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REPUBLIC OF SOUTH AFRICA
THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
JUDGMENT

Case no: 23556/2010

In the matter between:

MASILELA S M

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Neutral citation: *Masilela S M v RAF (23556/2010)*

Coram: DIPPENAAR AJ

Heard: 24-25 July 2013

Delivered: 14 August 2013

Summary: Damages sustained by pedestrian in a collision with motorist driving through crowd. Apportionment of liability.

ORDER

Defendant is declared to be liable for 70 per cent of plaintiff's proven damages and plaintiff's costs.

JUDGMENT

Dippenaar AJ:

[1] This is an action for damages sustained by the plaintiff in a motor vehicle collision which occurred between her and the driver of a white Volkswagen Fox bearing registration letters and numbers D..... GP on the evening of 22 November 2009 at Kololo Street, Tsakane, Brakpan. The plaintiff had been a pedestrian at the time.

[2] The parties agreed to separate the issues surrounding merits and quantum. On 24 July 2013, an order was accordingly granted separating the issue of liability on the part of the defendant under Uniform rule 33(4). The issues relating to quantum are to be postponed sine die.

[3] It was common cause that the plaintiff had been a pedestrian and had, inter alia, sustained a fracture to her left arm and wrist.

[4] The issues which must be determined in the present trial are the liability of the defendant and the degree of negligence on the part of the plaintiff, if any and the insured driver respectively.

[5] Only two witnesses were called to testify. The plaintiff testified and the defendant called the driver of the vehicle involved in the accident, Mr S Mkondwana ("Mkondwana").

[6] It was common cause between the parties that the collision occurred when the vehicle driven by Mkondwana collided with the plaintiff in Kololo Street on 22 November 2009 at approximately 22h45 during a street party.

[7] It was further common cause that the collision occurred on the road surface in the lane of travel of Mkondwana, who was driving through numerous people who were on the road surface.

[8] The parties' evidence diverges as to the exact circumstances under which the collision occurred between the plaintiff and the aforesaid vehicle.

[9] In summary, the plaintiff's evidence was that she had gone to a so-called stokvel ("street party") in Kololo Street after work on 22 November 2009 with her brother. Kololo Street is a paved dual carriageway with a pavement and curb on both sides of the street.

[10] On her arrival there were a lot of people partying on both sides of the street in the vicinity of the house where the party was being held. There was music and people were also dancing in the street. People were drinking and were enjoying themselves. There were some cars parked on the side of the road opposite to where she was standing.

[11] At the time, she was standing on the pavement on the side of the road with some friends and noticed a white Volkswagen vehicle facing her direction on the opposite side of the road where the cars were parked. This vehicle was stationary and was revving its engine, to the excitement of the crowd. She noticed a male driver and a female passenger who was making a noise.

[12] The plaintiff decided to cross the road to search for some friends on the opposite side of the street. She checked both sides of the road that it was safe to cross and started crossing the road. When she had proceeded about two steps into the road, the white Volkswagen collided with her, resulting in the injuries she sustained to her left arm and wrist. She believed that the driver of the said vehicle had lost control of it whilst revving its engine. At the time, she had not been concentrating on the vehicle as it was stationary. She testified that she knew the face of the driver of the vehicle but only learnt his name after the accident.

[13] On being questioned under cross-examination why she did not call any witness to the events as there must have been a large number of witnesses who must have observed the accident, the plaintiff testified that she had approached someone as a witness, but that such person declined to become involved as he knew Mkondwana.

[14] The plaintiff under cross-examination was confronted with a previous statement which she had made, in which she contended that she had been standing on the pavement when the collision occurred. She could not give any explanation for the contradictions in her version.

[15] The plaintiff conceded that she had had a few drinks at the party. She disputed that she had been dancing in the middle of the street when the collision occurred and disputed the defendant's version.

[16] She initially testified that the vehicle had collided with the front of her upper legs, but during cross-examination amended this evidence to indicate that the vehicle had hit her on the right side of her legs.

[17] In summary, Mkondwana testified that he was a professional driver who transported school children by day and by night from time to time provided taxi services to various people. On the night in question, his services had been obtained by a lady known to him as Mpho and two of her friends to take them to the street party in Kololo Street. Mpho was not called as a witness, despite her contact details being available. On certain occasions when such street parties were held, the road would be closed off. On the night in question, it was not and he drove slowly to the house at which the party was being held.

[18] On approaching the party he observed that there were a lot of people and that some of them were dancing in the street. He made his way slowly through the crowd of people and stopped his vehicle to allow his passengers to alight. There were no streetlights and the only light emanated from the surrounding houses and his headlights. He could see a lot of people on both sides of the road and in the street surrounding his vehicle.

