

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

- (1) Reportable: NO
- (2) Of interest to other Judges: NO
- (3) Delivered on: 05/12/19

CASE NO: 80259/2017

In the matter between:

KIERAN HENRI LOUW

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKHUBELE J.

Introduction

[1] Kieran Henri Louw , an adult male, who I shall henceforth refer to as 'the plaintiff or 'Mr Louw' issued summons against the Road Accident Fund, who I shall henceforth refer to as 'the defendant' which is a statutory body established in terms of the Road Accident Fund Act, 56 of 1996 for payment of compensation for damages suffered by him as a result of a collision that occurred on 16 February 2017 at about 17:15 at the intersection Umhlanga Rocks Drive and Ashley Road, Durban, Kwazulu-Natal Province.

[2] It is common cause that at the time of the collision, the plaintiff was riding on his motor cycle with registration letters and numbers [....] and that he collided with a vehicle bearing registration letters and numbers [....] that was driven by SE Bolleurs,

who I shall henceforth refer to as the 'insured driver'.

[3] The parties advised me at the commencement of the trial that both merits and quantum were still in dispute. The matter was allocated for three days. It was however agreed that it would be convenient to first deal with the issue of liability because the plaintiff was in the process of obtaining affidavits from the medical experts in order to expedite the hearing on the quantum aspects. The understanding is that the Defendant, who has not filed counter experts reports in regard to about eight (8) medico-reports would not object to handing in of the affidavits, where after the matter would be argued on paper.

I then exercised my discretion in terms of Rule 33(4) of the Uniform Rules of Court and issued an order to separate the merits and the quantum. The trial proceed on the merits only.

The particulars of claim

[4] In paragraph 6 of his particulars of claim, the plaintiff alleged that:

"The sole cause of the injuries sustained by the plaintiff was the negligence and/or wrongful act of the driver and/or the owner of the insured vehicle, which negligence and/or wrongful act materialized in one or more or all of the following respects:

6.1 *He/she/it failed to keep a proper and/or adequate look-out.*

6.2 *He/she/it failed to pay due regard to the rights of other road users, including those of other drivers, passengers and pedestrians.*

6.3 *He/she/it failed to take reasonable steps to prevent the occurrence of harm to the plaintiff, when he/she/it was capable and obliged to do so;*

6.4 *He/she/it failed to take reasonable precautions to ensure that the insured vehicle was in a proper and safe working condition in circumstances when it was foreseeable that same would be operating in circumstances where it could cause damage to others.*

6.5 *He/she/it was negligent in exercising a manoeuvre on a road without taking precautions that a reasonable person would have to have ensured that same was safe and would not endanger others.*

6.6 *He/she/it travelled at an excessive speed having regard to the circumstances.*

6.7 *He/she/it failed to give reasonable indication of the nature of actions he/she/it was attempting.*

6.8 *He/she/it failed to apply the brakes of the insured motor vehicle timeously or at all.*

6.9 *He/she/it failed to avoid the collision when by exercise of reasonable care, he/she could have done so.*

6.10 *He/she failed to observe the plaintiff's motor cycle, turned right at a time when it was unsafe to do so and collided with plaintiff's motor cycle.*

[7] In its plea, the defendant raised two special pleas relating to assessment of compensation for non-pecuniary loss in terms of Section 17(1) of the Road Accident Fund Act, Act No 56 of 1996, as amended by Act No 19 of 2005 read with the Regulations promulgated in terms thereof.

On the allegations in the particulars of claim, the defendant denied the collision and liability. In the alternative, it pleaded that the accident was caused by the sole negligence of the plaintiff, further alternatively that the plaintiff contributed to the causation of the accident.

[8] Particulars of the plaintiff's alleged negligence or contribution to the causation of the accident are that:

5.2.1 *he failed to keep a proper lookout;*

5.2.2 *he failed to exercise any proper control over the vehicle he was driving;*

5.2.3 *he travelled at an excessive speed in the circumstances;*

5.2.4 *he failed to utilize the brakes of his vehicle timeous/y, adequately*

or at all;

5.2.5 he failed to avoid the collision when by exercise of a reasonable care he could and should have done so;

5.2.6 he entered the road at a time and place when it was dangerous and inopportune to do so;

5.2.7 He crossed or remained in the path of travel of the insured driver and at a time when it was dangerous and inopportune to do so;

5.2.8 He failed to give adequate warning of his presence to other road users and more particularly the driver of the insured motor vehicle.

Evidence

Plaintiff

[9] The plaintiff testified and did not call any witnesses.

[10] In his evidence in chief, the plaintiff testified that:

[10.1] on the day in question at about 17:15 pm he was on his home from work and was riding his motor cycle. He was travelling from South to Northern direction of Umhlanga Rocks Drive.

[10.2] The road has two lanes , one is a compulsory turning lane and one is proceeding straight. There are road markings to this effect. He was traveling in the lane that was proceeding straight.

[10.3] The weather condition was fair. It was daylight and the road was dry.

[10.4] The accident occurred at the intersection of Umhlanga Rocks Drive and Ashley Drive. He knows the intersection and surroundings because he once lived in that area.

