Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9203/2017

Before:
The Hon. Mr Justice Binns-Ward

Hearing: 11 March 2020
Judgment: 18 March 2020

In the matter between:

LEONARD MARK DEACON Plaintiff

and

REEDS MOTOR GROUP
A division of Pepkor Trading (Pty) Ltd Defendant

Judgment

BINNS-WARD J:

[1] The plaintiff is a 59-year old businessman. On 29 May 2014, at about three o'clock in the afternoon, he was walking on the pavement in Christiaan Barnard Street on the Cape Town Foreshore when he caught his right leg against the tow bar of a BMW 540i motor vehicle that was parked on the sidewalk and tripped and fell. The current proceedings concern his claim for compensation in damages in respect of the injury he allegedly sustained in the incident and in consequence of its sequelae. The defendant is Reeds Motor Group, a well-known motor dealer. The BMW motor vehicle was owned by or under the control of the defendant. An agreement between the parties that the issue of liability should be

determined separately from, and before, the other issues in the case was formally adopted by way of a ruling made in terms of rule 33(4) of the Uniform Rules at the commencement of the hearing. This judgment is therefore concerned only with the question of liability, including, to the extent necessary, the issue of contributory negligence.

[2] The incident that gave rise to the institution of the action occurred immediately outside the defendant's Cape Town showroom. The BMW had been parked on the pavement by one of the defendant's staff. The vehicle was in point of fact one of five or six vehicles that were parked in a line-up of cars on the pavement outside the showroom. It emerged at the trial that it was a common practice of the defendant, and apparently also that of some other motor vehicle dealers with business premises in the vicinity, to display some of their stock on the pavement.

[3] The plaintiff's counsel pointed out that s 32(3) of the City of Cape Town Parking By-Law, 2010[1] prohibits the parking of a vehicle '*on a sidewalk or in a manner restricting pedestrian movement on a sidewalk*'. It is not altogether clear though whether the prohibition in terms of s 32(3) applies generally, or only within the area of a '*parking ground*'. The provision to which counsel referred is located within chapter 3 of the By-Law, which is entitled '*Parking Grounds*'. It does appear, however, that the parking of vehicles on pavements by motor dealers must have been regarded by the City as a particular problem, for which special provision in the By-Law appears to have been considered necessary. Thus, the parking of cars on the pavement by a dealer in, or seller of, vehicles is expressly prohibited in terms of s 8. It does not matter whether the vehicles are being actively advertised for sale or not. In terms of s 2 of the By-Law, the stated purpose of the statutory instrument is '*to control parking within the jurisdiction of the City in order to provide a safe environment*'.

[4] At the time of the incident, however, the defendant had been granted what appears to have been an informal dispensation by the municipal authorities permitting it to use the pavement to display some of its vehicles. The reason for the dispensation was that certain building activity being undertaken in the immediate vicinity had had the effect of temporarily impinging on the internal showroom space available on the defendant's premises, as well as restricting access to a certain extent. It was a condition of the dispensation that the vehicles had to be parked in such a manner as would leave at least one metre's width of the sidewalk free for unimpeded use by pedestrians. The evidence is that Christiaan Barnard Street is at

[1] Promulgated in Province of Western Cape: Provincial Gazette 6847, dated 18 February 2011.

times a busy pedestrian thoroughfare. There is a bus stop and a coffee shop in the close vicinity of the defendant's showroom.

[5] The plaintiff testified that on the afternoon in question he had parked his car in Jack Craig Street, a side road that intersects at right angles with Christiaan Barnard Street. He proceeded from there on foot along the pavement on his way to Amway, which is a business premises in Christiaan Barnard Street. Amway was on the same side of the road and in the same city block as the defendant's showroom. The plaintiff's route required him to navigate his way past the line-up of vehicles parked on the pavement outside the defendant's showroom. He did so using the pavement space that had evidently been left available for pedestrians to use. The free pavement space was in the area between the showroom display windows and the backs of the vehicles, which were parked facing into Christiaan Barnard Street. He had no difficulty in making his way until he reached the BMW, which was the last in the line of parked vehicles behind which he would have to pass. The rear end of the BMW was notably closer to the showroom window than those of any of the other vehicles in the line-up; the plaintiff estimated that the gap between the window and the BMW was only between 45 and 50 cm in width. The gap was so narrow that as he passed through it, the plaintiff, who is heavily built (but not exceptionally so), could feel the sides of his body brushing against the window on his left side and against the rear of the BMW on his right side.

