



20/10/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 18209/2015

9952/16

In the matter between:

DC VAN DER SCHYFF

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRAND AJ

- [1] The Plaintiff claims damages resulting from injuries sustained in a motor vehicle accident that occurred on 30 July 2012.
- [2] On the day of trial the matter served first before my sister Thlapi. The defendant brought an application for postponement, which my sister Thlapi dismissed. The matter then landed before me for disposal.
- [3] At the outset Mr Fourie for the Plaintiff informed me that the parties had agreed to a separation of the merits and *quantum* of the claim in terms of rule 33(4) and requested me to make an order to that effect, and that the determination of the *quantum* of damages be postponed *sine die*. I make such an order at the conclusion of this judgment.
- [4] The issue before me for determination was in other words only the merits, and as the Defendant had conceded negligence on the part of the insured driver who was involved in the accident in which the Plaintiff had sustained his injuries, but alleged contributory negligence on the part of the Plaintiff, the issue boiled down to apportionment of fault.
- [5] The Plaintiff called only one witness – the Plaintiff himself – and the Defendant none.

- [6] This meant that the only version before the court was that of the Plaintiff, as elicited during his testimony and under cross examination.

The Plaintiff's version

- [7] The Plaintiff testified that on the morning of the accident, at around 05:15, he departed from home in Phalaborwa to work on his motorcycle. It was an early winter's morning and therefore still dark. His place of work was approximately 5km from his home and given that he had to be there only at 06:15, he was not in a hurry.
- [8] He was wearing his two piece blue work overall, with reflective strips across the chest and back and around each lower leg, a wind-breaker that was open (unzipped), work boots and a crash helmet.
- [9] His motorcycle had a headlight, which automatically switched on when the engine switched on and switched off only when the engine was switched off. He is sure the headlight was functioning at the time, as he would not have been able to drive in the dark with it.
- [9] At between 05:50 and 05:55, he was driving along a single lane, two-way street, Selati Street. He stopped at an intersection with a four-way stop, behind a 'bakkie'. When the bakkie pulled away and crossed the intersection, he followed it. Both the Plaintiff and the bakkie in front of him where at that time driving toward the next intersection in Selati Street, which has only a two way stop for the side street, with no stop in Selati Street.
- [10] The bakkie was driving very slowly and the Plaintiff decided to overtake it. He turned on his indicator to the right, checked for oncoming traffic in the opposite lane, checked for traffic behind him and proceeded to overtake.
- [11] As he drove past the bakkie he noticed the logo of a company with which he has contact in his work, Trentyre, on the driver's door. At that moment he realised that the workshop of this company was located in the side street to the right of the next intersection with Selati Street and immediately thought that he hopes the bakkie was not on its way there, as it would then be making a turn to the right, with him alongside it.
- [12] As he had this thought he was already adjacent to the driver's door of the bakkie and could see inside the cabin. He recognised the driver as a man he knew from work. He also saw at the same time how the driver in one movement started to turn his steering wheel to the right in order to turn into the side street, and switched on his indicator. All of this – him realising the danger, seeing the driver and noticing him turning and switching on his indicator, happened almost simultaneously.

