

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

REPUBLIC OF SOUTH AFRICA



Case Number: 23905/2014

25/11/2016

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED 25.11.2016	
DATE	SIGNATURE

In the matter between:

ADV M VAN ROOYEN N.O. obo SIDNEY LEGODI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff, in her official capacity, claims damages in respect of injuries sustained by Sidney Legodi (Legodi) in a motor vehicle collision that occurred on 8 July 2011.

- [2] At the commencement of the trial, the parties indicated that they had agreed to a separation of the issues pertaining to liability and quantum and an order facilitating the separation was issued.
- [3] In the premises, the trial only proceeded on the question of liability.

FACTS COMMON CAUSE

- [4] During his opening address, Mr De Waal SC who appeared with Ms Ferguson on behalf of the plaintiff, listed the following facts as being common cause between the parties:
- i. the collision occurred on 8 July 2011 at approximately 23:50 at a traffic light controlled intersection at Bremmer Street and the R80 Highway in Hercules, Pretoria;
 - ii. Legodi was the driver of a Polo motor vehicle and the insured driver, a police officer, was the driver of a Golf motor vehicle ("the insured vehicle");
 - iii. the collision occurred to the far left of the lane of travel of the insured vehicle;
 - iv. Legodi was executing a right hand turn when the collision occurred.
- [5] Mr De Waal SC referred to various photos depicting the scene of the collision and the damage to the motor vehicles. The photos and sketch plan thereto is also common cause between the parties. Bremmer road is dual carriageway with a grass section dividing the two sections. The damage to the Golf is at its right front side and that of the Polo at its left front side.
- [6] Both parties obtained reports from motor vehicle collision reconstruction experts. The experts, Dr Lemmer on behalf of the defendant and Mr Grobbelaar on behalf of the plaintiff, compiled joint minutes, which minutes record the following:

- "1. The experts are in agreement that the damage to the vehicles and their positions of rest are consistent with the Golf having travelled in an essentially southerly direction prior to collision and the Polo having initially travelled in a northerly direction and turned in an easterly direction across the path of travel of the Golf.
2. The experts agree that there was essentially unrestricted visibility for both of the drivers to have seen the other vehicle and/or its headlights approaching, as the road was essentially straight and flat on approach to the accident scene.
3.

 - 3.1 The experts agree that the speed of the Golf at collision was probably between 90 km/h and 100 km/h and that the Golf was therefore travelling considerably faster than the speed limit of 60 km/h.
 - 3.2 They agree that any braking or slowing down by the Golf driver prior to collision implies that the Golf was probably travelling at a higher speed than this prior to braking or slowing down.
4.

 - 4.1 The experts agree that they are not in a position to establish, independently, what the colour of the traffic lights were for either of the vehicles at the time of the accident.
 - 4.2 They are however in agreement that, considering the traffic light sequence, there was a 50% probability that there was a flashing green right turn arrow for the Polo allowing it to turn right, and a red light for the Golf.
5.

 - 5.1 The experts agree that, depending on the circumstances (i.e. the colour of the traffic lights), the Polo turning to its right across that lane of the Golf may be considered a dangerous manoeuvre.

- 5.2 *They however also agree that, depending on the circumstances, when considering the speed of the Golf on approach to the accident scene as agreed in paragraph 3 above, the driver of the Polo may have misjudged the approach speed of the Golf and attempted to cross the intersection prior to the Golf reaching it."*

PLAINTIFF'S CASE

- [7] The plaintiff relied on various instances of negligent conduct by the insured driver, to wit:

"5.1.1 He failed to keep a proper lookout;

5.1.2 He failed to take any, alternatively sufficient, cognisance of the presence, the actions and the visibility intended and/or probable further actions of Mr Legodi;

5.1.3 He travelled at a speed which was excessive in the circumstances;

5.1.4 He failed to apply the brakes of the insured vehicle timeously and/or sufficiently and/or at all;

5.1.5 He failed to avoid the collision when, by taking reasonable and proper care (including, but not limited to, travelling more slowly, swerving, remaining on his correct side of the road) he both could and should have done so;

5.1.6 He failed to maintain any, alternatively sufficient, control over the insured vehicle."

- [8] The plaintiff, due to the injuries he sustained in the collision, has no recollection of the incident and did not testify.

