



NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 2443/08

In the matter between:

SEEMANE NKEKOLO JOYCE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CIVIL MATTER

KGOELE J

DATE OF HEARING : 09 MAY 2011

DATE OF JUDGMENT : 22 JULY 2011

COUNSEL FOR APPELLANT : ADV SWART

COUNSEL FOR RESPONDENT : ADV KRIEL

JUDGMENT

KGOELE J**A. INTRODUCTION**

- [1] The plaintiff instituted an action against the defendant for compensation in respect of bodily injuries she sustained as a result of an accident that occurred on or about 17/01/2007. By agreement between the parties, the merits and quantum were separated at the beginning of the trial.
- [2] The evidence that was led before this court comprised of that of the plaintiff herself and the insured driver of the respondent, Edward Jacques Geldenhuys.
- [3] The plaintiff testified that on the 17/01/2007 at approximately 17h30 she was standing at the edge of the road with the aim to cross over to the other side. The road which she testified about is according to her normally called the old Warmbath's road, a public road from Pretoria to Warmbaths. The place where the accident took place was at an intersection controlled by robots which is in Hammanskraal town. This road consists of two lanes leading to the same direction that had been divided by a white line on each side of the road. There is an open space that divide the two opposite sides. The robots or intersection was +- 15 meters from where she was standing.

- [4] According to her, she was on the side (left hand side) of the road leading from Pretoria to Warmbaths prior to the collision. Traffic was heavy on the road at that time. She had decided to wait there for the traffic to clear with the aim to cross over, rather than at the robots because according to her, they are used to do that when it is safe to do so.
- [5] Whilst standing there looking towards the side of the robots, which were on her right hand side of where she was standing, she saw that the robot had turned green. There were two cars that were approaching the robots crossing it and were travelling towards Warmbaths on the same side of the road but in two separate lanes. The car that was driving in the lane that was closest to where she was standing was a big truck. The other car on the other lane furthest from her was a private car.
- [6] Immediately after the two cars passed the robots, when they were to pass her, the private car quickly changed from its lane and came towards the front of the truck. According to her, this private car negotiated this movement being too close to the truck to such an extent that the driver of the truck sounded a hooter to it. From that moment the plaintiff testified that she did not know what happened and realized afterwards that she was hit by this private

car whilst standing there at the outside of the road when she regained her consciousness. She was at that time lying on the road on the inside of the left lane and the car that hit her having stopped next to her. During cross-examination when responding to some of the questions posed as to how she was hit, she expressed an opinion that because the private car was driving fast, when the driver thereof realized that there was no enough space to pass safely in front the truck without colliding with it or the cars in front of the truck, drove out of the road to the edge where she was standing and it collided with her there.

- [7] The insured driver testified on behalf of the defendant to the effect that he was driving a Ford Fiesta 1980 model blue in colour. According to him, when they approached the intersection, the robot was red. There was a red car in front of him but on the same lane he was driving on. On his left hand side, on the lane that was next to the outside of the road, there was a big truck.
- [8] Whilst waiting for the robot to turn green, he talked to the driver of the truck requesting him to allow him to move to the front of the truck in the lane where the truck was travelling. The truck driver agreed. When the robot turned green, they both proceeded to cross the robot. At that time before he could go into the lane in front of the truck as he requested, he saw a woman (plaintiff) standing in the middle of the two lanes in front of the two cars (his car and the one in front, the red car) in the road. Plaintiff wanted

to move in front of the red car but retreated back when she saw it. When he (the insured driver) was about to pass her, having kept his lane, all of a sudden plaintiff moved and stepped forward. The insured driver turned to the right and applied the brakes, but unfortunately the plaintiff landed on top of his car's bonnet and windscreen. He does not know how it came about that she landed there. He suggested that the plaintiff must have jumped onto the vehicle because he did not hit or collide with the plaintiff at all. His reason is that his car was not damaged anywhere especially in the front or on the side to indicate that he first collided with the plaintiff before she could fall onto the bonnet of the car.

[9] According to the insured driver the plaintiff was never unconscious, she was physically moving around on her legs after the collision and he instructed her to stand still in case she sustained some injuries. He denied that plaintiff was hit whilst at the edge outside the road. He further denied the fact that he moved to the front of the truck, in the lane in which the truck was driving on. His contention is that he intended doing so but did not ultimately do as he wished.

