

REPUBLIC OF SOUTH AFRICA

**SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: A5002/11

DATE:18/10/2011

NOT REPORTABLE

In the matter between

JUAN PIETER VERMEULEN

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

Appeal – against an order of absolution of the instance granted at the end of the plaintiff's case – principles applicable – no reason to interfere - appeal dismissed

J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal by the plaintiff in the court *a quo*, the appellant before us, against the judgment and order of Mayat J, in this Division, absolving the defendant in the court *a quo*, the respondent before us, from the instance with costs, at the end of the plaintiff's case. Leave to appeal having been refused the appeal is with leave of the Supreme Court of Appeal.

[2] The appellant sued the respondent for damages in respect of personal injuries arising out of a motor vehicle collision which allegedly occurred on 19 November 2007, in the afternoon, along Orange River Road, in the Kempton Park area. The appellant was riding his motorcycle which allegedly collided

with the insured vehicle, a Volkswagen Golf, at the T-junction of Orange River road with Terenure road.

[3] The trial of the matter in the court *a quo* proceeded on the merits of the appellant's claim only. Two witnesses testified for the plaintiff: firstly, the plaintiff, who as a result of amnesia resulting from the injuries sustained in the collision had no recollection thereof, and secondly, Mr Holliday, who arrived on the scene of the collision shortly after it had occurred. At the close of the appellant's case, the respondent sought and was granted absolution of the instance.

[4] The court *a quo* in its judgment proceeded from the common cause premise that there was no direct evidence to show how the collision had occurred. There were, however, the learned Judge held, many inferences that could be drawn from the evidence of the witnesses who had testified for the plaintiff. As to the inference sought to be drawn by the appellant, which was that the collision had occurred while the appellant's motorcycle was overtaking the insured vehicle which was in the process of executing a right hand turn from Orange River road into Terenure road, the learned Judge held that this was not the most readily apparent and acceptable inference from a number of inferences and "that there were no natural, plausible or reasonable inferences which could be premised upon the limited evidence relating to the incident".

[5] The issue to be decided in this appeal is whether or not the court *a quo* erred in finding that it was not persuaded that any reasonable inferences could be drawn from the evidence, relating to the liability of the driver of the insured motor vehicle which had allegedly collided with the plaintiff's motorcycle, either as alleged in the plaintiff's particulars of claim, or at all.

[6] There was a paucity of evidence at the trial: the appellant's evidence was confined to the fact that he had, prior to the collision, left his workplace on his way home and therefore did not take the matter any further. Holliday, who was likewise employed there, at approximately the same time, driving his motor vehicle, proceeded home. He testified that the appellant was riding his motorcycle ahead of him along Orange River Road. At some stage he realised

that “something” was happening in the road some 200 meters in front of him. When he reached that very spot he found that the appellant had been involved in an accident and that he was lying on the ground in the middle of the oncoming lane, next to where Terenure Road leads into Orange River Road from the right. The appellant’s motorcycle was lying in a ditch or culvert some distance away. He also observed the insured motor vehicle which was parked on the left in Terenure Road which is to the right of the intersection as one travels along Orange River Road. He testified that he did not witness the accident itself. He further described the damage consisting of scrape marks that he had observed on the insured vehicle’s front right side.

[7] Holliday evidence concerning the debris was merely the following:

“The debris was on the on-coming side but not ... uhm ... not right on the other side, it was more towards the middle of the road.”

[8] I need to deal specifically with firstly, the photographs depicting the damage caused to the insured vehicle, on its right front, and secondly, an Accident Report Form allegedly completed by a police officer who attended the scene of the accident after the collision. The photographs indeed depict the damage I have referred to, on the right front of the insured vehicle. As for the accident report form, under the heading “**BRIEF DESCRIPTION OF THE ACCIDENT**”, the following is recorded as the insured driver’s version of the collision:

‘Put indicator on to turn right. Took turn to the right. Noze (sic) of car was ± 30 cm over dached (sic) line. Bike was overtaking on right hand side at a very fast speed. Bike crashed into car on the right front side of car. Bike rider was catapulted onto road ± 30 m further & bike landed ± 30 m on shoulder of road. Bike rider had serious injuries.’

[9] Much of the argument before us turned on the admissibility of the accident report form. The appellant premised the contention that the accident had occurred while the appellant was overtaking the insured vehicle which was executing a turn to the right, on the version of the insured driver as recorded in the accident report. This is at odds with the opening address of counsel for the appellant, at the commencement of the trial, when he informed the court that:

'...the evidence will be that the plaintiff came along this road (Orange River road) travelling in the same direction as the insured vehicle and the insured vehicle turned to enter a side street to the right (Terenure road) and as the plaintiff was in the process of passing him he clipped the motorcycle and the plaintiff fell on the road and sustained some devastating injuries.'