- [9] Mr de Waal SC submitted that the common cause facts as well as the joint minutes of the experts provide *prima facie* proof, on a balance of probabilities, that the insured driver's negligence caused the collision. Consequently, he closed the case for the plaintiff at the end of his opening address.

ABSOLUTION

- [10] Mr Mathika, counsel for the defendant, thereupon applied for absolution from the instance.

[11] Having heard counsel for both the plaintiff and defendant, I dismissed the application and gave a short *ex tempore* judgment in this regard.

DEFENDANT'S CASE

[12] In its plea, the defendant denied that the insured driver was negligent and pleaded in the alternative and in the event that the court should find that he had been negligent, that he was confronted with a situation of sudden emergency, which negates any negligence on his part.

[13] Two further pleas were raised in the alternative. Firstly, that the plaintiff's sole negligence was the cause of the collision. In this regard, the defendant relied on the following grounds of negligence:

"3.3.1 He failed to keep a proper lookout;

3.3.2 He drove the motor vehicle at an excessive speed under the circumstances;

3.3.3 He failed to keep the motor vehicle under proper control;

3.3.4 He failed to take due regard to the safety of other road users in particular the insured driver;

*3.3.5 He failed to apply the brakes of the motor vehicle timeously
alternatively, adequately, further alternatively, at all;*

3.3.6 He failed to avoid the collision when, by the exercise of reasonable care, he could and should have done so;

3.3.7 He unnecessarily interfered with the insured driver's lawful driving;

3.3.8 He drove into the path of the insured driver when it was unsafe to do so."

- [14] Secondly, that both the plaintiff and insured driver were negligent and that any claim the plaintiff may have should be reduced in accordance with the provisions of the Apportionment of Damages Act 34 of 1956.
- [15] In support of the averments *supra*, the defendant tendered the evidence of the insured driver Mr Magoro ("Magoro"). Magoro testified that, on the night in question, he was on duty and was travelling with two colleagues in the Golf motor vehicle. He was travelling in the far left lane and upon arriving at the R 80 and Bremmer road intersection, the robot was green. He proceeded into the intersection and *"there appeared this vehicle driving on Bremmer road to turn left into the R 80."* According to his evidence the collision occurred in the middle of the intersection.
- [16] He was travelling at a speed of between 50 – 60 km/h and swerved to his left to avoid the collision. His vehicle was hit on the right hand side door.
- [17] During cross examination it emerged that Magoro was driving an unmarked police vehicle which was not equipped with flashing blue lights or flashing head lights. The vehicle was equipped with a siren, but the siren was not activated because, according to Magoro, there was no reason to do so.
- [18] He testified that he was not in a hurry. Magoro was referred to a statement he made, shortly after the accident, on 1 July 2011. In the statement, Magoro stated that he was on his way to a suspect's house when a call was received *"for a back up for a certain Black Audi that is possibly used at the ATM bombing."* He further stated that *"At the robot of Bremmer Street off ramping to Mabopane Highway a certain vehicle unexpectedly turned right and collided with the right at the robot. I was driving + 60 – 70 km per hour."*
- [19] Much was made during cross examination of the difference in speed between Magoro's testimony in court and his version in his statement. He testified that, although he was called for back-up, he drove slowly to keep a look-out for the

Audi and other vehicles. He noticed the Polo for the first time when it entered the intersection. At that stage he was under the impression that the Polo would stop. It was only when he was a few metres away that he realised that the Polo is proceeding through the intersection. This version does not correspond with his evidence in chief that he was already entering the intersection when he first observed the Polo nor does it correspond with the contents of his statement, wherein he stated that he only observed the Polo when it unexpectedly turned in front of him.

- [20] Magoro was referred to the photos depicting the damage to the Golf vehicle. It was put to him that the photos do not depict damage to the right hand side door of the Golf, but to the right front of the vehicle. Magoro answered that the accident happened fast and that it felt to him that the impact was on the right hand side door of the Golf.
- [21] Brake marks in the direction that he was travelling, which marks lead to the point of impact, were also pointed out to him. Although Magoro testified that he did not brake prior to the collision, he agreed that the brake marks could have been caused by the Golf. The significance of this admission is the fact that the experts agreed that any braking by the Golf prior to the collision implies that the Golf was travelling at a higher speed than 90 km/h – 100km/h.
- [22] Magoro testified that the Polo did not travel fast prior to the collision and agreed that the Polo almost cleared the intersection before the accident occurred. Asked why the impact was so severe if both the Polo and Golf were travelling at low speed, he could not give a satisfactory explanation.
- [23] Magoro was visibly uncomfortable during cross examination and when faced with an obvious contradiction in his version and/or an improbability, he hung his head, whilst answering.
- [24] The defendant did not call any further witnesses and Magoro's evidence concluded the case on behalf of the plaintiff.

