IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A548/16

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
26/4/2018 DATE
SIGNATURE

LLEWELLYN FOX **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal, with leave of the trial court, against the apportionment of blame of 30% on the side of the appellant / plaintiff ('Mr Fox') and 70% on the side of the insured driver who was mentioned during the trial as one Mr Willem Swart.

[2] The collision occurred between 15:45 and 16:30 on the Witkop gravel road in Onverwacht, Lephalale District on 19 September 2010, between a motor cycle ridden by Mr Fox and a Ford Quantum Bakkie (bakkie). Mr Fox was the only witness called to testify during the trial.

PLEADINGS

[3] In his particulars of claim Mr Fox (the plaintiff) attributes his injuries to the negligent

driving of the insured driver who failed to keep a proper lookout; who failed to exercise reasonable care by keeping proper control of his vehicle in order to avoid the collision and, who drove the vehicle without due consideration to the users of the road. In the alternative he pleaded that the insured driver failed to apply his brakes and failed to indicate that he intended to turn to the right.

[4] In its plea the defendant denied negligence and put the plaintiff to the proof. In the alternative it denied that the insured driver was negligent and attributed sole negligence to the plaintiff in that he failed to keep a proper lookout; he failed to keep a wide enough berth between himself and the insured driver; he failed to exercise reasonable care and skill and to avoid the collision. In a further alternative the defendant pleaded contributory negligence on the part of the plaintiff /appellant and requested the court to apportion plaintiff's damages in terms of the Apportionment of Damages Act, Act 34 of 1956, as amended.

FACTS

[5] It was a clear and sunny day. Mr Fox described the road as being 6 – 7 metres in width, straight all the way with no turn offs or curves. He was on his way to meet his friends in order to engage in their usual weekend activity of riding their motor cycles on a dry river bed in the area. They had arranged to meet at 15:00 and he left his residence at 14:00. As he travelled at below 60km per hour on the gravel road towards their rendezvous, he came across a bakkie travelling in the same direction, at a '*quiet slow*' speed and he overtook the vehicle.

[6] On his return travelling home and on the same road he came across the same bakkie again, also travelling in the same direction as he was travelling. The bakkie was travelling at the same speed it was travelling earlier on.

[7] He decided to overtake the bakkie. He slowed down, made sure that it was safe to overtake. As he negotiated his motorcycle towards the right hand side of the road, the bakkie suddenly took a turn to the right where there was no turn off. He thought of applying his front wheel brakes but thought that his front wheel was going slide. He went towards his left hand

side but there was not much time.

[8] He tried to avoid the collision by swerving to the right and attempting to pass the vehicle in front. These movements were too quick and he collided with the bakkie with the front wheel of his motorcycle. The point of impact was between the bakkie's right front wheel and right door. He was flung over the bakkie. He sustained injuries being fractures to his left side, that is, to his wrist, femur, ankle and multiple fractures to his knee.

[9] Mr Fox denied during cross examination that he had been travelling at a higher speed than the 60km per hour limit for that gravel road, as a result of which he was unable to avoid the collision. He testified that as he drove alongside the bakkie during overtaking, the berth between his motorcycle and the bakkie was about a metre and a half.

GROUNDS OF APPEAL

[10] The grounds of appeal were based on the trial courts findings that the contributory negligence on the part of Mr Fox was due to (a) his failure to keep a safe berth between his motorcycle and the insured driver (b) that the seriousness of his injuries showed that he travelled at an excessive speed and rejected Mr Fox's version with regard to the speed travelled (c) in finding that there was contributory negligence where no evidence was presented by the respondent for making an apportionment 30% on Mr Fox's side and 70% on the side of the insured driver.

THE LAW

[11] Liability depends on the conduct of the reasonable person. The test for negligence was stated in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-G as follows:

> " For the purpose 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,

.....Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstance of each case. No hard and fast basis can be laid down."

[12] It is trite that the onus then rests on the plaintiff to prove the defendant's negligence which caused the damages suffered on a balance of probabilities. In order to avoid liability the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff.

[13] Where the defendant had in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities, *Johnson, Daniel James v Road Accident Fund* Case Number 13020/2014 GHC paragraph 17, confirming *Solomon and Another v Musset and Bright Ltd* 1926 AD 427 and 435.

[14] Section 1(1)(a) of the Apportionment of Damages Act 1(1)(a) gives a discretion to the trial court to reduce a plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. In this instance in order to prove contributory negligence, it was necessary to show that there was a causal connection between the collision and the conduct of the plaintiff, this being a deviation from the standard of the *diligence paterfamilias*. In this instance no testimony was adduced by the defendant.

