

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 66306/2012

DATE OF HEARING: 6 MAY 2014

DATE: 30 MAY 2014

NOT REPORTABLE

In the matter between:

J V MCHEPU

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAKHOPA AJ:

1. INTRODUCTION

The Plaintiff instituted an action against the Defendant, claiming damages suffered as a result of injuries sustained in a motor vehicle accident which occurred on the 28th July 2011.

At the outset it was agreed by the two parties that quantum be postponed *sine die*. The only aspect in dispute is the negligence on the part of the insured driver.

2. COMMON CAUSE

It is common cause that the Plaintiff was a pedestrian when he was hit by a vehicle whilst crossing the road.

The vehicle that collided with the Plaintiff was driven by the insured driver.

3. EVIDENCE BEFORE COURT

The Plaintiff (Mr James Ussi Mchepa) testified that on the evening of the 28th July 2011 at about 19H00, he, together with his brother, alighted from a taxi on the corner of Voortrekker road and Lochner street, Raslouw, Centurion. Voortrekker road is a two way street, running from South to North and vica versa. It is divided into two lanes on each side.

There are stop signs on both sides of Lochner street for traffic wanting to turn into Voortrekker street. There is another lane for traffic wanting to turn right into Lochner street.

There were road works in Voortrekker street and the street was not lit. Plaintiff testified that he was with his brother and he was carrying a big bag on his head. He intended to cross the road but before he could do that he saw a vehicle approaching but it was still far. He saw the lights of this vehicle. The said vehicle was travelling too fast and when he saw it, it was about 100 meters away. Nevertheless he decided to cross the road.

He testified that he cannot remember in which lane the vehicle collided with him but later he testified that it was on the lane on page 88 photo 2 of the Court's bundle. Whilst crossing the road a vehicle driven by the insured driver hit him on his leg. When he crossed the road he was walking, he never heard the vehicle approaching. After the collision he was taken to hospital. The Plaintiff was the only witness for his case.

Defendant called two witnesses namely the insured driver and one person who was a passenger in the insured vehicle.

Trinity Bore testified that on the day of the collision he was driving his vehicle on Voortrekker Street from South to North. It was not the first time he was driving on this road. There were also passengers in the vehicle. He was travelling at a speed of about 90 km/h. It was dark, there were no street lights. The road surface was good. There were road works on the road.

Whilst on the fast lane he noticed two pedestrians ahead crossing the road. The two pedestrians then stood in between the two lanes, one of them stopped, however, the other one being the Plaintiff proceeded to cross the road. He hooted, but unfortunately the pedestrian was carrying a bag on his head and he reacted late. The witness testified that he swerved to his right to avoid colliding with the pedestrian but unfortunately the Plaintiff was hit by the left mirror and front wheel of his vehicle. After the accident he administered first aid to the Plaintiff.

Defendant called the second witness Mr Tebogo Makgale who testified that on the day in question he was a passenger in Mr Bore's vehicle, he was seated in the front seat and he was talking on his cell phone when Mr Bore swerved the vehicle and hooted. Their vehicle collided with the Plaintiff. Plaintiff was wearing dark clothes and carrying a big bag on his head. The collision took place in the middle of the road.

The Defendant thereafter closed his case.

4. THE LAW

In *Ntsala and Others v Mutual and Federal Insurance Co Ltd* 1996(2) SA 184(T) the honourable Judge Els. Stated the following "The onus rests on the plaintiff to prove negligence on the part of the defendant's driver".

In *Davies v Grossling* 1935 WLD 107 in this case, although the driver hooted to the pedestrian he was found to be negligent since he did not take extra caution.

In *Manual v SA Eagle Insurance Co Ltd* 1982(4) SA 352(c) at page 357 paragraph A the court said "*The principles to be extracted from these cases are as follows.*

"A motorist who sees a pedestrian on the roadway or about to venture thereon should regulate his driving so as to avoid an accident. The pedestrian may by his conduct convey to the motorist the impression that he recognises, and intends to respect, the motorist's right of way. When such an impression is conveyed by the pedestrian, the motorist may proceed on his way accordingly. Whether the motorist is reasonably entitled to assume or infer, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case some examples are to be found in the decisions cited above. When the assumption is not justified, the motorist must regulate his driving to allow for the possibility or probability, that his vehicle may not enjoy an unobstructed passage. Where a pedestrian reacts appropriately to the presence of an approaching vehicle, the critical enquiry is whether a reasonable motorist would foresee the reasonable possibility that the pedestrian might nonetheless act irrationally by moving, perhaps suddenly, into the vehicle or its path. That possibility exists for young children, for adults who are plainly drunk, and may arise in other cases. "

In my view this decision sets out succinctly the duties of a motorist when a pedestrian is crossing the road as well as the duties of a pedestrian when crossing the road.

The author W.E. Cooper in *Delictual Liability in Motor Law* 1996 edition at pages 193-194 writes as follows about a pedestrian's duty when crossing the road a road: "A pedestrian who intends crossing a road should do so at an opportune moment and he must exercise reasonable care. He must use his senses to ascertain whether

any motor vehicles are approaching. He should keep a proper look-out; he should acquaint himself with the vicinity and scan the road so as to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety. Usually a pedestrian will look to the left and to the right before entering the road. Once he reaches the centre of the road he should devote his attention to motor vehicles approaching from his left". See also *Beech and Another v Setzkorn and Another* 1928 CPD 500 at 504; *Singh v New India Assurance Co Ltd* 1966(4) SA 154(D); *Mazibuko v Santam Insurance Co Ltd and Another* 1982(3) SA 125 (A).

