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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 3676/11

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

RIDLY STEVEN FABRINSO

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] The plaintiff, an adult male has instituted a damages action against the defendant for certain bodily injuries he sustained in a motor vehicle collision that occurred on 26 October 2008. At the time of the collision, he was a pedestrian, walking in Silver Street, Eldorado Park when he was hit from behind by an unidentified insured motor vehicle.

[2] In the particulars of claim at paragraphs 5 and 6 thereof, the plaintiff alleged as follows:

“ 5. The aforesaid collision was caused solely as a result of the driver of the insured motor vehicle, who was negligent in one or more of the following respects:

5.1 He failed to keep a proper lookout;

5.2 He travelled at an excessive speed in the circumstances;

5.3 He failed to keep the insured vehicle under proper control;

5.4 He failed to apply brakes timeously, alternatively adequately, further alternatively at all;

5.5 He failed to give the Plaintiff proper warning of his approach;

5.6 He failed to avoid the collision when by the exercise of reasonable care, he could and should have done so.

6. As a result of the collision the plaintiff sustained bodily injuries the nature and extent of which are set out in a narrative report drawn by Dr. Enslin. The report is annexed marked ‘A’.”

[3] In its plea the defendant denied negligence on the part of the unidentified insured driver and in paragraph 5 thereof, specifically pleaded the following:

“5.1 The Defendant denies that the insured driver was the sole, alternatively, a cause of and that he/she was negligent in any of the respects alleged at all in the pedestrian /motor vehicle accident. The Plaintiff is put to proof thereof.

5.2 The Defendant, further to paragraph 5.1 above, pleads that the sole, alternatively, a cause of the pedestrian/ motor vehicle was the negligence of the Plaintiff. The Plaintiff having been negligent in one or more of the following respects:

5.2.1 He/She failed to keep a proper lookout;

5.2.2 He/She failed to avoid a pedestrian/ motor vehicle accident when, by the exercise of reasonable care and/ or due diligence would have been enabled him/her to do so;

5.2.3 He/She conducted him/herself and acted in a manner dangerous to other road users and, in particular, the Defendant's insured driver.

5.2.4 He/ She entered/crossed the road at a time and /or place when it was unsafe and/or inappropriate to do so, alternatively, not permitted;

5.2.5 He/ She entered /crossed the road across the immediate path of travel of the Defendant's insured driver when it was unsafe and/or inappropriate to do so;

5.2.6 He/She failed to stop, slow down, move out of the way or take any other action so as to avoid a pedestrian/ motor vehicle accident when, by the exercise of reasonable care and/ or skill and/ or due diligence, he/she could or should have done so."

The special plea raised by the defendant, was no longer persisted with during the trial.

[4] During the pre-trial, which minutes were filed before court, the parties agreed that the issue of merits and quantum will not be decided separately in terms of Rule 33(4). The defendant had further admitted, the date, time and place of the collision and that an unidentified motor vehicle had collided with the plaintiff, who was a pedestrian at the time. The defendant however disputed that the plaintiff was a pedestrian walking on the pavement when the collision occurred and the issue of negligence on the part of the insured driver remained in dispute.

THE DISPUTE

[5] The matter comes before me for the determination of the *liability* and the *quantum* of damages suffered by the plaintiff. In the event of the plaintiff being successful on the merits, I was called upon to decide the quantum of general damages. The parties having agreed to an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996 for the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of

goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 26 October 2008. The loss of earning capacity of the plaintiff is to be postponed *sine die*.

THE EVIDENCE

[6] The plaintiff, Mr Steven Ridly testified that on 26 October 2008 he was a pedestrian walking alone in Silver Street, Eldorado Park at around 22h00 at night. He was walking on the pavement at the time. He was from his mother's house where he had his dinner earlier on, going to his father's house where he resided. He described Silver Street as a tarred road, in a residential area and although it was not a main road, it was one used by taxis on a frequent basis and a road familiar to him. Silver Street was further described by him as dark on the evening and it had no streetlights illuminating the area. As he was walking along, his next recollection was when he woke up in hospital having lost some of his teeth.

[7] During cross-examination he further testified that the street where the collision occurred was situated in a built up area with houses on either side. Furthermore that the pavement that he was walking on was at least a metre in width and that he could not recall as to whether he was walking closer to the edge of the road or closer to the houses on the pavement. He also conceded that Silver Street had streetlights as is depicted on Exhibit A page 7. It was his testimony that on the evening in question there were not many people in Silver Street and that prior to being struck by the unidentified motor vehicle he was unable to see or hear it approaching him from behind. Mr. Ridly further conceded that he was walking with his back facing on-coming traffic and that he could just as easily have walked on the other side of Silver Street where he would have been able to face on-coming traffic. He also conceded that if it was to be accepted that the collision occurred on the pavement as testified too by him, then the unidentified motor vehicle would have mounted the pavement in order to have collided with him. He also gave evidence that he passed Grade 12 at school and was gainfully employed at the time of the collision.

