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REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION

CASE NO: 2010/37195

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- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED

DATE

SIGNATURE

In the matter between:

MARCEL ASHLEY SMITH

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE J:

[1] Following a motor vehicle collision between motor vehicle with registration letters and numbers [XDH 9.....], being driven by the Plaintiff, and motor vehicle with registration letters and numbers [NKW 7.....] (hereinafter referred to as “the bus”), being driven by the insured driver, that occurred on 7 July 2009 at or along Albert Street near Hillfox Shopping Center in Weltevreden Park, the Plaintiff instituted a delictual claim in terms of the Road Accident Fund Act No. 56 of 1996 against the Defendant for personal injuries that he sustained.

[2] The matter served before this court with the parties having agreed to separate issues. The court considered the parties’ agreement and in terms of Uniform Rule of Court 33(4) ordered that the issues be treated distinctly such that this court will only concern itself with the question of the determination of liability. Accordingly the main issue involved here is who of the two drove negligently ultimately causing the two vehicles to collide.

[3] The Plaintiff was the only witness who took to the stand to give evidence on his own behalf. Similarly, the insured driver was the only witness who testified on behalf of the Defendant. The evidence of the Plaintiff was that:

3.1 He was driving in Albert Street and had come to a complete stop at the turn that leads to his workplace, Bosch. He had to stop before executing a right-turn into his workplace because driving into his opposite direction was a bus travelling straight;

3.2 He had seen the bus while he was approximately 50 Metres before coming to a halt at the point where he was supposed to turn into his workplace;

3.3 He commences work at 7H30. As he drove towards the place where he was to turn into his workplace, he noticed some of his colleagues waiting outside the entrance to Bosch;

- 3.4 He conceded under cross examination that he took off his eyes from the road not once but twice to look at the entrance to his workplace;
- 3.5 When he returned his eyes to the road, the bus had already collided with his vehicle. He hit the windscreen with his head when the collision occurred. His seatbelt was securely fastened;
- 3.6 His vehicle was generally in a good working condition except for an airbag on his steering wheel that was faulty;
- 3.7 The damage to his vehicle was to the front of the right fender, both headlights and the front bumper fell off. The damage to the bus was also on the front right hand side;
- 3.8 Although his vehicle was not insured, the insurers of the bus paid his material claim for damage to his vehicle in full;
- 3.9 The bus stopped on the far end of its lane after the road leading to the entrance to the Plaintiff's workplace. The insured driver's vehicle was pushed back approximately 3 metres from the point of impact being at the point where the Plaintiff intended to turn.

[4] The insured driver's testimony was that:

- 4.1 He has been in the employ of Metro Bus as a driver for the past 16 years. In his career as a driver, he has never been involved in an accident;
- 4.2 He has on several occasions travelled in Albert Street in particular, the area where the collision happened. He confirmed that the place where the collision occurred is a bus route with clearly marked and labeled bus signs;

- 4.3 Prior to the collision, he drove at about 5 to 10 Kilometres per hour mainly because he came from a stationary position at a bus stop where he had just dropped off a commuter;
- 4.4 He had passed the entrance to the Plaintiff's workplace and had gone over a speed hump when he saw the Plaintiff's vehicle approaching into the opposite direction at a high speed zigzagging in the road and eventually slamming into the front right fender and the wheel. He applied brakes but this did not assist as the Plaintiff's vehicle still collided with the bus;
- 4.5 The whole of the front portion of the Plaintiff's vehicle was damaged as it hit the side of the bus with the right front side part. He confirmed that the bus was travelling straight while the Plaintiff's vehicle was travelling into the opposite direction but swerving from side to side as it had lost control due to the high speed at which it was being driven;
- 4.6 The police came to the scene of the collision and saw the positions of the vehicles. Under the observation of the police officials at the scene of the collision, he drew a sketch depicting Albert Street and the positions of the vehicle after the collision;
- 4.7 He described how the collision occurred on some papers which he handed over to a police official. The police official then transcribed the information onto the present police report;
- 4.8 Under cross examination he stated that there were no other measures that he could have taken to avoid the collision other than applying brakes. He could not swerve onto his left hand side because the pavement was too high;
- 4.9 He also estimated the distance at which he first saw the Plaintiff's vehicle swerving from side to side to have been approximately 4 Metres.

- [5] Insofar as negligence is concerned it could be instructive to refer to the case of **Kruger v Coetzee** 1966 (2) SA 428 which is a *locus classicus* in matters involving negligence:

“For the purposes of liability *culpa* arises if -

- “(a) a *diligens paterfamilias* in the position of the 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.”

- [6] A driver is under a legal duty to keep a proper lookout, to keep left, to travel at a reasonable speed under the prevailing circumstances and to avoid a collision by the exercise of reasonable care. A violation of these legal duties will warrant the attribution of negligence to the driver concerned.

- [7] Both the Plaintiff and the insured driver can be criticized for the manner in which they gave their testimony. The Plaintiff admitted that the insured driver had the right of way as the bus was travelling straight and he was to execute a right turn into his workplace.

- [8] The law regulating the execution of right turns has been set out in a number of cases and one such case is **AA Mutual Insurance Association Ltd v Nomeka** 1976 (3) SA 45 (A) 52E – G where the court stated the duty of care that motorists intending to travel across the path of oncoming or following traffic bear:

“Since it is inherently dangerous to turn across the line of following or approaching traffic, there is a stringent duty upon a driver who intends executing such a manoeuvre, to properly satisfy himself that it is safe and the opportune moment to do so.”