The same author, *supra*, on page 195 comments as follows about the duties of a driver: "A driver is required to exercise reasonable care and vigilance not only towards a pedestrian he sees, or ought reasonable to see, on or near the road; he is obliged to exercise the same reasonable care and vigilance towards an unseen pedestrian whose presence he should reasonably foresee or anticipate because, for example, of the proximity of a school or of a passenger bus."

In *Dlangamandla v Road Accident Fund* 2011(5) SA 565(FB) on paragraph 27 the court said "it has been held that a reasonable, prudent pedestrian should not cross the road when doing so exposes himself to the reasonable risk of collision with passing vehicles".

In *Dlangamandla v Road Accident Fund* *supra* in this case a collision took place between a pedestrian and a vehicle at about 19H10. The Plaintiff in that case was wearing dark clothes and the driver of the vehicle had seen the Plaintiff from a distance. The court held that under those prevailing circumstances the driver should have adjusted his speed long before reaching the pedestrian.

5. EVALUATION

The Plaintiff in this case when he gave his testimony it was clear to me that he was not proficient in the English language and he struggled to express himself properly. Besides the shortcomings in expressing himself he managed to give evidence up until the end of his testimony. The Plaintiff's testimony is riddled with inconsistencies and improbabilities. In addition he contradicted himself in material respects. I will mention just a few of these inconsistencies below:

a) In his affidavit handed in by consent between the parties page 35 of the bundle he says "I had already crossed the street a green BMW with registration number R[...] bumped me from behind". In his evidence in chief he testified that the insured vehicle collided with the right side of his body.

b) He testified that when he crossed the road he was having a big bag on his head. He saw the vehicle first when it was 100 meters away from him and it was travelling very fast despite this he told his brother that they must cross the road.

c) During cross-examination he was asked whether he looked or checked how far the speeding vehicle was that he saw earlier on. He answered as follows “I was in the road, I never checked”.

In regard to the insured driver, that is Mr Bore, he testified and conceded to the following:

a) He was travelling at a speed of about 90km/h when he first saw the Plaintiff and his brother crossing the road. Page 83 of the court bundle shows the speed limit on that road to be 80km/h,

b) He testified that he did not apply brakes but he immediately removed his foot from the accelerator pedal and applied brakes after swerving to avoid colliding with the plaintiff.

c) Even though he saw one of the two pedestrians stopping he did not reduce speed.

Besides giving his testimony Mr Bore gave his evidence in a clear and direct manner. Tebogo Makgale the second defendant’s witness confirmed that the Plaintiff was carrying a big bag on his head and Mr Bore did hoot to him.

6. CONCLUSION

From Mr Bore’s own testimony the court is satisfied that on a balance of probabilities he was negligent in that:

i) When he noticed the Plaintiff crossing the road with a big bag on his head which obstructed his view (the pedestrian) he (the insured driver) should have realised that his vehicle may not enjoy an unobstructed passage and should have reduced the speed and regulated his driving accordingly. See *Manuel v SA Eagle Insurance Co Ltd Supra*

ii) The insured driver testified that he was travelling at a speed of about 90km/h in an 80km/h zone. In my view that in itself constitute negligence especially when the road was not lit.

iii) The insured driver did not apply brakes when he saw the Plaintiff crossing and the other pedestrian stopping instead all he did was to lift his foot from the accelerator pedal.

Taking all these factors into account the court is satisfied that, on a balance of probabilities the Plaintiff has discharged the onus of showing that the insured driver was negligent.

However the Plaintiff is not without blame.

The court finds that the Plaintiff was also negligent as well in the following manner:

1. In his testimony he testified that he saw the vehicle approaching at a high speed and yet he proceeded to cross the road.
2. He was wearing dark clothes, carrying a big bag on his head which impeded his view and he crossed the road.
3. Whilst in the middle of the road he did not exercise reasonable care by checking or looking how far the speeding vehicle was which he saw approaching earlier on.
4. As a pedestrian he had a duty to exercise reasonable care and unlike his brother he did not stop to avoid colliding with the vehicle. See Manuel v Eagle Insurance Co Ltd Supra.

The court finds that Plaintiff have negligently contributed to the collision. In the matter of A.A Mutual Insurance Association Ltd v Nomeka 1976(3) SA 45(A) the court held that “.... provided the Plaintiff’s fault is put in issue an apportionment of damages need not be specifically pleaded or claimed.”

Taking all the evidence into consideration as well as case law referred to above the court is satisfied that both the Plaintiff and the insured driver were at fault.

7. ORDER

Accordingly I make the following order:

- a) On merit the Plaintiff’s claim should succeed on 60% of proven or agreed upon damages.
- b) The Defendant is directed to pay the costs of the trial.

MAKHOPA. AJ

JUDGE OF THE HIGH

COURT OF SOUTH AFRICA.

GAUTENG DIVISION.

PRETORIA