[6] The reliability of the plaintiff's estimate of the dimensions of the gap left behind the BMW for pedestrians to pass is supported by the undisputed evidence that the pavement is between 5,03 and 5,04 m wide and that the length of the BMW 540i was 4,83 m. Had the vehicle been parked at right angles to the road, with its entire body length straddling the pavement, only 20 cm or so of space would have been available for pedestrians to pass. However, the plaintiff's uncontradicted evidence was that, after his fall, he noted that the front end of the BMW was poking out over the kerb on the street-side edge of the pavement. After he had ascertained the relevant measurements, the plaintiff deduced, logically in the circumstances, that the front of the BMW must have been protruding over the kerb by about 25 to 30 cm.

[7] It was suggested to the plaintiff in cross-examination that the BMW had been parked at an oblique angle, in a position comparable to that in which the gold or brown VW Kombi that is visible in the centre of the photographic exhibit introduced as Exhibit C is depicted.

The plaintiff was unable to recall whether that had been so or not, and no evidence was called by the defendant to substantiate or confirm the proposition. In the result there was not any direct evidence on the point. It is evident, however, from the other photographs in the trial bundle, Exhibit B, that cars were at different times parked on the pavement outside the defendant's showroom in a variety of positions and parking configurations. What does weigh with me though is that it seems improbable, if the vehicle had been parked at a significant deviation from a 90° angle to the road, that the plaintiff would have experienced the sensation of his body brushing against the back of the vehicle as he passed behind it. If the vehicle had been parked at a distinctly oblique angle, the closest part of its rear to the showroom window would have been its left rear corner and the furthest part from the window would have been the right rear corner. The plaintiff's line of approach was from the right of the vehicle. If he started brushing against the car immediately he started passing it, as his evidence would suggest, he would find himself ever-increasingly squeezed between it and the showroom window as he traversed the line of the vehicle's boot from right to left if the vehicle had been parked at an oblique angle. That is not consistent with the experience he described. The plaintiff's description of his passage behind the vehicle before he tripped over the tow bar (which was probably protruding from somewhere more or less at the centre of the back of the car) was more consistent with what might have been expected had the rear of the vehicle been more or less parallel to the showroom window. That would have been the case had the vehicle been parked at a right angle to the street.

[8] As the plaintiff went by the back of the parked BMW, he did not see that there was a tow bar protruding at its rear. The tow bar obviously encroached onto the narrow 45-50 cm space through which the defendant proceeded, for otherwise it would not have caught on his leg as he walked past the car. The first the plaintiff knew about the tow bar was when he looked back and saw it from the position into which he had fallen after tripping over it. As mentioned, he had not been aware of it before his leg came into contact with it, unexpectedly interrupting his forward motion and toppling him from his feet. He said that had he been astute to the tow bar before passing behind the vehicle he would have taken pre-emptive action by moving himself sideways to negotiate the narrow opening between the showroom window and the back of the car.

[9] There was also no positive evidence about the colour of the tow bar. It was suggested to the plaintiff in cross-examination that tow bars are usually black or chrome in colour and that in some cases the bar is black and the ball or towing hook is chrome. Everyday

experience as a motorist and urban pedestrian suggests that most tow bars are actually entirely black in colour. It was common ground that the place where the incident occurred was on the eastern side of the building in which the showroom was housed and that the pavement area closest to the showroom windows would have been in shadow in the afternoon. It is evident from the photographs that were put in evidence that there is also an overhanging roof or ceiling protruding significantly over the pavement outside the showroom windows, the effect of which would have strengthened the darkening effect of the afternoon shadow in the pavement area closest to the windows. I consider that it may be inferred as a matter of probability that the degree to which any dark attachment sticking out from the back of the BMW would have been visible would be relatively poor, or at least adversely affected, in the prevailing circumstances.

[10] The defendant's counsel argued, however, that the plaintiff's eyes would have had time to adjust to the poorer light by the time he had walked up Christiaan Barnard Street as far as the BMW. Acceptance of that submission would imply that the plaintiff had been walking all of that distance with his eyes focussed on the darker part of the pavement, rather than looking ahead, as a pedestrian ordinarily would do, in the general direction of his destination. Looking ahead, in what I would regard as the normal way, would have involved scanning areas of both light and shade at the same time. The effect on his vision in those circumstances would not have been the same as if he had walked into a darkened room with the adjusting dilation of his pupils to cope with the darkness, as counsel's postulate would imply. Moreover, the tow bar, being a relatively small protuberance, did not constitute anything like the 'open danger, manifest and apparent',[2] that the large inspection pit in an adequately lit workshop did in the example in *Albort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 (3) SA 531 (E) referred to by counsel. The defendant's counsel relied on *Albort-Morgan* to support a contention that the tow bar was such a commonplace phenomenon that any pedestrian walking behind the car should have anticipated its presence and looked out for it; so obviously so went the argument that the defendant could not be reasonably be expected to treat its susceptibility to trip up passers-by as a danger worthy of guarding against. I am not persuaded that the analogy counsel sought to draw was at all apposite. The inspection pit in *Ablort-Morgan* loomed large. It was 5,25m long, 0,75m and 2m deep. It was situated 2,55m from the entrance to the room, the dimensions of which were 9,15m x 3,9m. In other