- [9] The damage to the vehicles could be of assistance to determine the manner in which the collision happened. The damage to the bus was on the front right hand side, between the headlamp and the front right wheel. The damage to the Plaintiff's vehicle was on the right hand side and the whole front of his vehicle was damaged. This does not suggest a head-on collision by any chance as the Plaintiff

would want this court to believe. The bus did not have any damage in the front nor was there evidence that the right hand side corner of the bus was damaged.

[10] Reference to 'mold' by the Plaintiff only surfaced during re-examination after a leading question was asked to which Counsel for the Defendant objected, which objection the court upheld. I am therefore disregarding that part of the Plaintiff's testimony.

[11] If the bus was not damaged in the front because it was high, as Counsel for the Plaintiff suggested, then one would have expected the Plaintiff's vehicle to have gone under the bus. Furthermore, if it were so high, how was the damage on the front right hand side possible on the bus? It must therefore be correct that the impact has always been on the side and not in the front of the bus.

[12] The damage to the whole front of the Plaintiff's vehicle demonstrates that it was a bigger portion of the right hand side of his vehicle that collided with the front right hand side of the bus. This explains why the whole front of the Plaintiff's vehicle fell off. Such damage could only have happened when the Plaintiff's vehicle turned into the side of the bus. The injuries to the Plaintiff are also telling. If it were the bus that slammed into his vehicle, one would not have expected the Plaintiff to hit the front windscreen especially if his seatbelt was on. His explanation that he hit it because of the design of his vehicle is rejected as falls on a balance of probabilities.

[13] On the Plaintiff's version that he was stationary waiting for the bus to drive pass, the law is clear and I refer once again to the matter of **AA Mutual Insurance Association** *supra*. The Plaintiff had a stringent duty to satisfy himself that it was safe and opportune to execute a right turn. Having regard to the damage to the two vehicles and his injuries, it appears that the Plaintiff failed to observe this strict duty imposed on him by law.

[14] A more probable explanation is that the Plaintiff was late for work and was therefore driving fast as suggested by the insured driver and lost control when he was surprised by the oncoming bus at the curve. In consequence of this loss of control of his vehicle he slammed onto the side of the bus and sustained injuries.

- [15] If the Plaintiff was not late and concerned about his colleagues at the entrance to his workplace as he claims, why did he risk taking off his eyes from the road not only once but twice to look at them instead of keeping a proper look-out?
- [16] I said the version of the insured driver is more probable to what the Plaintiff has put forward to this court. Ordinarily, one does not expect a driver intending to execute a right turn to just drive onto the face of oncoming traffic or into a vehicle that is passing unless he is committing suicide. I do not think that the Plaintiff wished to do that hence there must be some other explanation.
- [17] It also does not make sense to argue that the bus left its path of travel for no apparent reason and collided with the Plaintiff's vehicle and then swerved back to its path of travel and stopped there.
- [18] The questions about the width of the road and the size of the bus have not been canvassed in the Plaintiff's papers and I see no need to entertain them here. Similarly, the court refuses to draw any adverse inferences from the settlement of the plaintiff's insurance claim for material damage to his vehicle. I cannot assume that this is an indication or acknowledgment that the insured driver was negligent besides, this court would not be bound by their assessment of the collision.
- [19] If the Plaintiff is urging this court to draw that inference, what should this court make of the continued employment of the insured driver? Should this court then surmise that he has been kept because he was not to blame for the collision? There could have been many reasons why the insurers of the bus chose to settle the plaintiff's claim, if they did. In the whole though that testimony was also not traversed in the papers and that is the basis for my rejection of it.
- [20] Having said that about the evidence of the Plaintiff, I need to state that the insured driver too was not impressive as a witness. Like the Plaintiff, he failed to keep a proper look-out because it was not until the Plaintiff's vehicle was 4 meters in front of the bus that he noticed it. The insured driver could not under those circumstances have been alert and aware of what was about to unfold before him.

Had he looked beyond the four metres perhaps he could have taken evasive measures and avoided the collision.

[21] The insured driver also performed poorly when asked about the completion of the police report. For some reason he thought that he filled it in and then turned around and said that he gave it to the police official to transcribe it onto the present police report. He also confused himself when he was questioned why he only saw the vehicle when it was 4 meters away. He said that it was because of other vehicles yet it turned out from his evidence that there were no other vehicles other than the Plaintiff's vehicle and the bus.

[22] That said, this court finds that the primary cause of the collision was the Plaintiff. He drove at a high speed under the prevailing circumstances, failed to keep a proper look-out, turned onto the bus that was travelling straight when it was not safe and opportune to do so and failed to apply his brakes timeously or at all. While the insured driver was driving in his correct lane and straight, he still had a duty to be alert and to keep a proper look-out. This he failed to do completely. Had he done so, he probably could have been the last person to avoid the occurrence of the collision.

[23] It is evident that the above calls for an apportionment of negligence. In my view the Plaintiff was 70% more negligent than the insured driver. Accordingly, the apportionment is 70% / 30% in favour of the Defendant.

[24] Against that background I make the following order:

1. The Defendant shall be liable for 30% of the proven damages of the Plaintiff;
2. The Defendant shall pay the costs of the Plaintiff

B. A. MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Adv R. Saint
Instructed by: Wim Krynauw Attorneys

Counsel for the Defendant: Adv N. Alli
Instructed by: Mothle Jooma Sabdia Incorporated

Trial proceedings took place on 2 and 3 June 2015
Date of delivery of Judgment: 23 July 2015