[19] He denied revving his vehicle as suggested by the plaintiff although he left its engine running whilst his passengers alighted. He testified that he observed the plaintiff coming from the side of the street and commencing dancing backward in the street, facing his vehicle. The plaintiff's eyes were focussed on his vehicle. He continued moving and crept up slowly towards the plaintiff, at which point she put her

hands on the vehicle and placed all her weight on the bonnet of his vehicle. He applied brakes and stopped, resulting in the plaintiff losing her balance and falling backward onto the road, causing her injuries.

[20] Mkondwana testified that before colliding with the plaintiff, he continued moving slowly through the crowd with his headlights on and that he took no further steps to draw the revellers' attention to his presence. He did not flash his lights or use the hooter of his vehicle as in his view, the hooter would not be heard above the loud music which emanated from speakers on the side of the road. He assumed that the plaintiff would move out of his way as the other people in the crowd had done and did not stop his vehicle until there was contact between it and the plaintiff.

[21] It was suggested to him in cross-examination that he should have dropped off his passengers before entering the crowd of people and should have done a u-turn and taken an alternative route to get home, rather than to continue travelling through the crowd of revellers, once he saw that the road was busy and that there were a lot of revellers in the street. He responded that the road had not been closed and that as his home was on route from Kololo Street, it was convenient for him to proceed slowly through the crowd in the circumstances. He did not consider taking an alternative route.

[22] He testified that he embarked from the vehicle to check on the plaintiff. Thereafter an altercation ensued between them. The plaintiff's version differs materially on this issue. She testified that Mkondwana remained in his vehicle and she had approached him to ask why he had knocked her over. He had locked the doors of the vehicle and refused to speak to her.

[23] On both witnesses' versions, an altercation ensued between the plaintiff and Mkondwana after the collision, the details of which were fundamentally different. This dispute is not however relevant to how the collision occurred and it is not necessary to deal with this issue in any detail.

[24] The defendant confirmed that in his view, the plaintiff had been aware of his approaching vehicle and he had assumed that the plaintiff would stop dancing and

move out of the way of his vehicle as he approached closer, as other of the dancing people in the street had done.

[25] The versions of the plaintiff and defendant are irreconcilable in material respects regarding how the collision occurred and are mutually destructive. The plaintiff contends that the collision occurred whilst she was crossing the road, whereas the defendant contends that it occurred whilst the plaintiff was dancing in the street and that she was accordingly the author of her own misfortune.

[26] It is common cause between the parties that the plaintiff bears the onus.

[27] The technique generally adopted by courts in resolving factual disputes when dealing with two irreconcilable versions is set out in *SWF Group Limited and Another v Martell ET CIE and Others*¹, wherein the following relevant applicable principles are stated:

[27.1] Findings must be made on:

[27.1.1] the credibility of the various factual witnesses which depends on a court's impression about the veracity of the witnesses;

[27.1.2] their reliability; and

[27.1.3] the probabilities.

[27.2] In regard to the credibility of a witness, a number of factors must be taken into consideration: (i) the witness' candour and demeanour in the witness-box, (ii) his latent and blatant bias, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with the established facts or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of

¹ 2003 (1) SA 11 (SCA) para [5]; See also: *Dreyer & Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558 para 30. These principles are somewhat more detailed than the principles enunciated in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E).

his performance compared to that of other witnesses testifying about the same incident or events.

[27.3] A witness' reliability will depend, in addition to the aforesaid factors mentioned in paragraph [27.2] (ii), (iv) and (v) above, on: (i) the opportunity he or she had to experience the event in question, (ii) the quality, integrity and independence of his or her recall of the event.

[27.4] Having regard to the probabilities, this necessitates an analysis and evaluation on the probability or improbability of each party's version on each of the disputed issues.

[27.5] In light of its assessment of the factors in [27.2] to [27.4] above, a court should then, as a final step, determine whether the party burdened with the onus of proof, has succeeded in discharging it.

[27.6] When a court's credibility findings compel it in one direction and its evaluation of the general probabilities compels it in another direction, the more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities will prevail.

[28] I have carefully weighed up all the evidence in light of the above factors.

[29] The plaintiff contends that the evidence of both witnesses were unsatisfactory in certain respects but that the evidence of neither can be rejected in its totality.

[30] The defendant contends that the plaintiff's evidence was contradictory, that she presented no less than three versions of how the collision occurred and that her evidence should be rejected. It further contends that the version proffered by Mkondwana was credible and accorded with the probabilities.

[31] In my view, the plaintiff's evidence was not reliable and satisfactory in various material respects and her evidence was contradictory on various issues, such as where the collision occurred and what portion of the vehicle made contact with her body. However, the evidence of Mkondwana was similarly not satisfactory in all respects and does not in all material respects accord with the probabilities,

specifically in relation to the plaintiff's conduct shortly before the collision in effectively climbing onto his vehicle and exactly how the collision occurred.

