IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, EAST LONDON CIRCUIT LOCAL DIVISION)

Case no: EL348/2012
ECD 848/2012

Date heard: 10.12.2014
Date delivered: 17.2.2015

In the matter between:

MONWABISI MATSHOBA **Plaintiff**

vs

ROAD ACCIDENT FUND **Defendant**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MALUSI AJ:

[1] This an application for leave to appeal against the judgment and order of this Court that the defendant is liable to the plaintiff in such amount of damages as may be proved arising from a motor vehicle collision.

[2] I shall use, for the sake of convenience, the same titles as were assigned to the parties during the trial.

[3] The matter came before me on trial only on the merits as the parties applied for a separation of merits and quantum which order I granted.

[4] The evidence adduced at the trial was largely common cause or not disputed. The evidence established that the plaintiff was crossing the N2 highway. At the time of the collision he was standing on a painted island in the middle of the highway

waiting for an opportune moment to cross. The motor vehicle driven by the insured driver veered off the lane it was travelling on and mounted the painted island. It collided with the plaintiff on the leg knocking him to the ground.

[5] In my judgment, I found that the insured driver had been negligent for failing to keep a proper look-out and driving at a speed that was excessive in the circumstances. I refused to apportion contributory negligence on the plaintiff as I held that his mere presence on the painted island was not of itself negligent. I held that the defendant was liable for the damages as may be proved. The defendant applies for leave to appeal that judgment.

[6] It is necessary that I set out *in extensio* the grounds of the defendant's proposed appeal. It will become apparent that some of the grounds are repetitive. I do no intend to deal with them *in seriatum* when I consider the merits of this application later in this judgment. The wrong impression may be created at the conclusion of this judgment that I have not dealt with all the grounds of appeal as I am not in the habit of repeating myself. The proposed grounds of appeal are the following:

> "1. The Honourable Trial Judge erred in the following respects:
>
> 1.1 That, although the Plaintiff's presence on the highway was prohibited by Regulation 323 of the National Road Traffic Act 93 of 1996, by finding that the Plaintiff did not expose himself to a reasonable risk of collision;
>
> 1.2 By finding that the Plaintiff was waiting on the non-trafficable surface of the highway;
>
> 1.3 By concluding that the place where the Plaintiff was waiting and accordingly where the collision occurred was non trafficable, when in effect it was a trafficable surface of the highway;

1.4 By finding that it was reasonably unforeseen that a motor vehicle would leave the "three lanes" and drive on the painted island.

1.5 By not finding that the Plaintiff's prohibited presence on a highway, where such presence is prohibited Regulation 323 of the National Road Traffic Act 93 of 1996, is in itself negligent;

1.6 By not finding that the Plaintiff placed himself on the roadway when it was dangerous and/or negligent for him to do so;

1.7 By finding that the insured driver was not allowed to drive on the painted island but not, on the same hand, finding that the Plaintiff was not allowed to be on the painted island;

1.8 By finding that it was common cause that the Plaintiff was not allowed to drive on the painted island, when no such common caused existed;

1.9 By failing to criticize and find negligent the Plaintiff's conduct by placing himself on a National Highway in prohibited circumstances, when it is common cause that the Plaintiff would have been able to cross the highway by way of a pedestrian bridge which was in the near vicinity;

1.10 By failing to find that the Plaintiff exposed himself to a reasonable risk of collision;

1.11 By failing to find that the evidence established negligence on the part of the Plaintiff;

1.12 By failing to find that the Plaintiff was contributory negligent."

[7] It is trite in our law that the requirement for leave to appeal is the existence of reasonable prospects of success on appeal. An application for leave to appeal must succinctly and clearly specify the finding of fact and rulings of law the applicant intends to appeal. It is incumbent upon the applicant to furnish all the information necessary to enable the Court to decide whether or not leave ought to be granted. The application must not be expressed in general and ambiguous terms so as to allow the applicant to canvass any element relating to judgment[1].

