IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A96/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI DATE: ~~12-02-2021~~ 16-02-21

In the matter between:

P.J WELMAN **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

KUBUSHI J (MOKOSE J AND VORSTER AJ CONCURRING)

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

[1] This unopposed appeal is against the order and judgment of Khumalo J. The appeal emanates from a claim against the Road Accident Fund (the respondent herein) for personal injuries sustained by the appellant in a motor vehicle collision.

[2] The appellant had sustained serious injuries in the collision and had as a result claimed damages from the respondent for loss of earnings/ earning capacity, general damages and loss for past medical expenses.

[3] Before the commencement of the trial the respondent had conceded negligence on the part of the insured driver. By agreement between the parties the only issue to be determined by the trial court was whether the appellant had contributed to the negligence or not.

[4] On the basis of the evidence tendered in relation to liability, the trial court found the appellant to have negligently contributed to the collision in that he failed to avoid the head-on collision whilst the driver of the motor vehicle travelling in front of him was able to do so. The trial court apportioned negligence at 70/30 in favour of the appellant.

[5] As regards *quantum*, the trial court was informed, before the trial commenced, that the parties had entered into a settlement agreement in which

they had agreed that the respondent will pay the appellant an amount of R5 290 025 for loss of earnings/earning capacity, the amount of R1 500 000 for general damages and the amount of R89 507, 28 for past hospital, medical and related expenses. The trial court, however, in its discretion reduced the amount of general damages from the agreed amount of R1 500 000 to R1 000 000 and the appellant was awarded an amount of R1 000 000 for general damages.

[6] Aggrieved by the judgment and order of the trial court the appellant approached this court on the grounds that the trial court misdirected itself in finding that: -

6.1. the appellant had contributed to the negligence and that an apportionment of 70/30 should apply; and

6.2. in awarding R1 000 000 for general damages instead of R1 500 000.

[7] The appeal is before us, leave to appeal having been granted on Petition to the Supreme Court of Appeal in so far as it relates to the trial court's finding that the appellant had contributed to the negligence and that an apportionment of 70/30 should apply; and in respect of the award made for the general damages in the amount of R1 000 000.

[8] Only two witnesses testified at the trial, being the person who witnessed the collision and was driving the motor vehicle that was travelling in front of the appellant's motor vehicle when the collision occurred ("Mr Welman"); and the appellant, who had no recollection of the collision. The respondent did not tender any evidence having opted not to call the insured driver to give his version of the collision. As such, the only version of the collision that was before the trial court was that of the appellant as tendered by Mr Welman.

[9] The factual background is gleaned from the evidence tendered in court by Mr Welman. According to Mr Welman, a head-on collision occurred on the appellant's side of the road in the early evening of 15 March 2013. The lights of all motor vehicles involved were switched on and on dim. The speed limit along that road was 80 kilometres *per* hour. The road had one lane in each direction with gravel shoulders on either side and there was a solid line in the middle of the road. On the left-hand side of the road was an open field and on the right-hand side was a restaurant.

[10] Mr Welman, the biological uncle of the appellant – hence the same surname, was driving a Nissan Hard body LDV ("the bakkie") and the appellant was travelling directly behind him in a Citi Golf. The appellant is said to have

maintained a normal following distance. Mr Welman and the appellant were both travelling at the normal speed with their headlights switched on dim.

[11] Mr Welman noticed a motor vehicle ("the insured motor vehicle") coming from the opposite side of the road with its lights also on dim. The insured motor vehicle suddenly and unexpectedly moved over from its correct lane of travel into the lane of travel of Mr Welman hurtling towards him. To avoid colliding with the insured motor vehicle, Mr Welman swerved to the left-hand side of the road, out of the way of the oncoming motor vehicle onto the gravel. He had to take sudden emergency evasive action by swerving out of his lane of travel onto the gravel shoulder of the road to avoid colliding with the insured motor vehicle.

[12] The insured motor vehicle that had nearly collided with him passed him on his right-hand side. When he looked into the rear view mirror of his motor vehicle, Mr Welman saw the collision between the insured motor vehicle that had just passed him and the appellant's motor vehicle.