DISCUSSION

- [25] I agree with Mr de Waal SC, that the evidence establishes the fact that Magoro was driving at an excessive speed. I am, furthermore of the view that Magoro did not keep a proper look-out. If he was driving at approximately 60 km/h and if he was keeping a proper look-out, he would have seen the Polo earlier and could have taken steps to avoid the collision. The severity of the impact and the point of impact support the conclusion that he drove at an excessive speed and did not keep a proper look-out.
- [26] The question of contributory negligence then arises. Magoro testified that the traffic light was green in his favour. Although Mr de Waal SC, urged me to reject the evidence of Magoro as being false alternatively unreliable, I do not deem the contradictions or discrepancies in his evidence to be fatal to the remainder of his evidence.
- [27] Bearing in mind that the collision occurred some 5 years ago, discrepancies in his version are to be expected. What is, however, clear from his evidence and more specifically the manner in which he answered certain questions, is the fact that he refused to admit that he drove at an excessive speed. He endeavoured to create the impression that, even though he is responding to a "back-up" call, he was maintaining the permitted speed limit. This version, as alluded to earlier, is both improbable and does not accord with the common cause facts.
- [28] If the traffic light was in Magoro's favour, the next question is whether Legodi was negligent in executing a right hand turn at an inopportune moment. Mr de Waal SC submitted that although a right hand turn across the lane of travel of an oncoming vehicle is generally speaking a dangerous manoeuvre, the facts of each matter should be judged independently.

[29] In the circumstances under consideration, Mr de Waal SC submitted that Legodi was not negligent in executing the right hand turn at the moment he did. In support for this submission, he relied on paragraph 5.2 of the joint minutes of the experts, referred to *supra*, which indicates that Legodi might have misjudged the approach speed of the Golf.

[30] This approach found favour with the Supreme Court of Appeal in *De Maayer v Serebro and Another; Serebro v Road Accident Fund and Another* 2005 (5) SA 588 SCA at para [13]:

"[13] *Turning across the line of oncoming traffic is an inherently dangerous manoeuvre and a driver intending such manoeuvre must do so by properly satisfying himself that it is not only safe but opportune to do so (see AA Mutual Insurance Association Ltd v Nomeka 1976 (3) SA 45 (A) at 52E-G). This rule, however, does not create a general presumption of negligence, since each case has to be considered on its own special facts and circumstances. It does not confer on a through-driver an absolute right of way (see Milton v Vacuum Oil Co of SA Ltd 1932 AD 197 at 205). A through-driver has to be vigilant and in appropriate circumstances reduce his speed to accommodate a driver who turns across his path of travel.*"

[31] As stated *supra*, it is trite that the onus to prove contributory negligence rests on the defendant. In order to succeed in its claim, the defendant has to establish on a balance of probabilities that a *diligence paterfamilias* in the position of the plaintiff would have foreseen the reasonable possibility of his conduct injuring another person causing him patrimonial loss and would have taken reasonable steps to avoid such event from occurring. [See *Kruger v Coetzee* 1966 (2) SA 428 AG at 430E-F].

[32] Given the fact that the Polo almost cleared the intersection prior to the collision coupled with the high speed the Golf was travelling, I am of the view that

Legodi could not have foreseen that a reasonably possibility exists that the execution of a right hand turn, in the circumstances, could result in a collision.

[33] Consequently, the defendant did not succeed in proving, on a balance of probabilities, any negligence on the part of the plaintiff.


CONCLUSION

[34] In the premises, the plaintiff's claim on liability must succeed.

ORDER:

I grant the following order:

1. The Defendant is liable for the plaintiff's agreed or proven damages.
2. The Defendant is ordered to pay the costs of suit.

A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line.

**N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

APPEARANCES

Counsel for the Applicant: Advocate De Waal SC
Advocate Ferguson

Instructed by: Adams & Adams

Counsel for the Defendant: Advocate Mathika

Instructed by: Tau Phalane Inc.