

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

Case no: 3025/2020

**REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED**

In the matter between: -

LOURENS DE LANGE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

N.E NKOSI (AJ):

INTRODUCTION

[1] The plaintiff is an adult male person born on 4 May 1998. He was involved in a motor vehicle collision on the 29th of March 2018 and consequently sustained some bodily injuries. He is now claiming compensation from the defendant in terms

of Section 17 (1)(a)¹ of the Road Accident Fund Act 56 of 1996. The plaintiff's action is defended.

[2] The issue before Court for determination is whether the collision was caused by the negligence of the insured driver and if so, to what extent.

[3] The matter was set down for trial in respect of both issues of liability and quantum. However, at the commencement of the trial, Mr Keet, appearing for the plaintiff informed the Court that both parties had agreed to the separation of issues and requested that the matter proceed with the issue of liability only. This was confirmed by Mr Mukasi, who appeared for the defendant. I considered the request and was of the view that in the circumstances of this matter, it would be in the interest of justice to grant such request. I accordingly ordered the separation of the issues in terms of Rule 33 (4) of the Uniform rules of Court.

[4] I enquired from both parties the number of witnesses each party intended to call. I needed to have an indication how long the trial would take in light of the fact that the issues were now limited to the question of liability. Mr Keet indicated that he would be calling the plaintiff only and Mr Mukasi stated that he would be calling the insured driver only.

EVIDENCE

[5] At the pre-trial² held on 25 October 2021, the parties agreed that the duty to begin and the onus of proof rested with the plaintiff. Should the plaintiff succeed in proving negligence on the part of the insured driver, the onus will shift and rest on

¹ "Section 17 (1) The Fund or an agent shall –

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) ...;

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place in the Republic, if the injury or death is due to the negligence or wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

² Caselines, 008/31 para 15.7

the defendant to prove contributory negligence. The plaintiff was the only witness called to testify in his case.

[6] The plaintiff testified that, on the 29th of March 2018 at approximately 18H00, he was driving his motorcycle along the main street in Mokopane. He stopped at the intersection for a short period because the traffic light was red for him as well as the vehicle across the intersection facing his opposite direction. The said vehicle was a white Toyota Corolla.

[7] The traffic light turned green for the plaintiff and he entered the intersection travelling straight. The driver of the Toyota Corolla also entered the intersection but turned right in front of the plaintiff and collided with his motorcycle. He had already travelled deep into the intersection, having driven past the first lane. The collision happened so fast and there was nothing he could do to avoid it.

[8] He remained at the scene and the police arrived. The police asked him some questions about the incident. Shortly thereafter an ambulance arrived and he was taken to hospital. At that moment he was bleeding from his injuries and losing a lot of blood.

[9] He was thereafter cross examined by Mr Mukasi. He testified that he was not sure about the names of the streets where the collision occurred. He however accepted that the names could be Thabo Mbeki Drive and Kruger Streets.

[10] He denied that the collision occurred between 20H00 and 21H00. He maintained his view that it occurred at approximately 18H00 because when the collision occurred, it was not that late.

[11] He admitted that he was driving a motorcycle which was black in colour but denied that its headlights were switched off. He also denied that he drove the motorcycle when it did not bear the registration number. This was in spite of the fact

that his own affidavit³, dated 22 June 2018, did not disclose the registration number of his motorcycle.

[12] He was referred to the accident report⁴ and taken through it. He then conceded that the collision occurred at about 21H00 and that the registration number of his motorcycle does not appear on the accident report. These concessions were contrary to his earlier testimony.

[13] He also testified that on impact, he was flung from his motorcycle onto the pavement and landed on his left side. The vehicle did not drive over him. The vehicle was damaged on its front bumper and the front area. His motorcycle was badly damaged to an extent that it became uneconomical to repair.

[14] It was put to him that the insured driver ("Mr Maake") would testify that, he waited at the robot which was red, as soon as it turned green and as he was about to take off the plaintiff came from nowhere and collided with the insured driver. He denied the defendant's version.