[10.4] The speed limit is 60 Km per hour and he was travelling at that speed.

[10.5] The headlights of his motor cycle were switched on as he always does.

[10.6] When he approached the intersection, he saw a vehicle from the

opposite direction edging to turn right into Ashley Street. This is not an unusual thing, motorists intending to turn right always do that whilst waiting for traffic proceeding straight to pass.

[10.7] The robot was green, meaning that he had a right of way. When he was about 1 and a half car away from the intersection, the motor vehicle abruptly entered the intersection .

[10.8] He swerved to the left to avoid the collision but unfortunately it was late. He hit the right hand side bonnet of the vehicle.

[10.9] After the collision all he remembers is that a gentleman came to him and removed his cell phone from his pocket to make a call. He could not do anything because his hands were shaking and his lower body was badly injured. He also heard a voice of a woman, who he assumed was the driver of the insured vehicle. She was repeatedly saying '*I am sorry, I am sorry*'.

[11] The plaintiff also identified an aerial photograph in Bundle 2C at page 358 which depicts the area of the scene of the collision. At the request of the court, he duly marked the photograph to indicate his direction of travel and the position of the insured motor vehicle.

[11.1] Umhlanga Rocks Drive has two carriageways. The plaintiff was traveling in the southern to northern direction part, which has two lanes. It is not clear from the photo whether the opposite direction, northern to southern also has two lanes but there are vehicles queuing in two rows, the closest being in the inner part, closer to the opposite lane in which the plaintiff was travelling .

[11.2] On the travel side of the plaintiff one can clearly see road markings which shows two lanes, one turning and one traveling straight.

[11.3] The photo shows a motor vehicle at the intersection of Umhlanga Rocks Drive and Ashley Ave, doing what is called 'edging' into its right hand side. The front part is standing in a turning position across Ashley Drive, with the right part of the bonnet slightly over the edge of the end of its lane of

travel. Its position is similar to what according to plaintiff as the position of the insured vehicle before the collision.

[12] Under **cross examination**,

[12.1] The plaintiff confirmed the position of his motorcycle and that of the insured vehicle just before the collision.

[12.2] He confirmed that his motorcycle was brand new, about three months old, with brand new tyres.

[12.3] With reference to the photos, depicting a dent on the front right side of the insured vehicle, he also confirmed that this indicates that he took evasive action by swerving to the left and that he almost succeeded. The right hand side of the bonnet is the furthestmost point.

[12.4] He agreed that he could have avoided the collision if he was traveling at less than 60 Km/h. He was however traveling at the prescribed speed limit of 60 Km/h.

[12.5] He did not agree with a suggestion that with his knowledge that vehicles intending to turn right into Ashley Street always edge into Umhlanga Rocks Drive, he would have avoided the collision by traveling at a speed lower than 60 km/h. He repeated his answer that he was traveling at 60 km/h and that what was being suggested would be correct if he was traveling at a higher speed.

[12.6] He confirmed that the size of the engine of his motor cycle was 310CC.

[13] There was no re-examination.

[14] Asked by the court, he confirmed that there was no waiting area for vehicles that were intending to turn right into Ashley Avenue from the Northern side of Umhlanga Drive.

[15] The plaintiff closed his case.

Defendant

[17] The defendant closed its case without leading any evidence.

Submissions

Plaintiff

[18] Mr Strydom pointed out that there was one uncontested version before me and that it is clear that the plaintiff did not have time nor an opportunity to weigh his options. He was faced with a situation where the insured driver made an abrupt turn. He swerved to the right but it was too late.

[19] It was also submitted that the insured driver is probably the lady that told the plaintiff that she was sorry.

[20] Under the circumstances, the defendant should be held liable for 100% of the plaintiff's damages.

Defendant

[21] Mr Rossouw had a difficult case to meet by cross examination only. He did his best as an officer of court by highlighting the circumstantial evidence arising from the photos which on objective assessment, illustrate the fact that. in his own words, the plaintiff did well in trying to avoid the collision.

[22] Other than the suggestion that plaintiff could have reduced speed because he knows about the tendency of turning vehicles to edge into the intersection, he did not make any further substantial submission to rebut the version presented by the plaintiff with regard to how the accident occurred.

Issues for decision

[23] Whether the insured driver was negligent and whether there was any contributory negligence on the part of the plaintiff.

Legal principles

[24] The plaintiff bears the onus to prove negligence on the part of the insured driver. The defendant bears the onus to prove that the plaintiff contributed in the collision.

[25] The approach on assessing whether a party has discharged its onus was described by Eksteen JP in *National Employers' General v Jagers*,¹² as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[26] There is only one version in the matter before me, and as such issues of 'mutually destructive' versions do not arise. As a result, all I have to do is to assess whether the plaintiff's evidence with regard to how the accident occurred is credible.

[27] It is common cause that the insured driver in the matter before me was in the process of entering a robot-controlled controlled intersection by executing a right turn.

