IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case No: 599/04
Date heard: 06-07/03/07
Delivered: 25/05/07

ANFRID JUNIOR RAATH **PLAINTIFF**

versus

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MOKGOHLOA AJ:

1. The plaintiff, a pedestrian, instituted action against the defendant, the Road Accident Fund ("RAF") for damages suffered by him as a result of a collision with a motor vehicle with registration numbers and letters BBS983NC (the insured vehicle) driven by one Mr Willem Berg (the insured driver). The said collision occurred on 11 March 2002 at 22h00 at Gousblom Street, Andalusia, Jan Kempdorp. The plaintiff based his claim on the alleged sole negligence of the insured driver.

2. At the commencement of the trial, by agreement between the parties, I was requested to order, in terms of Rule 33(4) of the Superior Court Rules, that the merits be adjudicated separately from the quantum, which order I granted. Exhibit "A" which is the plaintiff's bundle was referred to extensively by both parties during the trial.

COMMON CAUSE FACTORS

3. The following factors were common cause:

3.1 That there was a collision between the plaintiff and the insured vehicle;

3.2 That the plaintiff sustained injuries as a result of the collision.

FACTORS IN DISPUTE

4. The following factors were in dispute:

4.1 Whether the point of impact was on the sidewalk or on the road surface;

4.2 Whether this was a frontal (a head on) or a side collision and which part of the insured driver's motor vehicle collided with the plaintiff: was it the front left bumper or the side left mirror.

PLAINTIFF'S CASE

5. The plaintiff, Anfrid Junior Raath, a 26 years old male, and two of his witnesses testified. His evidence was that on the evening of 11 March 2002 at about 22h00 he was walking along Gousblom Street in Jan Kempdorp in the company of his two friends, Mr Daniel Edward and Mr Franco Maasdorp. The three of them were walking abreast. He was on the extreme right heading North. Edward was walking in the middle and Franco on the left. They were going to turn right after some distance. Plaintiff was walking on the gravel verge which served as a sidewalk. The sidewalk was demarcated from the tarred road by concrete kerb stones but the latter were flush with the ground level so that there was no gutter between the tarred road and the gravel verge.

6. According to the plaintiff there were no street lights except for a flood light which was on the far left side of the road. However the street was not well illuminated because the shadows of the trees along the street fell on the street. Plaintiff was wearing a khakhi shirt and a khakhi pair of trousers. There were no other pedestrians along the street except himself and his two companions.

7. Whilst walking as aforesaid he observe the lights of a motor vehicle approaching them from behind. He looked back and saw that the vehicle was travelling in the same direction that they were taking. He knew he was safe as he was walking on the gravel and not on the tarred road. He turned to face the direction they took. The motor vehicle bumped him from behind and knocked him down. He was injured on his right foot and lost some of his teeth. The impact catapulted him to land on the tarred road with his injured right foot and his whole body on the gravel verge. The evidence of Edward and Maasdorp corroborated that of the plaintiff in all material respects. There were no contradictions worth mentioning, if it all.

DEFENDANT'S CASE

8. On behalf of the RAF the insured driver, Mr Willem Berg who is 62years old, testified that he was driving an Al Camino bakkie at a speed of about 40 kilometres per hour from South to North of Gousblom Street. His dimmed headlights illuminated the street ahead of him. There was no traffic approaching from the opposite direction. He saw three pedestrians walking on the left side of the road. They were coming from a side road and joined Gousblom Street walking in the same direction as he was travelling. These pedestrians tried to cross the road. The one on the extreme right, i.e. the plaintiff, looked back and must have seen his motor vehicle approaching. The pedestrians then proceeded to walk straight along the Gousblom Street with their

backs turned against him. There was no need for him to sound a hooter because the plaintiff was aware that he is approaching. He saw other pedestrians on the other side of the road.

9. According to Berg, the plaintiff was walking on the tarred road about 2 metres from the sidewalk/pavement and about 1½ metres from his motor vehicle. He swerved the motor vehicle to the right to avoid knocking the plaintiff. He drove past these three pedestrians and then heard a bang from the front left side of the motor vehicle. He stopped and alighted from the vehicle and found the plaintiff lying down with his right foot on the tarred road and body on the pavement. He then called the police and an ambulance.

10. The Officer's Accident Report (OAR) Form was completed and photos of the scene of the accident were taken. A sketch plan was also drawn up and Berg confirmed the correctness of the OAR Form, the photos and sketch plan. He also confirmed that he pointed out the point of impact to the police. These materials were part of the bundle of documents, Exhibit "A".

