

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO.
(3) REVISED. ✓
14/4/2010
DATE SIGNATURE

1

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG NORTH DIVISION)

CASE NO: A.406/07

15/4/2010

In the matter between

MAKGANOTO, M.F.

Appellant

and

JEENATH, YACOOB T/A BADUPE
TRADING STORE

Respondent

CORAM: PRINSLOO J. et EBERSOHN AJ

HEARD ON: 1 APRIL 2010

DATE JUDGMENT HANDED DOWN: 15 APRIL 2010

JUDGMENT

EBERSOHN AJ:

[1] In this judgment the parties will be referred to as in convention.

[2] The plaintiff sued the defendant in the magistrate's court pursuant to a

collision which occurred on the 13th June 2003 between his car, driven by his wife, and the defendant's light delivery van, driven by the defendant himself.

[3] At the commencement of the trial the merits and quantum were separated by agreement between the parties.

[4] The plaintiff's wife was the only witness called on his behalf with regard to the merits.

[5] Only the defendant testified.

[6] After hearing evidence and argument the magistrate granted judgment in the plaintiff's favour with regard to the merits and when the matter resumed for the hearing of evidence with regard to the quantum, the defendant's attorneys advised the plaintiff's attorney that there would be no appearance on behalf of the defendant and that judgment regarding the quantum could be taken by default. The plaintiff's attorney, however, called a panelbeater, one Schulman, to verify the damages to the plaintiff's car and after giving evidence the magistrate granted judgment in the plaintiff's favour in the amount of R20 667,97 with costs and dismissed the counterclaim.

[7] The defendant noted an appeal against the magistrate's judgment to this Court.

[8] The appeal was enrolled to be heard by Molopa J and Mothle AJ in 2009 but was struck from the roll with the wasted costs reserved. The Court noted from an affidavit filed on behalf of the defendant and deposed to by an attorney, one Simon Rautenbach, that due to an oversight in his office counsel was not timeously briefed to prepare the heads of argument causing the matter to be struck from the roll in 2009.

[9] At the commencement of the hearing of the appeal Mr. de Beer, who appeared for the appellant, moved an amendment to supplement the appeal grounds with the following:

"Dat die Agbare Hof gefouteer het deur te vind dat die Eiser die eienaar van die voertuig is, alternatiewelik of hy die risiko van skade aan die voertuig dra."

The application to amend was, however, abandoned after the Court was addressed on the merits of the amendment, and the appeal was then argued.

[10] Before the magistrate were two conflicting versions. The plaintiff's wife testified that she was driving at a speed of about 60-80 kilometres per hour in the left hand lane after entering the highway and had driven about 500 metres on the highway and was then overtaken by a vehicle which was driving in the right hand lane and she testified that she then saw a light delivery van also driving in the right hand lane, approaching from her rear at a speed higher than she was driving at. When the light delivery van was next to her it started veering into the left lane in which she was driving and it struck the car she was driving, with its rear on the right front fender of the car she was driving. The car started spinning uncontrollably and whilst it was spinning it received another bump at its rear end from the light delivery van. Both vehicles then came to a stop. She testified that the light delivery van had a canopy on and that the front windows thereof were darkened.

[11] She did not falter in her evidence under cross-examination.

[12] The plaintiff's case was then closed.

[13] The defendant then testified on his own behalf. According to him he was

driving in the right hand lane and that he did not see the plaintiff's car at all before the collision occurred and whilst driving he suddenly heard a bang on the left hand door of his light delivery van.

[14] It was his case that the plaintiff's vehicle was not in front of him and must have approached him in the left lane from the rear and he conceded that he did not look to the rear and to the left of the light delivery van. He conceded that he did not look properly for traffic on his left.

[15] The version of the defendant is difficult to believe and it was rejected by the magistrate. If his version was true, the question arises as to why would the plaintiff's wife, if she was approaching the defendant, who was driving in the right hand lane, when she was next to the light delivery van, which would then be on her immediate right, against all probabilities, veer to the right and collide with the light delivery van.

[16] The magistrate accepted the version of the plaintiff's wife and rejected the version of the defendant.

[17] The plaintiff's wife was not joined as a party in the case and if the defendant is found to have been negligent the plaintiff must succeed in full with his claim and there could be no apportionment of damages.

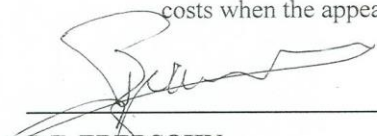
[18] Mr. de Beer argued that the version of the plaintiff's witness was not put to the defendant and that the magistrate accordingly should have granted absolution. In this regard Mr. de Beer is mistaken as it appears almost at the bottom of typed page 23 of the record that it was in fact put to the defendant in cross-examination.

[19] A Court of appeal will not readily interfere with a lower court's decision regarding a finding of fact (See *R v Dhlumayo and Another* 1948(2) SA

677(AD)) and in this matter there is no need to interfere with the magistrate's findings and the appeal cannot succeed.

[20] I propose that the following order be made:

1. The appeal is dismissed with costs, such costs to include the wasted costs when the appeal was struck from the roll by this Court in 2009.


 P.Z. EBERSOHN
 ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:


 W.R.C. PRINSLOO
 JUDGE OF THE HIGH COURT

Appellants' counsel
 Applicant's attorneys

Adv. L. DE BEER
 VEZI DE BEER INC.
 S. RAUTENBAKH/JVDH/V367
 Ref. Mr. Dreeckmeier/TD/1910
 9918283
 Tel. 012x346 7588

Respondent's counsel
 Respondent's attorneys

Adv. N. Erasmus
 Thys Cronje Inc.
 Ref. Mr. T. Cronje KJ0018
 Tel. 012x362 4959