[2] A quotation from *Skinner v Johannesburg Turf Club* 1907 TS 852 at 860, drawn on by Kannemeyer J in the full court's judgment in *Albort-Morgan*.

words, the pit took up more than 11 percent of the floor space of the entire workshop. Its presence could hardly be missed. A tow bar, by comparison, is a proportionately insignificant vehicular attachment, more especially so on a large vehicle like a BMW 540 sedan.

[11] Indignant about what had happened, and reportedly in some pain as a result of his fall, the plaintiff immediately went into the defendant's showroom to complain about what he considered to be the dangerous situation created by the parked vehicle. He was given an unsympathetic reception by the sales staff on the floor and consequently asked to speak to the manager. The manager was absent, but the plaintiff was given his email contact details.

[12] When he got home later that afternoon, the plaintiff addressed an email letter of complaint to the manager. The email was sent after office hours and seen by the general manager of Reeds Cape Town, Mr Denicker, only the next morning. Mr Denicker responded promptly to the plaintiff's email early on 30 May 2014 as follows:

> Dear Mr Deacon
>
> I apologise for the inconvenience & frustration caused due to your accident.
>
> At the moment as you can see, our building is a partial building site, which has taken up not only nearly all the customer / staff parking outside the building, but a fair portion of our parking inside the building as well.
>
> As a business we still need to trade & be profitable during this inconvenient construction process / period. We have salaries (jobs to protect), rent, etc. to pay.
>
> Normally we leave a gap of a meter behind the cars parked in front to allow customers access, but unfortunately in the case of the big BMW, one of our drivers mislaid the keys after parking it, and we could not move the car from the night before.
>
> This can be verified by the security company who were asked to monitor the vehicle through the night. I had already given instruction for the car to be moved & not to be parked in that manner.
>
> We are very sorry to hear that you injured / hurt yourself & we sympathise with you. As to your accident, we are not at fault, as you walked into the tow bar without seeing it (an unfortunate accident).
>
> However, I am not happy with my one staff member's reaction when you confronted him & we apologise profusely. I have already taken action in this regard.
>
> Please understand our position in this instance & I wish you a speedy recovery.

Yours sincerely

Kevin Denicker

REEDS Motor Group
General Manager
Reeds Cape Town

[13] The plaintiff alleged that the defendant had been causally negligent in a number of respects, but in view of the conclusion to which I have come it is necessary to mention only one of them. The allegation I have in mind is that the defendant had been negligent by failing to ensure that the parked vehicle did not constitute a source of danger to the public.

[14] Whether the defendant was negligent in the manner just described falls to be decided on the well-established test that was usefully summed up and elucidated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) in the following terms at p. 430E-G:

> For the purposes of liability *culpa* arises if-
> (a) a *diligens paterfamilias* [i.e. the notional reasonable person] 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.
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. 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 circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.

[15] In my judgment, a reasonable person in the position of the defendant would appreciate that parking a vehicle with a tow bar fixed at its rear on a pavement, leaving only 45-50 cm of pedestrian space between the rear of the vehicle and the adjoining building, and no pavement space whatsoever in front of the vehicle, would create a source of potential danger to pedestrians using the pavement. He or she would foresee the reasonable possibility that doing so could result in a passing pedestrian being injured as a consequence of colliding with or tripping over the tow bar. In a situation, such as that which presented in the current case, where the only passage left for pedestrians to go by on the pavement was at the rear of the line-up of parked vehicles, the reasonable person would foresee that the possibility of injury to a passing pedestrian would increase the closer the vehicle was parked to the building. The hazardous potentiality of the tow bar would be increased because of the limitation in the

space left available for a pedestrian to circumvent it. Even a pedestrian who had seen the tow bar would be rendered vulnerable to injury by exposure to the possibility of mis-stepping or tripping while trying to negotiate the obstruction. But in the given situation in the current case, the danger that the tow bar might not even be noticed by an approaching pedestrian was heightened by the fact that the affected part of the pedestrian thoroughfare was in shadow.