11. The defendant also called one Ms Lucia April, a female of 27 years, to testify. She said that she knew Berg very well. She was with him earlier on that evening conducting a census. When the incident occurred she was walking along Gousblom Street on the right hand side from South to North. She saw three pedestrians (the plaintiff and his friends) emerging from a side left road which runs into Gousblom Street. The plaintiff was walking in the middle of the tarred road. His friends pulled him off the road but he returned to the road. The motor vehicle, driven by Berg, approached the plaintiff from behind. The driver swerved the motor vehicle to the right to avoid the plaintiff. The plaintiff groped at the vehicle but was struck by the side mirror.

EVALUATION OF EVIDENCE

12. The plaintiff's evidence is clear and simple. It is corroborated by that of Edward and Maasdorp in all material respects. They are in agreement on the point of impact. They also agree that the insured motor vehicle veered off the road and knocked the plaintiff down.

13. As far as the evidence of the RAF witnesses, Berg's and that of April is concerned, it reveals several contradictions on material aspects. The following are noted:

13.1 According to April the plaintiff was walking in the middle of the road prior to the accident. She marked the point as LT3 on photo 20. However, Berg's version is that the plaintiff was walking on the road about 2 metres from the sidewalk not in the middle of the road;

13.2 April says the plaintiff was dragged and pulled off the road by his companions. Berg did not see this happening;

13.3 Berg says he swerved his car right up to about 1½ metres from the plaintiff whilst April's testimony is to the effect that Berg swerved his car right up to the oncoming cars lane. The width of the road according to scale on photo 24 is 7,5 metres;

13.4 The point of impact according to Berg is at the extreme left side of the surface of the road whilst April's version is that the point of impact is in the middle of the road, which she marked as LT6 on photo 20.

PROBABILITIES AND IMPROBABILITIES

14. In order to succeed in his claim, the plaintiff has to prove negligence on part of the defendant. In **Kruger v Coetzee 1966(2) SA 428 (A) at 430**

E-G, **Holmes JA** stated the following:

"*For the purpose of liability culpa arises if-*

(a) a diligens paterfamilias in the position of a defendant

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

15. The test for whether a particular act was negligent or not has been formulated by **Van der Walt and Midgley**, **Principles of Delict (3ed) Durban**, **Lexis Nexis Butterworths: 2005 at para [29]** as follows:

"*Traditionally, the forseeability test is applied to determine whether or not conduct was negligent. The test basically comprises three elements: reasonable forseeability of harm; reasonable precaution to prevent the occurrence of such foreseeable harm; and failure to take the reasonable precautions.*"

16. Berg described the point of impact to be on the extreme left of the road and that he had swerved his motor vehicle to the right to avoid the

accident, it is highly improbable that the point of impact still remained at the extreme left of the road. With such evidence one would have expected that the plaintiff was bumped by Berg's motor vehicle towards the centre of the road.

17. It is improbable, in terms of the evidence given by April, that the collision could have taken place on the right hand side of the road. It makes no sense that having been passed by Berg the plaintiff would grope at the vehicle which had virtually gone passed him. A side rear view mirror has to be located in front of the driver to be useful and cannot be located towards the rear of the vehicle.

18. Mr Pohl, on behalf of the defendant, argued that there should be apportionment of blame on the part of the plaintiff. He argued that maybe the plaintiff decided to cross the road at the time when the motor vehicle was already near him. He further argued that maybe Berg did not keep a proper distance between himself and the plaintiff.

19. In the case of **Hoffman v South African Railways and Harbours 1955(4) SA 476 (A)** the Appeal Court had to deal with the issue of contributory negligence. The Court referred briefly to the legal approach where a motorist has collided with an unilluminated object. **Schrerner ACJ**, as he then was, stated as follows at **478 B-H**:

"*In the Court below, De Villiers, J., after rightly stating that the onus lay upon the defendant to prove that the plaintiff was negligent, continued,*

"In die onderhawige saak kan daar geen twyfel wees nie dat daar 'n plig op eiser gerus het om 'n behoorlike uitkyk te hou vir voorwerpe op die publieke pad, of die voorwerpe verlig was, al dan nie, want hy kon sulke voorwerpe, wat onverlig was, redelikerwys verwag het, ***(vgl. Manderson v. Century Insurance Co. Ltd., 1951 (1) S.A. 533 (A.D.) te bl. 539****) en hy moes sy spoed so gereguleer het dat hy binne die afstand wat hy kan sien, sy motor tot stilstand kon gebring het...*"