[1] Capital Building Society v De Jager and Others; De Jager and Another v Capital Building Society 1964 (1) SA 247 (A); S v Ackerman en 'n Ander 1973 (1) SA 765 (A); S v Sikhosana 1980 (4) SA 559 (A) at 562

[8] I am obliged to dispassionately consider the application for leave to appeal and decide whether there is a reasonable prospect the Appeal Court may come to a different conclusion than mine. This requires that I clear my mind of the opinion I held when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto.

[9] *Mrs Kopke,* who appeared on behalf of the defendant at the hearing, submitted that the thrust of the application was that the plaintiff ought to have been held to be contributory negligent and apportionment ordered. She conceded that the defendant was correctly found to be negligent but argued strongly that the plaintiff was also negligent to some unspecified degree.

[10] *Ms Watt*, who appeared on behalf of the plaintiff, supported the judgment. She submitted that the only ground alluded to by defendant in its plea which was supported by the evidence was that the plaintiff had placed himself on the highway. She argued his mere presence on the highway did not amount to negligence.

[11] The contention that the plaintiff was negligent is premised on regulation 323(2)(a) of the National Road Traffic Act 93 of 1996 which prohibits the presence of pedestrians on the highway. Due to the contravention it was thus argued the plaintiff exposed himself to a reasonable risk of collision and placed himself on the roadway when it was dangerous to do so. This was the thrust of the submission that the plaintiff was negligent. (See paragraphs 1.1, 1.5, 1.6, 1.9, 1.10, 1.11 and 1.12 above).

[12] The contention is without merit. It is settled law that 'the mere contravention of a statutory provision can never be equated to or taken as proof negligence'[2]. The doctrine of precedent is an intrinsic feature of the rule of law which is in turn foundational to our Constitution. It requires Courts to follow the decisions of coordinate and higher Courts'[3].

[13] No attempt whatsoever was made by the defendant to show that any of the plethora of cases was wrong on the settled law or the case at hand was distinguishable from the welter of authority on the facts. I simply was implored to depart from precedent at a whim. This is the invitation to chaos envisaged by Madlanga J in *Turnbull-Jackson*. I still maintain my refusal at the invitation.

[14] It was contended that I erred in finding that the painted island was a non-trafficable surface (see paragraphs 1.2, 1.3, 1.7 and 1.8 above). This contention sought to withdraw a concession *Mr Sandi* had correctly made at the trial. I was not provided with any authority for the contention.

[15] There is no merit in the contention. Schedule 1 of the regulations of the National Road Traffic Act 93 of 1996 provides that the painted island marking indicates to the driver of a vehicle that he or she shall not drive his or her vehicle in such a manner that such vehicle or any part thereof crosses such marking[4].

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[2] RAF Practiioners Guide, Issue 18, page A-54 at para (viii) and the cases cited therein

[3] Makhanya v University of Zululand 2010 (1) SA 62 (SCA) para 6; Turnbull-Jackson v Hibiscus Coast Municipality and Others 2014 (6) SA 592 (CC) para 54-55

[4] Cooper on Road Traffic Legislation, Service 16, 2000, page 2-1-729

[16] It was this contravention and the circumstances of her colliding with the plaintiff which informed the finding that the insured driver was negligent (own emphasis). The contravention on its own, as previously indicated, is no proof negligence.

[17] At the hearing *Mrs Kopke* finally submitted that leave must be granted so that there is further clarification of legal principles so in future there is certainty. This is usually a consideration when there are conflicting decisions within the division on a point of law. No decisions contrary to the judgment on a point of law were brought to my attention. I could not find any after a diligent search. Thus, it appears there is no basis for this ground either.

[18] It is clear the application lacks merit and no other Court may reasonably come to a different conclusion. I was given no reason why the usual costs order should not be made.

[19] In the circumstances and for the above reasons the following order is made:

[19.1] The application for leave to appeal is dismissed with costs.

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T. MALUSI
ACTING JUDGE OF THE HIGH COURT

For the plaintiff	:	Adv Watt
Instructed by	:	Matyeshana & Moodley Attorneys EAST LONDON (Ref: Matyeshana/td)
For the defendant	:	Mrs Kopke
Instructed by	:	Bate Chubb & Dickson Inc EAST LONDON (Ref: Mr Kretzmann/svp/R1354/W79277)