[10] In a civil trial it is trite that the onus of proof is discharged on a balance of probabilities. What a court does is to draw inferences

from the proved facts. The inference drawn is the most probable, though not necessarily the only inference to be drawn. See **Cooper v Another V Merchant Trade Finances 2000 (3) SA 1009 (SCA) at page 1027F to 1028D.**

- [11] Analysis of the court of the evidence before it is that the evidence of plaintiff and the insured driver are mutually destructive as to the point of impact. There is no other reliable evidence as to the exact point of impact. This court will therefore in reaching its decision as to whether the insured driver was causally negligent or not, consider all the evidence before it and then balance all the probabilities before making inferences or finding as to where the point of impact could have been.
- [12] The only evidence that seem to be common between the parties is that there was a truck driving on the outside lane and the insured driver was also driving on the inside lane parallel to the truck of the road in Hammanskraal leading towards Warmbaths.
- [13] Plaintiff's evidence is to the effect that the insured driver moved from its lane, into the front of the truck, to the outside lane where she was standing and collided with her whilst standing on the edge of the road. From the evidence of the insured driver there seems to be an element of corroboration to the plaintiff's evidence in this regard because the insured driver confirmed that he initially wanted to move to the front of the truck into the

outside lane, and he requested this from the truck driver, who did not refuse. There is a ring of truth from this corroboration. I am saying this because the following question remained unanswered during the trial and up to now:

If ever there was no actual moving of the car of the insured driver to the front of the truck, and at the same time this was the intention of the insured driver, how possible is it that the plaintiff could easily concord this allegation which coincide with the initial intention of the insured driver, when according to the insured driver this never happened?. I find it highly improbable that plaintiff could have fabricated this piece of evidence when she did not know what was in the mind of the insured driver.

- [14] According to the plaintiff, the insured driver moved to the front of the truck in a high speed and closely. The insured driver denies ever doing that. It was repeatedly put by counsel for the defendant that if the plaintiff is to be believed that, the insured driver was moving in a high speed, he could have easily outdrove the truck which was moving slowly even if he had moved to its lane and no collision could have taken place. Unfortunately the evidence of the plaintiff that the truck driver sounded his hooter when suddenly the insured driver's car moved in front of it was not denied not taken an issue of. This bring us to another question that also remained unanswered which is: *Why did the truck driver, who according to the insured driver agreed that he could move to the*

lane in front of him where he was driving, suddenly decided to sound its hooter, if nothing unusual was happening?.

- [15] Plaintiff alleges that amongst the injuries she sustained was the right leg which according to the doctor from the papers on record indicates that she had ***a compound fracture of the right tibia and fibula***. These injuries are consistent with being hit or knocked down on those areas of a leg and somehow corroborates the plaintiff's evidence that she was hit or knocked down by a car. This corroboration unfortunately renders the insured driver's allegation that the plaintiff jumped onto the car less probable and highly unlikely.
- [16] I find it difficult to understand the version that the plaintiff jumped onto the car. The insured driver also was at pains to explain how the jumping occurred and ultimately proffered no explanation at all. He could not explain how the plaintiff ultimately fell on top of the body of his car, except to give out this improbable reason.
- [17] This court is also mindful of the fact that, according to the insured driver's evidence, he saw the plaintiff whilst still at a distance from her standing in the middle of the two lanes. According to him, the plaintiff was nearly hit by the red car in front but she managed to retreat back in time that is why it missed her. As a driver, he knows quite well that at the time he saw this pedestrian (plaintiff) roving on the street like that, he had a duty to be vigilant and extra

careful, and further in appropriate circumstances reduce his speed to accommodate any sudden movement that may again arise from this pedestrian. The insured driver failed to do that. This inference is drawn from the fact that:-

- Firstly, he does not know how the plaintiff landed on top of his car;
- Secondly, during cross examination, he at some stage admitted to the fact that he did look away from the pedestrian to the right where he intended swerving;
- Thirdly, at no stage did the insured driver tell this court that he reduced the speed he was travelling at when he saw the pedestrian moving in and out of the road. The only thing he said is that he swerved to the right and applied the brakes when the accident occurred.

[18] Taking all of the above considerations, probabilities points more towards the fact that the insured driver did on this particular day move to the lane where the truck was driving on. He was too close to the truck when he did so and was driving fast. Unfortunately, because there were many traffic on the road at that time, and as plaintiff suggest, he could not safely do that without colliding with the vehicle that were probably in front of the truck. He drove towards the edge of the road and collided with

the plaintiff there. This conduct constitutes negligence on the part of the insured driver and I find that it is the sole cause of the collision. Unfortunately all of this renders the plaintiff's version more likely and or most probable.

[19] I come to the conclusion that the plaintiff managed to discharge the onus on a balance of probabilities that the insured driver of the defendant was the sole cause of the accident on this day.

[20] The following order is thus made:-

20.1 Quantum and merits are separated;

20.2 Defendant is liable to pay plaintiff the proven damages;

20.3 The defendant is ordered to pay costs.

A.M. KGOELE
JUDGE OF THE HIGH COURT

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