[16] The submission by the defendant's counsel that the fact no other person had, to the knowledge of the defendant's representatives, been injured as a consequence of the parking of cars on the pavement outside the defendant's showroom, notwithstanding that the practice of parking cars there had stretched over several years, demonstrated that it did not give rise to a dangerous situation worthy of requiring the defendant to take avoiding measures is unpersuasive. I did not understand it to be suggested that the parking of vehicles on the pavement was, of itself, dangerous. The case the defendant had to meet was that the parking of the BMW in the manner *that* vehicle was parked created a danger. It was not suggested, for example, that the position in which the other five or six vehicles in the line-up had been parked created a danger. Certainly, it is evident from the photographs, and the dimension of the pavement as measured, that it would be possible to park vehicles on that sidewalk in ways that would not constitute a danger. That, no doubt, was the reason that the local authority had been prepared to give the defendant a conditional dispensation from compliance with s 8 of the Parking By-Law.

[17] The suggestion that pedestrians like the plaintiff approaching the BMW could take an alternative route by stepping off the pavement and walking around the front of the car afforded no excuse to anyone to park the vehicle in a position which presented a potential danger. There would be no danger to a pedestrian who had seen the tow bar and was nimble enough to avoid it. The most pressing danger presented was that there was a foreseeable chance that a pedestrian would not see the tow bar in the prevailing condition of reduced visibility caused by the area being in shadow, and, to a lesser degree, that even a person who had seen it might nevertheless accidentally trip over it because the space left open was too narrow for some people, especially those of larger build like the plaintiff, to walk through normally.

[18] That the situation created by the parking of the vehicle in the manner it in which it had been posed a danger was, in my judgment, acknowledged in Mr Denicker's email to the plaintiff quoted above. The email acknowledged that the plaintiff ordinarily left a space of

one metre behind the vehicles parked on the pavement. The reason for that is self-evident. It was to allow for the reasonably safe use of the pavement by the pedestrians for whose use the sidewalk facility is primarily intended. The parking of vehicles on an urban pavement is, by contrast, an exceptional use of the facility, and a person parking a car on a pedestrian facility should therefore reasonably be expected to be especially conscious of the impinging effect of his or her action on the ordinary user of the sidewalk. The duty on such a person to consider the impact on pedestrians is quite distinguishable from that which would apply were the vehicle to be parked in a parking bay or other space specially designated for parking. A pedestrian choosing to cross an urban road by walking through designated parking bays, instead of using a designated pedestrian crossing place, might be expected to take more care to look out for vehicular attachments than he or she would be expected to do when using a designated pedestrian space.

[19] It was all very well for Mr Denicker to formally deny that Reeds had been at fault, but it is evident from what he wrote in his email to the plaintiff that he recognised that the position in which the vehicle had been parked was not acceptable and that it had been incumbent on the defendant to rectify the position. Indeed, the evident import of Mr Denicker's email, which was produced during the plaintiff' evidence, made it obvious that any application for absolution from the instance at the end of the plaintiff's case would be misconceived. It was primarily that consideration that motivated the summary refusal of the application that was nevertheless brought.

[20] The nature of the problem that Mr Denicker had in mind when he composed his email to the plaintiff was not explored with him in evidence by counsel on either side, but, in the absence of any special explanation, his most probable concern would have been that its position presented an unacceptable impediment to lawful users of the pavement because it left inadequate space for pedestrians to pass safely. The effect of the inadequacy was obviously potentially dangerous if a tow bar protruded into the already too little space that had been left for pedestrian use.

[21] The leaving of a space of at least one metre for the safe passage of pedestrians was evidently also considered by the relevant municipal traffic authority to be a necessary measure. That is the only rational reason I can conceive of for its stipulation of the condition it attached to the dispensation that was given to the defendant from compliance with s 8 of

the Parking By-Law. And nothing in Mr Denicker's evidence suggested that he regarded the condition as inappropriate or irrational.

[22] Having determined that a reasonable person in the position of the defendant's employee would have foreseen the reasonable possibility that parking the BMW in that position could result in a passing pedestrian injuring himself and incurring consequent expense and financial loss, the question arises 'would the reasonable person in the position of such employee have taken reasonable steps to guard against such occurrence?' In my judgment, the question indubitably demands an affirmative answer. A reasonable person would have been careful in the circumstances to comply the municipality's condition for allowing the special dispensation to park vehicles in a space intended for pedestrian use; he or she would appreciate that the imposition of the condition was related to the safety and convenience of the pedestrians. The reasonable person would have complied with the condition, just as Mr Denicker appreciated should have been done. It is clear from the instructions that Mr Denicker said he had given that the car could easily have been parked elsewhere or differently. No financial cost to the defendant would have been involved in taking steps to avoid the danger.