[15] It was further put to him that Mr Maake would further testify that, while coming out of nowhere speeding, the plaintiff did not have the headlights of the motorcycle switched on. He could not see the plaintiff from far. He replied, "I do not agree".

[16] I then asked Mr Mukasi whether Mr Maake was able to tell from which direction was plaintiff coming so that it may be put to the plaintiff to confirm or deny. Mr Mukasi submitted that "we accept that plaintiff came from the direction he says he was coming from and without lights".

[17] The plaintiff was referred to his affidavit⁵ which he signed on the 22nd of June 2018 almost three months after the collision. It reads:

³ Caseline 007 – 4 – "On or about 30//03//2018 at approximately 20H00 I was involved in a motor vehicle accident. At the time of the accident I was a driver in a motorbike with registration letters and numbers _____ in Mokopane....."

⁴ Caseline 007 – 48. The accident report was compiled by Constable MJ Lamola, Service number 7088205 – 3 on 29 March 2018 at 23h15.

⁵ Caseline 007 - 4

“On or about 30/03/2018 at approximately 20H00 I was involved in a motor vehicle accident. at the time of the accident I was a driver in a motor bike with registration letters and numbers _____ in Mokopane at the intersection of Thabo Mbheki Drive and Kruger Street at robot. I approached the robot that was green for me to go, as I crossed the street the motor car turned into me from the right hand side. I was hit on my right side...”

[18] He admitted that the affidavit was his and that he signed it. He confirmed its contents. The extract is understood by the defendant to mean that the plaintiff was travelling through a green traffic light speeding and collided into Mr Maake's vehicle which at the time was turning right. If this is the case, it would therefore confirm Mr Mukasi's submission that the plaintiff's case is premised on two different versions. I will revert to this aspect later in this judgment.

[19] It was further put to the plaintiff that, because he had a right of way, he proceeded without checking if it was safe to do so. I disallowed that line of questioning in light of the undisputed facts namely, that the collision happened on plaintiff's lane of travel having crossed the first lane and deep into the second lane and that there was nothing the plaintiff could do to avoid the collision. In my view the issue of right of way was at that stage a subject for argument having regard to the evidence already on record.

[20] He was re-examined and he confirmed that there was nothing he could have done to avoid the collision. The plaintiff's case was thereafter closed.

[21] Mr Maake was called to testify for the defendant. He testified that it was on the 29th of March 2018, a day before Good Friday when the collision occurred between his Toyota Corolla and the plaintiff's motorcycle.

[22] Shortly before the collision he had just driven out of the KFC complex to join Kruger Street and stopped at the intersection of Kruger Street and Thabo Mbheki Drive because the traffic light was red for him.

[23] As he was stationary at the intersection the motorcycle was not there. The traffic light turned green and with his vehicle indicating a right turn, he entered the intersection turning right into Thabo Mbeki Drive. At that moment there was an impact between his motor vehicle and a motorcycle. He did not know where the motorcycle came from. It was not there when he executed a right turn. I must pause to mention that it was not his evidence that before turning, he kept a proper lookout to check if there was any oncoming traffic travelling straight.

[24] Upon being asked by Court, he testified that there was light from the KFC area and street lights in the area of the intersection. However, where the motorcycle emerged from, it was dark.

[25] He testified further that he was not the cause of the collision. The plaintiff is the one who crashed into his vehicle. He drove into the plaintiff's lane of travel because the plaintiff's motorcycle was not there at the time. He also stated that there was no way he could avoid the collision. He admitted that a driver intending to turn right should wait for oncoming traffic to drive past before turning.

[26] Mr Maake was thereafter cross examined by Mr Keet. He conceded that the point of impact was on plaintiff's lane of travel being a place designated for oncoming traffic. He insisted that the plaintiff was not there when he turned right. He was asked how did the collision happen when the plaintiff was not there. He struggled to give an answer and insisted that the plaintiff was not there and that he came from nowhere. The question was repeated on a few occasions until the Court intervened to ask Mr Maake to answer the question. His demeanour at the time informed me that he understood the question very well and was well aware of the implications of the required answer. He tried very hard to avoid the inevitable answer namely, the plaintiff was there at the time of the impact.