[13] At the time of the collision the appellant's motor vehicle was on its correct side of the road. According to Mr Welman, the insured motor vehicle was already too close to his motor vehicle when he saw it coming over to his side of the road and that he only had time to swerve away and narrowly avoid

the collision. There was no time for him to warn other motorists in any way such as by putting on his hazard lights. Mr Welman testified that the appellant could also not have had time to swerve to the left to avoid the collision because most probably his bakkie which had a canopy might have obscured the appellant's view. He testified further that he would not have been able to avoid the collision with the insured driver if he had been in the appellant's position.

[14] The appellant's evidence was that he did not remember anything about the collision. Under cross examination he testified that he normally drove at a safe following distance behind other motor vehicles that would enable him to stop if the motor vehicle in front of him stopped suddenly and that would enable him to take evasive action if he saw a motor vehicle from the opposite direction coming over to his side of the road. But in this case he did not see the insured motor vehicle when it came to his side of the road and collided with him.

[15] Before us, the appellant is arguing that the trial court misdirected itself on the facts, the application of the law and on the exercise of its discretion.

[16] For the reasons that follow hereunder I intend to show that, on the merits, the appellant is correct that the trial court misdirected itself on its factual

findings and the application of the law thereon, and that it misdirected itself when exercising its discretion in regard to the general damages.

[17] As argued, correctly so, by the appellant the trial court misdirected itself on the following factual findings:

17.1. that the appellant's version was that if there was space he would have been able to see a vehicle crossing his lane;

17.2. that the appellant would have seen the insured driver leaving its lane of travel if he had been keeping a vehicle's following distances on a two lane road if he was paying enough attention to the road;

17.3. that the appellant testified that he did not see anything when the insured motor vehicle was approaching during the time of impact.

[18] In reaching the decision it did on the merits, the trial court relied on the following distance the appellant maintained behind Mr Welman's motor vehicle at the time of the collision. However, there is no evidence on record that it was the appellant's version that he would have been able to see the insured motor vehicle crossing its lane of travel into the lane of his travel if there was space between his motor vehicle and that of Mr Welman. In his testimony the appellant's version is that he could not remember anything that happened after

they left the BP garage which they had visited prior to the collision. His speculation about distances during cross examination, remains just speculation. The speculation is of no value and as such, no weight ought to be attached to it. The only evidence of value that the trial court ought to have considered is that of Mr Welman whose testimony is that the appellant maintained a normal following distance.

[19] There is also no evidence on record to support the finding that the appellant would have seen the insured driver leaving his lane of travel if he [the appellant] had kept a proper following distance and if he was paying enough attention or whether there would have been enough time for the appellant to take evasive action to avoid a head-on collision. The mere fact that Mr Welman was able to take evasive action and avoid the collision does not necessarily justify a finding on the probabilities that the appellant should also have been able to do so.

[20] Of importance, that the trial court should have taken into account, is that the evidence that was before it was that the appellant was not in a position to testify whether he saw anything, whether he took evasive action or exactly what happened immediately before the collision occurred.

[21] I am in agreement with the appellant's argument that the trial court erred in its application of the law relating to the keeping of proper following distances. The argument by the appellant that the mere fact that a motorist is unable to avoid a head-on collision does not prove that such motorist either did not keep a proper lookout or did not keep a safe following distance behind the motor vehicle in front of it, has merit.

[22] The general principle in law is that it is expected of a motorist to react as soon as it becomes clear that another motorist is acting unlawfully and in contravention of the rules of the road.

[23] In this instance, there is no evidence to support a contention that the appellant failed to act when a reasonable person would in his position or should have acted and that he would have been able to avoid the collision if he had done so. There is no evidence, on record, to suggest that a reasonable man in the appellant's position would have been on the lookout and would have foreseen the possibility of the insured motor vehicle coming from the opposite direction, suddenly and unexpectedly moving over to its incorrect side of the road at a dangerous and inopportune time.

[24] The general principle in law is that a motorist can expect of other motorists to be responsible, to abide by the rules of the road and it is not

expected of other motorists to guard against the possible unlawful and irrational behaviour of other motorists.[1] In its finding the trial court sought to place the responsibility on the appellant to guard against the possible unlawful and irrational manner in which the insured driver conducted himself on the road, which is not the correct position in law.