[15] The powers of an appeal court to interfere with the exercise of this discretion is limited, unless it is shown that the trial court had failed to exercise its discretion judicially or

that it had been 'influenced by wrong principles or a misdirection on the facts'. In *Santam Versekeringsmaatskappy Beperk v Strydom* 1977 (4) SA 899 the following was stated:

> " Die Verhoorregter maak afleidings van die getuienis, hy maak staat op sy ondervinding en op die indruk wat die getuies in die Hof geskep het. .....Derhalwe sal hierdie hofm nie met sy verdeling van die skade ligtelik inmeng nie, al sou ons sook van mening wees dat die verhoorregter geregtig sou wees het on die persentatise van respondent se skuld iewat hoer gestel het. Ek verwys na die saak *South British Insurance Co, Ltd v Smit,* 1962 (3) SA 826 (A)
>
> " From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of the degree in which the claimant was at fault in relation to the damage is necessarily a matter upon which opinions may vary. In the words of Lord Wright in British Fame (Owners) v Macgregor (Owners), 1943 (1) A.E.R. 33 at p35: "It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be difference of opinion by different minds.
>
> Were this court readily to interfere with a trial Court's apportionment of damages, dissatisfied litigants would be encouraged to appeal in well-nigh every case. Where therefore the trial Court has correctly found the facts and has made no error in principle, this Court .....will not disturb the apportionment decided upon by the trial Court."

[16] Counsel for the appellant argued that in light of the defendant's plea, the defendant bore the onus to prove that the plaintiff was negligent and, that relying on the only evidence available the plaintiff could not be faulted for his conduct in trying to avoid the collision after the insured driver had decided to take a sudden turn to the right. In Beswick v Crews 1964 (3) SA (ECD) the court attributed a higher degree of negligence to the plaintiff, whose vehicle had careered into the veld after taking a violent swerve to the right in trying to avoid a collision with the lorry of the insured driver, which had taken a sudden outward swerve to the

right in trying to avoid a brick in the road.

[17] Counsel for the appellant submitted that the above decision was appealed against in *Beswick v Crews* 1965 (2) SA 690 (AD). Counsel for the respondent relying on the latter case contended that the court placed a strict duty on 'both the right turning driver as well as the driver wishing to overtake". In my view the facts in Bescwick are distinguishable:

(a) both the plaintiff and the insured driver testified. On the version of the insured driver he was distracted from concentrating on the road by two cows outside the road and when he looked back onto the road he saw a brick in the road, swerved to the right in order to avoid the brick. According to the plaintiff when her vehicle was one -third of the length of the lorry it suddenly swerved to the right.

(b) The Insured driver's negligence was founded on his concentration on objects outside the road without at the same time being aware of what was in front of him and, as a result he never thought that by swerving to the right he might be jeopardising traffic from behind. It was further found on the evidence that it was a reasonable inference that the sudden swerve by the insured driver necessitated a swerve by the plaintiff which caused her to lose control. Her swerve was that of a driver taking avoiding action caused by the negligent swerve of the insured driver. In as far as it concerned the plaintiff's vehicle which was overtaking, it was found that a sufficient berth depended on the type of motor vehicle the motorist was about to overtake and this could only be determined through evidence. A motor vehicle following another had to allow for a foreseeable and normal lateral movement of the car in front and of his own and no more.

[18] In this instance it was a motor cycle overtaking a bakkie, therefore the allowable berth would be different. It is my view that before pronouncing on the reasonable berth to be

allowed between the bakkie and the motorcycle on the gravel road, it was necessary to have heard evidence on the measurement of the road and the bakkie and the imaginary centre line of the road in order to determine the berth as was dealt with in Beswick supra at 702 F-H. Mr Fox testified that the road was 6-7 metres wide and that between the motor cycle and the bakkie was a berth of about 1 metre and a half. In my view it would have made sense for the trial court to give indication from which point of the road it determined the berth. Relying on the only evidence available it was not possible to determine what the reasonable expected berth should have been between the motor cycle and the bakkie. I find that the trial court misdirected itself in as far as it relied on Beswick *supra* to determine what should have been a reasonable berth to be allowed between the plaintiff's motor cycle and the bakkie. Furthermore, there was no evidence led to disprove the version of the plaintiff and he was not found to have been an unreliable witness.

[19] In Beswick *supra* Potgieter AJA associated himself with the remarks in *Maxengard, Negligence on the Highway* 4th ed. At p 338:

> "The law does not require of any driver that he should exhibit perfect nerve and presence of mind enabling him to do the best thing possible. It does not expect men to be more than ordinary men".

The trial court should have found that the plaintiff swerved to the right in an attempt to avoid a collision with the insured driver who had taken a sudden swerve to the right, where there were no roads turning off the main gravel road to the right. It is therefore appropriate, given the circumstances of this case to conclude that the defendant had failed to prove negligence on the part of the plaintiff or that there was a causal link between the damages incurred by the plaintiff and his negligent conduct. The trial court should have found that the insured driver was negligent and solely responsible for the collision.

[20] In the result the following order is given:

The appeal is upheld and the order of the Court *a quo* is set aside and is

substituted with the following order:

1. It is ordered that the defendant is a 100% liable for the damages incurred by the Plaintiff.
2. The defendant is ordered to pay the costs in the appeal.

TLHAPI VV
(JUDGE OF THE HIGH COURT)

I agree,

MAVUNDLA M
(JUDGE OF THE HIGH COURT)

I agree, it is so ordered.

MNGQIBISA-THUSI N P
(JUDGE OF THE HIGH COURT)