[27] It was put to him that he did not comply with his obligation to give right of way for the plaintiff to drive through the intersection before turning to the right. He replied that he could not do so because the plaintiff was not there. He conceded that he had an obligation not to turn when it was not safe to do so.

[28] He further conceded and not without struggle that had he waited for at least a minute without turning, the collision would not have occurred.

[29] He was re-examined and asked whether there was no oncoming traffic or he did not see any. He replied that he did not see any oncoming traffic and that there was none. That concluded the defence case.

COMMON CAUSE

[30] Having regard to the evidence and submissions made, it is apparent that the facts relating to the occurrence of the collision are to a large extent common cause. These are indicated in the paragraphs hereinafter.

[31] It is common cause that on 29 March 2018 at approximately 21H25 and at the intersection of Thabo Mbheki Drive and Kruger Street in Mokopane, a collision occurred between a Black Sam 125 cc motorcycle with an unknown registration number which was driven by the plaintiff and a white Toyota Corolla with registration number [....]driven by Mr Maila Herich Sejaphala, the insured driver whose surname later changed to 'Maake'.

[32] The plaintiff was travelling straight from west to east along Kruger Street. Mr Maake was travelling from east facing west and turned right into the north direction intending to join Thabo Mbeki Drive.

[33] The plaintiff had already driven across the first lane and was in the second lane of Thabo Mbeki Drive when the impact took place.

[34] The intersection was illuminated with lights from the KFC complex and the street lights. The KFC is about a meter away from the scene.

[35] Mr Maake's vehicle suffered damage to the front bumper as well as some front portion of the vehicle. The plaintiff's motorcycle was damaged to such an extent that it was uneconomical to repair.

DISCUSSION

[36] The plaintiff's testimony is not limited to a single version. He earlier testified that he arrived at the intersection and stopped because the traffic light was red for him. He saw Mr Maake's vehicle also stationary across the intersection facing his opposite direction. When the traffic light turned green, they both entered the intersection and before they could both drive pass each other, Mr Maake executed a right turn. This version, if true, would support the common cause fact that the point of impact was on the plaintiff's lane of travel and after he crossed the first lane of Thabo Mbeki Drive.

[37] This version would also lead to a probable conclusion that Mr Maake ought to have seen the plaintiff stationary at the traffic light and thereafter in the intersection before executing a right turn. Consequently, Mr Maake was obligated not to turn right in front of the plaintiff but should have delayed his turn until the plaintiff had driven past his motor vehicle.

[38] The second version proffered by the plaintiff is that, *"I approached the robot that was green for me to go, as I crossed the street the motorcar turned into me from the right-hand side. I was hit on my right side and my leg was badly injured."*⁶

[39] The above extract is from the plaintiff's affidavit which he confirmed. He further admitted, under cross examination, that this particular version constitutes a description of how the accident occurred. According to this version, the plaintiff approached a traffic light which was green in his favour before entering the intersection, in other words, he never stopped at a red traffic light. That would explain why Mr Maake did not see the plaintiff stationary at the red traffic light because he was not there. However, when the plaintiff entered the intersection, Mr Maake had also travelled almost the same distance into the intersection as the plaintiff and at that crucial point in time, Mr Maake should have seen the plaintiff entering the intersection and when he was in the intersection. That should have been the case more so that, Mr Maake testified that the area in the intersection was

⁶ Caseline 007 – 4.

illuminated by street lights and KFC lights. If not, he should have satisfied himself, at that crucial moment, that there was no oncoming traffic before executing a turn to the right. His observation of the oncoming traffic is limited to the stage when he was stationary at the intersection and when he entered the intersection but not when he was about to make a turn.

[40] It is clear that he turned right at an inopportune time when he should have allowed the plaintiff to drive past. This view finds support from the fact that the damage to Mr Maake's vehicle is to be found in the front portion of his vehicle. If Mr Maake had already completely turned right, the damage would have also been found on the left side of his vehicle. This version is also consistent with the fact that the point of impact is on the lane of plaintiff's travel.