[25] The argument by the appellant that a motorist's following distance is normally judged with reference to reaction time required to react to the movements of the vehicle being followed, has merit. Hence, following distances are naturally longer when vehicles travel fast and judged with reference to the time period lapsing between the leading motor vehicle passing a fixed point and the following motor vehicle passing the same fixed point.[2]

[26] No such evidence was led and, as such, the trial court erred in concluding that the fact that the appellant did not even realise what was going on indicates that he was travelling very close to Mr Welman. The evidence on record is that the speed limit on the road was 80 kilometres *per* hour and that both motor vehicles of Mr Welman and that of the appellant were travelling at the normal

[1] NEG v Sullivan 1988 (1) SA 27 (A).
[2]

speed. The normal speed would in the circumstances be not more than 80 kilometres *per* hour. That indicates that the appellant was not speeding.

[27] The immediate impact does not justify the trial court's conclusion that the appellant did not keep a proper following distance or a proper look out for other motor vehicles travelling along that road and that his actions were, as such, not in line with the conduct of a reasonable man. As submitted by the appellant, under these circumstances, he did not carry the burden of eliminating any risk.

[28] Where one motor vehicle suddenly deviated from its correct path of travel, moved across or encroached onto the wrong side where it collided with another motor vehicle, the driver of the latter, the court has held, has to prove facts from which an inference of negligence against the driver of the former motor vehicle may be inferentially deduced in the absence of an explanation.[3]

[29] On the evidence tendered at the trial, bar any explanation from the insured driver,[4] a reasonable inference to have been made by the trial court would have been that the appellant did not see the insured motor vehicle when it came in his line of travel because the canopy of Mr Welman's bakkie obscured

[3] Arthur v Bezuidenhout and Meiny 1962 (2) SA 566 (AD) at 573C – H.
[4] Guardian National Insurance v Saal 1993 (2) SA 161 (C).

his view. The facts proven by the appellant, through Mr Welman's evidence, that at the time of the collision, the appellant was travelling on the correct side of the road, at the normal speed and following Mr Welman at the correct following distance supports such inference.

[30] Under such circumstances, it cannot be said that the appellant did not conduct himself as a reasonable person would have. The trial court ought, therefore, to have found that the appellant did not contribute to the collision and concluded that the insured driver was 100% negligent.

RE: *QUANTUM*

[31] Having come to such a conclusion in regard to the liability, there could have been no need for the trial court to apportion the general damages or to exercise its discretion in favour of reducing the agreed amount of general damages from R1 500 000 to R1 000 000.

[32] Conversely, the appellant's argument that in decreasing the amount agreed between the parties the trial court misdirected itself, is also correct. The trial court failed to exercise its discretion properly on the ground that it was not required to resolve a dispute, where none existed, between the parties relating to the general damages; and there was no justification in law to set aside the compromise reached between the parties.

[33] Consequently, the appeal ought to succeed.

[34] The respondent did not oppose the appeal and I see no reason why it should be mulcted with costs. No order as to costs should, therefore, be made.

[35] I make the following order:

1. The appeal is upheld.
2. The trial court's judgment and order are set aside and replaced with the following order:

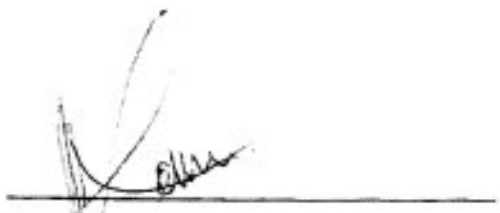
   "The Defendant is liable for 100% of the Plaintiff's agreed/proven damages and that the award for general damages is in the amount of R1 500 000.00."

3. No order as to costs.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION,
PRETORIA



S.N.I MOKOSE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION,
PRETORIA

L.I VORSTER

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION,

PRETORIA

Appearance:

Appellant's Counsel	: Adv. J. F Grobler S.C
Appellant's Attorneys	: **Adams & Adams.**
Respondent's Representative	: **The Road Accident Fund**
Date of hearing	: 03 February 2021
Date of judgment	: 16 February 2021