- [13] At this point, realising that the driver of the bakkie had not seen him and was going to turn into him and given that it was too late to avoid the collision, he attempted to fall with the motorcycle so that he could try to slide out of the way. It was too late: the motorcycle got caught under the bakkie and was dragged along and across his leg and the bakkie's right hand rear wheel also drove over his leg.
- [14] He was left lying in the road and remember the driver of the bakkie, who had recognised him, coming to him and saying he is sorry and that he had not seen him.
- [15] I admitted into evidence as exhibit A, a sketch plan of the accident drawn by the Plaintiff some time after the accident. It shows that the collision occurred at the start of the intersection with the side street into which the bakkie was turning; that the Plaintiff ended up on the ground just into the side street and outside the intersection and that the bakkie with the motorcycle still under it stopped a short way into the intersection.
- [16] I also admitted into evidence as exhibit B three colour photographs taken shortly after the accident (two are digitally marked at 5:58 and 5:59 respectively) as exhibit "B". Two of these photographs show the right side of the bakkie, with the motorcycle still caught under it, more or less at the driver's door and with the motorcycle's headlight clearly on. One shows the right side of the bakkie with the Trentyre logo on the driver's door.
- [17] Mr Maluleka for the Defendant in his cross examination pursued with enthusiasm only one line of questioning. He asked the witness whether there were any road markings on the road indicating that it was lawful for him to overtake where he did. The witness responded that there were, apart from the markings of the intersection, no markings on the road where he overtook and particularly no line (whether broken or solid) between his and the oncoming lane. Mr Maluleka then put it to the witness that he had overtaken at a place where 'in terms of the Road Traffic Act' it was unlawful for him to do so. The witness denied this, but Mr Fourie then objected that, given that the Defendant was not going to lead any evidence, Mr Maluleka could only put this proposition to the witness if he either had evidence before court that it was unlawful to overtake there, or he could refer the court to the provisions of the 'Road Traffic Act' that would render it unlawful to do so. In response Mr Maluleka indicated that he would abandon this line of questioning.
- [18] At conclusion of cross examination, I directed a question to the witness from the bench. I asked him when he saw for the first time that the bakkie that he overtook was a Trentyre bakkie. He answered that it was only when he was already alongside and passing it.
- [19] The plaintiff was a reliable and credible witness: Mr Maluleka did not seek to impugn his reliability or credibility and there was nothing in his demeanour and

the content of his testimony, whether in his examination in chief or under cross examination that indicated otherwise.

- [20] In closing argument Mr Fourie submitted that a defendant alleging contributory negligence on the side of a plaintiff must either place evidence before a court to establish such, either through calling its own witnesses, or impugning the Plaintiff's version to the contrary under cross-examination. He referred me in this respect to the matter of *Bata Shoe Company Ltd (South Africa) v Moss* 1977 (4) SA16 (WLD), a matter similar to this in that it involved also a collision caused by a vehicle turning to the right while being overtaken on the right.
- [21] Relying on *Bata Shoe Company* Mr Fourie then submitted that in a situation such as this the driver that overtook must show that before overtaking he had given reasonable notice to other road users, including the user he wants to overtake that he intended to overtake by timeously engaging his right hand indicator; and that he had kept a proper lookout for other road users – oncoming traffic, traffic from behind and the vehicle he seeks to overtake before proceeding to overtake.
- [22] The driver that turned for his part must show both that he had clearly and timeously signalled his intention to turn to the right in such a manner as to warn approaching traffic, following traffic and any person perhaps intending to overtake of his intention; and that he had satisfied himself 'by full and careful personal observation' that the time for him to turn turned at the opportune time, that is a time at which he could turn without endangering 'or even seriously impeding' other road users.¹
- [23] On the Plaintiff's version, the driver of the bakkie (the insured driver) had failed both to signal his intention to turn and to determine properly whether it was an opportune time to turn; while the Plaintiff had both properly signalled and kept a proper lookout.
- [24] This version was contested neither by the Defendant calling witnesses to the contrary; nor by counsel for the Defendant on cross examination.
- [25] In this light there is nothing before me on the basis of which I can find any contributory negligence on the part of the Plaintiff and I find the Defendant to be 100% liable for any damages arising for the Plaintiff from the injuries sustained in the accident.
- [26] Accordingly I order as follows:
- (a) The issue of quantum of damages is separated from the merits of this matter and its determination postponed *sine die*.

¹ *Bato Shoe Company* at 21B-C.

(b) The Defendant is held 100% liable for any proven damages resulting from the injuries sustained by the Plaintiff.

A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned above a horizontal line.

JFD Brand
Acting Judge of the High Court