[41] In *Madzunye v Road Accident Fund*⁷, Maya JA, as she then was referred with approval to *Milton v Vacuum Oil Co of SA Ltd*⁸ where the Court said:

"Where there are two streams of traffic in a road in opposite directions, a person in a vehicle proceeding in one direction 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 inopportunately turn across the line of traffic. A person travelling in one direction can assume that one travelling in the opposite direction will continue his course, but he may only assume that until he is shown a clear intention to the contrary. When a clear and undoubted warning is given, then there is no longer any room for the assumption that the other party will continue in his former course".

[42] Mr Maake testified that when he arrived at the intersection, he indicated to turn to the right side and this is denied by the plaintiff. There is no clear and undoubted warning given by Mr Maake of his intention to turn to the right side. In the absence of a clear and undoubted warning the principle in Milton's case (*supra*) should therefore apply.

⁷ [2006] SCA 103 (RSA).

⁸ 1932 AD 19 at 205. See also *Sierborger v South African Railways and Harbours* 1961 (1) SA 498A at 504 A – G.

[43] In *Sierborger's*⁹ case the Court said:

“Du Pleez was in the circumstances of the particular case entitled to expect that appellant (Sierborger) would, in relation to the motor vehicle, choose an opportune moment to cross in front of it, and would not suddenly and at the last moment dart across the line of his travel”.

[44] The two versions presented by the plaintiff and which I earlier on referred to, display an inconsistency in so far as the position of the plaintiff before entering the intersection. At first, he testified that he was stationary at the red traffic light and later confirmed in his sworn statement indicating that he was approaching a traffic light which was green for him to enter and drive through the intersection. Besides this inconsistency, both versions are similar concerning how the collision occurred in the intersection.

[45] In my view and having regard to the evidence, Mr Maake executed a right turn in front of the oncoming traffic, in particular the motorcycle driven by the plaintiff when it was inopportune to do so. Had he kept a proper look out and delayed to make a right-hand turn, the collision would have been avoided. Mr Maake acted negligently and thereby causing the collision. In the circumstances, the defendant should be held liable for the plaintiff's proven damages.

[46] The enquiry does not end there. The extent of the defendant's liability must be established. The defendant in its plea pleaded contributory negligence and prayed that the plaintiff's claim be reduced in terms of the Apportionment of Damages Act 34 of 1956. The onus rests with the defendant to adduce evidence to prove contributory negligence on a balance of probabilities on the part of the plaintiff¹⁰.

[47] Mr Keet argued, and in my view correctly so, that the defendant failed to adduce evidence to prove on balance of probabilities that the plaintiff's claim falls to be reduced in terms of the Apportionment of Damages Act. Mr Maake is the only

⁹ *Sierborger supra* at pages 504 to 505.

¹⁰ *Llewellyn Fox vs Road Accident Fund A 548/16 (26/4 2018)* at para 13, See also *Johnson Daniel James vs Road Accident Fund Case No 13020/2014 GHC* at para 17 confirming *Solomon and Another v Musset and Bright Ltd 1926 AD 427* at 435.

witness for the defendant and his evidence does not progress to an extent that it demonstrates negligence on the part of the plaintiff.

[48] It is clear that the defendant failed to conduct an investigation into the merits of this case. The defendant was aware of the insured driver's version in particular the assumptions he made namely, that the plaintiff was speeding, that the plaintiff drove the motorcycle without the headlight switched on and that the plaintiff himself was the cause of the collision. There is also a police accident report uploaded on Caselines. The defendant elected to call the insured driver only, as a witness. The police officer who attended the scene and found the plaintiff and the vehicles at the scene was not called to testify. The assumption made by the defendant were baseless without the support of the evidence by an Accident Reconstruction Expert.

[49] I am therefore unable to make a finding that the plaintiff acted negligently and that his negligence contributed to the occurrence of the collision.

[50] In the circumstances, I make the following order:

1. The defendant is liable in full to compensate the plaintiff for his proven damages.
2. The defendant shall pay the costs of suit.

NE NKOSI, AJ
Acting judge of the
High Court

Date of hearing : 19 and 23 November 2021

Date of Judgement : 14 January 2022

For the plaintiff : Mr. DeWet Keet

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