The passage quoted by De Villiers, J., is from the head-note of ***Rose v. Madden, 1913 TPD. 82****. I prefer, however, the language used by Ramsbottom, J., in the other case cited by De Villiers, J., namely,* ***Rex v. Yssel, 1945 TPD 235****. This was a criminal case but for the present purposes that is immaterial. At p. 243 Ramsbottom, J., says,*

"*If the Crown proves that a pedestrian or cyclist or other object with which the motorist collided was visible so that a person keeping a proper look-out or driving at a reasonable speed in the circumstances ought to have seen the obstruction in time to avoid the accident then the inference of negligence can be drawn. But where the evidence does not show that the person with whom the car collided was visible in that sense then there is no ground for drawing the inference of negligence.*"

"*Could with the exercise of reasonable care*" *is a legitimate elaboration of the word* "*should*"*, provided that due emphasis on the word "reasonable" is preserved and that one does not slip into the error of supposing that, if the collision could have been avoided, it therefore should have been, in the sense that failure to avoid it proves negligence. In the case of Manderson, to which De Villiers J. refers, Hoexter J.A., giving the majority judgment of this Court, quoted with approval from Lord Greene's judgment in* ***Morris v. Mayor of Luton, 1946 K.B. 114****, the view that no rule of law can be laid down that a person driving in the dark must be able to pull up within the limits of his vision. It is of course difficult to refrain from generalising in a matter of this kind; careless driving of swift vehicles is certainly dangerous and there is obviously a relationship between speed and visibility. But the generalisations regarding night driving, of which our reports contain many examples (see, e.g.* ***Venter v. London & Lancashire Insurance Co. Ltd., 1951 (4) S.A. 554 (A.D.) at***

pp. 556 and 560), *must not be construed as laying down a rule of law which can be applied as governing the facts of each case of this kind. It is the facts that are decisive throughout and they are too infinitely variable to admit of the formulation of a legal rule.*"

20. It is the evidence of both the plaintiff and Berg that the plaintiff was visible. Berg stated in his evidence that he saw and was aware of the plaintiff and his companions' presence along the road. According to him they were walking on the left hand side of the road about 2 metres from the pavement. The road is 7,5 metres wide. There was no traffic approaching from opposite direction. All that Berg needed to do to avoid the collision was to keep his vehicle on the correct side of the road. The fact that he knocked the plaintiff on the gravel verge of the road is ample demonstration that he failed to keep his motor vehicle under proper control. His failure to do so rendered him negligent.

21. Plaintiff and his companions stated that they were the only pedestrians or people around when the accident took place. It was never put to the plaintiff that April was a witness to the accident and what her version of events would be. In any event, April was a poor witness, and as stated contradicted Berg on material aspects. This forced Mr Pohl to concede his difficulty and argued that April's evidence be disregarded. I agree. Berg's evidence was no better. I am satisfied that April was not on the scene and that she was a witness fabricated by Berg. I therefore draw an adverse inference against him and April for their conduct. I reject the evidence of both.

22. It is trite that a plaintiff must prove his/her case on a balance of probabilities. Eksteen AJA, as he then was, said the following in **National Employer's General Insurance v Jagers 1984 (4) SA 437 (ECD) at 440 D - 441 A :**

"*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 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 Caner*** *(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 the 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."

23. The above having been stated I find as follows:

23.1 The plaintiff has discharged his onus on a balance of probabilities;

23.2 That the accident occurred as described by the plaintiff and his witnesses;

23.3 That the point of impact is as described by the plaintiff in his evidence and

by Berg on the sketch plan to the police officer at the scene of the accident

attached to the OAR in Exhibit "A";

23.4 That the plaintiff's injuries on his right leg were not caused by being knocked by the insured motor vehicle's side mirror but by being knocked by the front left bumper of the insured motor vehicle;

23.5 That the collision was caused by the sole negligence of the driver of the insured motor vehicle when he veered off the road to knock down the plaintiff on the sidewalk.

24. There is no reason why costs should not follow the result.

I therefore make the following order:

ORDER

1. **Judgment is granted in favour of the plaintiff with costs.**

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FE MOKGOHLOA

ACTING JUDGE

NORTHERN CAPE DIVISION

For the Plaintiff	: Adv. Portier	Instructed by	: Venter van Eeden Inc.
For the Defendant	: Adv. Pohl	Instructed by	: Haaroffs Inc.