[28] The conduct of the insured driver (executing a right turn) should be judged against the following trite principles which were confirmed by Msimeki J on behalf of the appeal court in the matter of **Jacobs v Road Accident Fund**¹

"[12] EXECUTING A TURN TO THE RIGHT

1. *Our Provincial Divisions and the Supreme Court of Appeal have held that to turn across the path of oncoming or following traffic is an 'inherent dangerous manoeuvre' and that a driver who intends executing such a manoeuvre bears a stringent duty to do so after satisfying himself that it is, indeed, safe and then choosing the right moment (often called the opportune moment) to do so. (See in this regard AA Mutual Insurance Association Ltd v Noneka, **1976 (3) SA 45** (AD) at 52E. R v Cronhelm, **1932 TPD 86**; **Sierborger v SAR & Harbours**, **1961 (1) SA 498** (AD) and Johannesburg City Council v Public Utility Transport Corporation Ltd, **1963 (3) SA 157** (W)). It is therefore understandable why a driver turning right has a greater duty towards both the traffic following as well as traffic approaching from the opposite direction.*

2. *A driver turning to the right must signal his intention clearly and avoid turning until an opportune moment presents itself. (See in this regard Welf v Christner **1976 (2) SA 170** (N)).*

3. *He should only turn to the right once he has satisfied himself that there is room enough between his motor vehicle and the approaching vehicles to allow him to complete the manoeuvre safely. (See R v Court, **1945 TPD 133** at 134).*

4. *A driver is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary. (See Van Staden v Stocks, **1936 AD 18** and Rustenburg v Otto, **1974 (2) SA 268** (C) and Old Mutual Fire and General Insurance Co of Rhodesia (PVT) LTD and Others v Bntz and Another **1976 (2) SA 650** (RAD)*

5. *Drivers who see a driver signalling his intention to turn right are entitled to assume and accept that that driver will only execute his turn to the right at a safe and*

¹ (A402/2008) [2011] ZAGPPHC 121 (13 June 2011).

opportune moment. This is so because they are not obliged to guard against the unreasonable and negligent actions of a driver who signals his intention to turn to the right. In this regard Van Winsen AJA (as he then was) in the matter of Serborger v South African Railways & Harbours (supra) at 504 . 505 said," . the answer seems to be 'none other than keep a look-out'. There was no obligation upon him to stop or even slow down because of having seen a signal In parenthesis, it need scarcely be remarked, that du Freezes statement in evidence that had he seen appellant's signal he would have stopped, even supposing it to be true, cannot burden him with an obligation not imposed by law." (My emphasis)

*In Moore v Minister of Posts & Telegraphs **1949 (1) SA 815** at 826, Schreiner JA (as he then was) said:*

"Speaking very generally one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from other users of the highway."

6. *It therefore follows that a driver is only called upon to take precautions against reasonable foreseeable contingencies and not the reckless driving of other motorists . See Rondalia Versekerings Korporasie van SA Beperk v De Beer, **1976 (4) SA 707** at 711.*

[29] The plaintiff, on the other hand was proceeding on a straight road (path) that he was travelling in.

[30] It is so, that having a right of way does not mean that one has no duty of care towards fellow road users. Every driver has a duty to keep a proper lookout, and the duty on a driver proceeding in a street with intersections is greater than one driving in a street without intersections. A motorist on a through street must be aware of what is happening in the cross roads, even in stop streets. (Marine & Trade Insurance Co LTD V Biyasi 1981 (1) SA 918 (A))

[31] A driver, particularly one who knows the area has a greater duty to approach intersecting streets with caution. He must have regard to traffic coming from an intersecting street and must exercise reasonable care to avoid a collision.

Was the insured driver negligent

[32] Taking into account the evidence of the plaintiff, which is confirmed by the physical evidence (the photos), I am satisfied that the insured driver was negligent by failing to ensure that the traffic that was proceeding straight had in fact cleared before she could turn into the intersecting Ashley Avenue.

Any contributory negligence on the part of the plaintiff

[33] The fact that evidence is uncontested does not mean that I must accept it. In the circumstances of this matter, there are no gaps in the evidence of the plaintiff to suggest that he did something wrong or could have done something positive to avoid the collision.

[34] The dent on the right hand side of the insured vehicle's bonnet accords with the plaintiffs evidence that he/she made an abrupt turn. If she/he had turned whilst the plaintiff was a bit further, the damage to the insured driver would have been at the left hand side of the bonnet.

[35] There is nothing that the plaintiff could have done to avoid the collision.

[36] Therefore, the plaintiff is entitled to recover 100% of his proven damages.

[37] There is no reason why costs should not follow the plaintiff's success in the action.

Order

[37] Therefore, under the circumstances, I make the following order:

[37.1] The insured driver was the sole cause of the collision.

[37.2] The defendant is ordered to pay the plaintiff 100% of his proven or agreed damages.

[37.3] The defendant is ordered to pay the costs.

TAN MAKHUBELE J

Judge of the High Court, Gauteng Division

APPEARANCES:

PLAINTIFF:

ADVOCATE GJ STRYDOM SC

Instructed by:

De Broglio Attorneys Inc

DEFENDANT:

AB ROSSOUW SC

Instructed by

Lekhu Pilson Attorneys

Heard on:

04 December 2019.

Judgment delivered on:

05 December 2019.