[23] It is not in dispute that the defendant failed to take either of the measures that it should have done in the circumstances. In the result I am satisfied that the plaintiff has succeeded in establishing causal negligence on the part of the defendant so that the defendant should be liable, at least to a certain extent, for such damages that the plaintiff may prove that he sustained as a consequence of the injury that he suffered.

[24] The defendant pleaded that in the event of it being held to have been causally negligent, the extent of its liability for the plaintiff's damages should be abated in terms of the Apportionment of Damages Act 34 of 1956 by virtue of the plaintiff's contributory negligence. In this regard it was alleged that the plaintiff had been negligent in one or more of the following respects (I quote from paragraph 7.2 of the defendant's plea):

1. He had failed to keep a proper look out;
2. He had failed to avoid injury to himself under circumstances where he could and should have done so;
3. He failed to pay due and /or proper regard to the area where the vehicles were parked, and in particular the immediate area where the incident occurred;
4. He failed to make use of an alternative route under circumstances where he could and should have done so;

5. He failed to take any reasonable steps to prevent the incident under circumstances where he could and should have done so.

[25] I do not consider that there is any merit in the contention that the plaintiff should have made use of an alternative route. On the contrary, any alternative route would have required him to leave the pavement and step off the kerb and use a space that was not designated for pedestrians. It is clear that the line-up of cars had been parked in such a manner as to suggest a route to pedestrian users of the pavement. The route was that circumscribed by the wall of the building on the one side and the rear of the parked vehicles on the other. The only tricky bit was where the BMW was parked, and even there the gap of 45 to 50 cm that had been left would have been wide enough for many persons of slighter build than the plaintiff to proceed without difficulty and with less jeopardy. I do not suggest that it would not have been open to the plaintiff to take an alternative route by walking around the front of the BMW, stepping into the adjacent loading bay in order to be able to do so. I do hold, however, that it was not unreasonable in the circumstances for him not to have done so.

[26] I am, however, of the view that the plaintiff should reasonably have taken into account that the route behind the BMW that he chose to proceed on was unusually narrow and that it provided a relatively ill-lit passage on the pavement to traverse. These features, which made walking on that part of the pavement different to the experience of being able to stride confidently down an unobstructed sidewalk, should have made him more watchful of his step than might be expected in ordinary circumstances. The evidence suggests that had he been more watchful, he probably would have seen the tow bar and been able to take steps to avoid coming into collision with it. In the result I am satisfied that the defendant has shown that the plaintiff was contributorily at fault.

[27] In determining the consequent apportionment of liability, I must consider the degree to which the conduct of each of the protagonists deviated from the standard of the reasonable person in the circumstances; see *South British Insurance Co. Ltd v Smit* 1962 (3) SA 826 (A) at 836C-E. In my judgment the conduct of the defendant in parking the BMW in a position that gave rise to a foreseeable danger of injury to passing pedestrians constituted a materially greater deviation from the conduct of a *diligens paterfamilias* than did the plaintiff's failure to keep an especially watchful lookout. In the circumstances I consider that it would be just and equitable were the defendant to be held liable for only 65 percent of the quantum of such damages as the plaintiff might prove in the second stage trial of the action.

[28] It is not obvious that the sum of damages that the plaintiff is likely to be awarded in the second stage hearing will necessarily exceed the jurisdiction of the regional court, and the questions involved in the determination of liability were not of sufficient complexity or difficulty as to, by themselves, justify the institution of proceedings in the High Court. It is therefore not clear at this stage whether the plaintiff should be able to recover his costs on the High Court or the Regional Magistrates' Court scale. That will only become apparent once his damages have been fixed by a subsequent judgment or agreement. In the circumstances, I consider that the appropriate order in respect of costs would be to direct that they stand over for later determination by the court seized of deciding the remaining issues in the action if the parties are not able to reach a settlement.

[29] The following order is made:

1. It is declared that the defendant is liable to pay to the plaintiff 65 percent of the quantum of damages that the plaintiff might prove in the second stage trial of the action.

2. The costs of the trial in respect of the separated issue of liability shall stand over for later determination by the court seized of deciding the remaining issues in the action, or by agreement between the parties.

A.G. BINNS-WARD
Judge of the High Court

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