[32] Having regard to the evidence as a whole and based on the undisputed evidence, it appears probable that the accident occurred in the street, rather than on the pavement, as confirmed by the plaintiff during her evidence in chief. At the time of the accident, the vehicle driven by Mkondwana had been proceeding slowly through the crowd until it made contact with the plaintiff. By virtue of the inherent improbabilities in both witnesses' versions, it is not possible to make any definite finding on exactly how the collision occurred and neither of the witnesses' evidence on this issue is reliable.

[33] The plaintiff urged me to apportion the negligence of the respective parties in favour of the plaintiff, whereas the defendant contended that an apportionment of equal fault would be appropriate. In my view, having regard to the available evidence and specifically the evidence of Mkondwana, his conduct substantially deviated from the norm of a reasonable man in his circumstances to a larger extent than that of the plaintiff.

[34] Mkondwana readily conceded that he was aware of the crowd of revellers in the street as he approached. On his own version, he was aware that they were having a party and must therefore reasonably have anticipated that not all the revellers were sober and may have taken alcohol as part of their festivities. He was also aware that a lot of people were dancing in the street and were accordingly acting carelessly. He further knew that roads were sometimes closed to traffic when there were street parties such as the present. He is a professional driver and as such aware of having a responsibility for the safety of others.

[35] Notwithstanding such knowledge he proceeded to enter into the crowd and did so with only his headlights on. He took no additional steps to make the revellers aware of his presence. He simply assumed that the people in the crowd would become aware of his presence as he slowly moved forward and would get out of his way. This conduct smacks of a disregard for the safety of the people present on the road and a measure of arrogance. He did not consider it necessary to stop or take

any proactive steps to clear the revellers from his path or to draw their attention specifically to his approach. Mkondwana further did not deem it necessary to take an alternative route, although he could clearly have done so, thus avoiding any danger.

[36] On Mkondwana's own version he was accordingly negligent in not taking proper precautions to guard against any carelessness on the part of any of the people in the crowd². He was further negligent in simply driving into the crowd, albeit slowly, rather than to take any action to avoid driving through the crowd although he could easily have done so³. In my view the degree to which Mkondwana was at fault in relation to the collision should be apportioned at 70 per cent.

[37] The conduct of the plaintiff must also be considered to determine to what degree, if any, her negligence contributed to the collision. The collision occurred in the road at a time when the plaintiff, on her own version, was aware of the vehicle driven by Mkondwana, albeit that she was under the impression that the vehicle was stationary. On the probabilities the vehicle was moving at a slow pace towards her. If she failed to notice this, she was not keeping a proper look out. The plaintiff, on her own version, took no action to evade a collision with the vehicle. On the defendant's version, the plaintiff remained dancing in the road, well aware of the approaching vehicle.

[38] In determining the culpability of a pedestrian, a court may have regard to any breach of the National Road Traffic Act or regulations thereunder⁴. Any transgression of the regulations constitutes an offence under s 89(1) of the National Road Traffic Act⁵. Regulation 316 lists the duties of pedestrians. Specifically regulations 316(3) to (6) are of importance, which in general terms: (1) obliges a pedestrian to satisfy herself that the roadway is sufficiently free from oncoming traffic to permit the road to be crossed in safety; (2) obliges a pedestrian not to linger on a road but to cross it with prompt dispatch; and (3) provides that no pedestrian on a

² *R v Ngwenya* 1959 (4) SA 75 (T).

³ *The State v Ngcobo* 1962 (2) SA 333 (N).

⁴ *Watt v Western Assurance Co* 1952 (3) SA 778 (W).

⁵ 93 of 1996.

public road shall conduct herself in such a manner as to or which is likely to constitute a source of danger to herself or to any traffic which may be on the road.

[39] In the present instance, the plaintiff clearly did not comply with any of these duties. At the time, the road was being used by various of the revellers as a surface for dancing to such an extent that the road surface was blocked by people. Mkondwana confirmed that as he was progressing through the crowd, there were people all around him. This may well have lulled the plaintiff into thinking that it was safe to do so.

[40] This does not however excuse the plaintiff's conduct entirely from being present on the road surface and in my view she was negligent in doing so, irrespective of whether there were other people who were similarly present on the road surface. The conduct of the plaintiff was not however in wilful disregard to what could happen if she continued to stay on the road surface.

[41] In the circumstances, I am of the view that the plaintiff's negligence contributed to the collision⁶ and that an apportionment of 30 per cent would be appropriate in the circumstances.

[42] I accordingly make the following order:

[42.1] The issues surrounding the quantum of the plaintiff's claim are postponed sine die.

[42.2] The defendant is liable to pay 70 per cent of the plaintiff's proven damages.

[42.3] The defendant is directed to pay the plaintiff's costs.

**E F DIPPENAAR
ACTING JUDGE**

⁶ *Stern v Podbrey* 1947 (1) SA 350 (C)

APPEARANCES**PLAINTIFF:**

Adv R Saint

Wim Krynauw Attorneys, Johannesburg

DEFENDANT:

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