Although there was no direct evidence as foreshadowed in counsel's opening address, the appellant before us, as in the court a quo, relied on the inference I have referred to, which, so the argument went, consequently imposed on the insured driver, as a matter of law, an obligation to ensure that it was opportune and safe to execute an inherently dangerous manoeuvre in turning to the right which he *prima facie* had failed to do resulting in the collision occurring.

[10] The accident report was neither admitted nor proved in evidence. It was handed in by counsel for the appellant as part of a "merits" bundle at the commencement of the trial. It had apparently been discovered by the respondent. It was moreover not referred to at all in the evidence. It only featured in argument before Mayat J. Concerning this document the learned Judge held, firstly, that the description of the accident in the report did not sustain any of the grounds of negligence set out in the particulars of claim and secondly, that it had not been proved by the evidence of the police officer who was the author thereof. It is only the finding concerning the admissibility of the report that requires comment. In my view the finding was correctly made. The report did not by its mere production, as it were, as part of the appellant's merits bundle and in the absence of an agreement between the parties concerning either its admissibility or provisional evidential value, become admissible (Cf *Southern Insurance Association v Cogill and Another* 1978 (4) SA 128 (A) at 133D-E). Much the same difficulty arises concerning the bundle of photographs depicting the scene of the accident and the damage caused to the insured vehicle, which counsel for the appellant handed up at the commencement of the trial. The admissibility of the plaintiff's photographs was addressed by counsel for the appellants in his opening address, almost it seems by way of afterthought, when having referred the court a quo to the index to the appellant's bundle of photographs, he interrupted himself in requesting "May I just enquire from my opponent if I may hand in certain photographs?" The response by counsel for the respondent, if any, has not

been recorded and appellant's counsel without more ado proceeded to hand the photographs in. This Court accordingly is left in the dark as to the exact status thereof although nothing eventually turns on this. The procedural ineptitude again illustrate the need of this Court reaffirming the salutary practice, as required by the Rules of Court, of addressing the exact status and evidential value of documents that are to be handed in at the trial, prior to the commencement of the trial and further to ensure that the Court is properly informed thereof prior to handing in. It follows that the inference contended for by the appellant, was correctly rejected by the court a quo.

[11] All that remains is to consider whether on the evidence that was presented in the court a quo, the appellant, at the close of his case, had discharged the onus to "convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of inferences" as was held in *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615B or, as it was stated earlier in *Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H:

'...daar nie 'n opweging van verskillende moontlike afleidings sou geskied nie, maar slegs 'n bepaling of een van die redelike afleidings ten gunste van die eiser is.'

The evidence placed before the court a quo was circumstantial and crucial aspects which seem to have been readily ascertainable were simply overlooked. In the regard I merely need to refer to the absence of evidence as to the direction of travel of the vehicles prior to the collision, the exact location on the road surface of the debris Holliday had observed and what the nature of the debris was. It is for these reasons that counsel for the respondent, not without merit I should add, challenged the appellants contentions based on aspects that had not been proved, such as the direction of travel of the vehicles. In passing it need mentioning that maxim of *res ipsa loquitur* does not apply (Cf *Road Accident Fund v Mehlomakulu* 2009 (5) SA 390 (ECD)) which in any event was not contended for. The totality of the evidence in summary shows, post accident, the position of the appellant, his motor cycle, the presence of debris on the roadway, the position of the insured vehicle and the damage to its right front. An attempt to reconstruct the collision on those facts will necessarily attract conjecture and speculation as opposed to

inferences that can properly be drawn from objective facts proven by the evidence (Cf *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733).

[12] For these reasons I am satisfied that the learned Judge a quo correctly concluded that there was simply no evidence to support an inference of negligence concerning the insured driver resulting in, at the close of the plaintiff's case, there not being evidence upon which a court applying its mind reasonably to such evidence, could or might find for the plaintiff (*Gascoyne v Paul and Hunter* 1917 TPD 170). It follows that the appeal must fail.

[13] In the result the appeal is dismissed with costs.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

NF KGOMO
JUDGE OF THE HIGH COURT

I agree.

V NOTSHE
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT ***ADV JJ WESSELS SC***
APPELLANT'S ATTORNEYS ***MUNRO FLOWERS & VERMAAK***

COUNSEL FOR THE RESPONDENT ***ADV (Ms) A VILJOEN***
RESPONDENTS' ATTORNEYS ***LINDSAY KELLER & PARTNERS***

DATE OF HEARING ***19 SEPTEMBER 2011***
DATE OF JUDGMENT ***18 OCTOBER 2011***