[8] The plaintiff then closed his case.

[9] The defendant closed its case without tendering of any *viva voce* evidence.

ON MERITS

[10] The plaintiff's evidence was that the collision occurred on a pavement (sidewalk). This portion of his evidence is uncontradicted as the defendant presented no evidence in rebuttal. A sidewalk is part of the street specifically allotted to pedestrians. A pedestrian is not obliged to anticipate that a motor vehicle will either directly or indirectly intrude on his or her way. That would conflict with the whole purpose of a sidewalk.¹ In normal circumstances a reasonable pedestrian on a sidewalk would not foresee that a vehicle would without warning come from behind mount the pavement and struck him.

[11] During closing argument, counsel acting on behalf of the defendant argued that the plaintiff was under a duty to keep a proper lookout for vehicles travelling along Silver Street and that the plaintiff was further under a duty to walk on the side of the road facing on-coming traffic. I cannot find favour with the first leg of counsel's argument. This I say so, because it would have been expected of the plaintiff to keep a proper lookout, if the collision occurred on the road, or before an entrance, in the process of the insured driver executing a turn into the entrance. The evidence presented before me, does not point to this. Whilst it might be so that a pedestrian walking on a road should as far as possible walk on the edge of the road facing on-coming traffic, this requirement is only set in Regulation 316 (2)² of the National Road Traffic Act, Act 63 of 1996, where the public road in question has no sidewalk or footpath. In the present matter the road in question did have a sidewalk. Furthermore, in a built up area such as where this collision occurred a host of other driving manoeuvres could potentially have been performed by a driver that even if the plaintiff was walking facing on-coming traffic a collision having occurred that night could not have been excluded. What spring to mind are the driving manoeuvres where drivers perform U-turns in order to change their course of direction, or where drivers decide to stop on a sidewalk without the road signs permitting them to stop. As a result I cannot find the actions of the plaintiff as to where he was walking that evening to be indicative of any negligence on his part.

¹ See *Mashigo v Santam Assuransie Maatskappy Bpk* 1973 (1) SA 156(A)

² Regulation 316 (2) "A pedestrian on a public road which has no sidewalk or footpath abutting on the roadway, shall walk as near as practicable to the edge of the roadway on his or her right-hand side so as to face oncoming traffic on such roadway, except where the presence of pedestrians on the roadway is prohibited by a prescribed road traffic sign."

[12] On the liability thus the defendant is held liable to compensate the plaintiff 100% of such damages as the plaintiff is able to prove as a result of the collision which occurred on 26 October 2008.

ON QUANTUM

[13] The parties before this court were in agreement that this court should award R 60 000 as general damages, barring any apportionment that the court might award in the event of this court making a finding of any apportionment. Furthermore in addition to the above, as was previously stated in this judgment, the parties were further in agreement that the plaintiff is to be issued with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of future medical expenses.

ORDER

[14] In the result the following order is made:

14.1 The defendant shall pay the plaintiff 100% of the plaintiff's agreed or proven damages;

14.2. The defendant shall pay the plaintiff the amount of R 60 000 in full and final settlement of the plaintiff's claim for general damages arising out of a motor vehicle accident which occurred on 26 October 2008;

14.3 The defendant shall furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1956, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment or rendering of service to him arising out of the injuries sustained by him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 26 October 2008;

14.4 The payment of the amount set out in paragraph 14.2 shall be made on or before 10 October 2016 into the Plaintiff's attorney's bank account, the details of which are set out as follows:

Name of account holder: Raphael and Dawid Smith Incorporated Trust Account

Bank name : First National Bank

Branch name : Rosebank

Account number : 50.....

Type of account : Trust account

Brach code : 2.....

14.5 The defendant shall pay the plaintiff's taxed or agreed party-and-party costs. The plaintiff shall, in the event that the costs are not agreed, serve the notice of taxation on the defendant's attorneys and the plaintiff shall allow the defendant seven (7) court days to make payment of the taxed costs;

14.6 The costs shall include the costs of the plaintiff's experts including Dr Condie, Dr T Enslin, Dr Schnaid, Drs Matisonn & Scott, Wilma van der Walt, Marc Peverett and Munro Consulting;

14.7 The issue of loss of earning capacity is postponed *sine die*;

14.8 It is recorded that there exist no contingency fee agreement between the plaintiff and the plaintiff's attorneys of record.

C.J COLLIS

ACTING JUDGE GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

Counsel for the Plaintiff : ADV. I. SMITH

Instructed by : RAPHAEL & DAVID SMITH INCORPORATED

Counsel for the Defendant : ADV. N. MAYET-BEUKES

Instructed by : DIALE ATTORNEYS

Date of Hearing : 28 JULY 2016

Date of Judgment : 9 SEPTEMBER 2016

