation that the motorcycle was not fitted with a headlamp is patently false. I am satisfied, therefore, that on a preponderance of probabilities the headlight of the motorcycle was on at the time of the accident.

30. Mr Mgwali admitted that he did not see, or hear, the plaintiff's motorcycle prior to the collision. It was only after the collision, when he alighted from the insured vehicle, that he saw it for the first time. It is evident that Mr Mgwali's failure to see the approaching motorcycle in the opposite lane was not because it did not have any lights on but due to him not keeping a proper look-out. Mr Mgwali also admitted that when he reached the centre line he only slowed down, and did not stop, before commencing his turn to the right. It is apparent that if Mr Mgwali had stopped the plaintiff would have been able to proceed safely past the insured vehicle and the collision would not have occurred.

31. It is evident further that since Mr Mgwali had failed to notice the presence of the plaintiff's motorcycle he did not take any steps to avoid the collision. Further, the right-hand turn was an inherently dangerous manoeuvre and he executed it without regard for the rights of other road users, more particularly the plaintiff. Moreover, Mr Mgwali drove across the line of travel of the plaintiff's motorcycle, which had the right of way, at an inopportune time and without ensuring that it was safe to do so.

Conclusion

32. In his submissions, Mr Niekerk stated that, if the Court found that the headlights of the motorcycle were on, the defendant conceded there could not be any contributory negligence on the part of the plaintiff. In my view, the defendant has rightly made this concession.

33. In the circumstances, I am satisfied that the plaintiff has established on a preponderance of probabilities that the collision was due solely to the negligence of Mr Mgwali, the driver of the insured vehicle. It follows the defendant is liable for the damages suffered by the plaintiff arising from bodily injuries sustained in the motor vehicle collision on 26 June 2000.

Costs

34. Mr Paterson and Mr Niekerk agreed that an order for costs be made at this stage and not stand over until quantum is determined. Mr Niekerk also conceded that costs should follow the result. In the event, the defendant is liable for the plaintiff's costs of the action.

35. In the result, there is an order in the following terms:

(a) The defendant is liable to the plaintiff for such damages as the plaintiff may prove he suffered arising from bodily injuries sustained in the motor vehicle collision that occurred on 26 June 2000.

(b) The defendant is to pay the plaintiff's costs of suit, together with interest thereon at the prevailing legal rate, payable as from the date of taxation to date of payment.

Y EBRAHIM
JUDGE OF THE HIGH COURT

17 FEBRUARY 2006

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES: **RAYMOND DYSEL**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

- Registrar CASE NO: **1342/03**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **SOUTH EASTERN
CAPE LOCAL DIVISION**

DATE HEARD: 30 and **31 January 2006**

DATE DELIVERED: **21 February 2006**

JUDGE(S): **EBRAHIM J**

LEGAL REPRESENTATIVES -

Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **Adv N M Paterson**
- for the accused/defendant(s)/respondent(s): **Mr D Niekerk**

Instructing attorneys:

- Applicant(s)/Appellant(s): **Dhanjee Padayachee Inc**
- Respondent(s)/Defendant(s): **Wilke Weiss van Rooyen Inc**

CASE INFORMATION -

- *Nature of proceedings* :
- *Topic:*