

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 5 MAY 2010

CASE NO: 34797/08

In the matter between:

MPUTI SEHLABANE

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PHATUDI (J)

[1] The Plaintiff instituted this action against the defendant for damages sustained as a result of accident that occurred on 31 March 2007. The Plaintiff was a pedestrian when knocked off by a motor vehicle bearing registration number and letters B[...] (insured motor vehicle) driven by Dumisane Nzimande (insured driver).

[2] At the commencement of the trial I ordered separation, in terms of Rule 33(4) of the Uniform Rules of the Court, of the merits and quantum at the instance of parties' agreement.

[3] Mr Kekana, counsel for the Plaintiff, placed on record that the parties agree, as a matter of common cause, that (i) the accident did indeed occur on 31 March 2007. (ii) The insured motor vehicle was indeed driven by the insured driver. Mr Knoetze, counsel for the Defendant confirmed. He, however, submitted that the Defendant's version differs with that of the Plaintiff. He submitted that the court will have to determine which of the versions is correct and that the insured driver was not negligent. He further submitted that the Defendant relies on sudden emergency.

[4] The Plaintiff testified that he went with his brother to a party after having had some few drinks. A quarrel

ensued at the party between other people and himself. The person he quarrelled with entered the motor vehicle and occupied the front passenger seat. He immediately thereafter left with his brother for home, leaving the motor vehicle at the party house. On their way home, while they were about to cross the tarmac road, a motor vehicle approached from behind. The motor vehicle struck him on his left side. The occupant of the motor vehicle ferried him with intent to take him to the hospital. He, surprisingly, was dropped off approximately 350m from the scene of accident.

[5] The Plaintiff noted the Defendant's version with dismay when put to him under cross examination that (i) he (Plaintiff) was in the middle of the road refusing to give way for the motor vehicle. Further that the Defendant revved the motor vehicle but to no success and there after the motor vehicle knocked him and fell underneath the motor vehicle.

[6] On the other hand, the insured driver testified that at the party one gentleman, who later appeared to be the Plaintiff, quarrelled with one of the people in his company. He managed to calm them down. A group of people blocked the road preventing them from driving off. They were later let off with one Lorraine alighted some few meters ahead of the main tarmac road (the road from Polokwane to Burgersfort). Shortly thereafter, the Plaintiff and his brother, stood in front of his motor vehicle with stones in their hands. He estimated their distance from the motor vehicle at 3¹/₄ meters. He then drove slowly toward them with intent to negotiate with them. At a distance of about 1(one) metre to the Plaintiff, he realised that the road was widening in a V shape. He at that moment accelerated more with the motor vehicle on its first gear. Shortly thereafter, the Plaintiff jumped on the side of the motor vehicle and the motor vehicle struck him. The motor vehicle struck him by its left front next to the front head lamp.

[7] Mr Kekana submitted that I should find in favour of the Plaintiff based on the Plaintiffs version. He refers me to **Rv Du Plessis 1948 (2) SA 302 fC) and R v GISHION 1948 (2) SA 131 (T)** and submits that the Defendant's defence of sudden emergency be rejected on the basis that the insured driver had time to consider other alternative actions at that time. He further submits that sudden emergency is only acceptable if there is no other alternative available for the insured driver.

[8] In rebuttal thereto, Mr Knoetze, the defence counsel, submit that the principles set out in the cases referred to by counsel for the Plaintiff, are Criminal Law principles and are of no force or effect on this matter. He refers me to **National Emergency vs. Ganv 1931 AD 187** where the court held that where there are two (2) conflicting versions, the court must find in favour of the Defendant. He concedes that there were alternative options available at the insured driver's disposal. He however, submitted that sudden emergency is the Defendant's defence. He stated that that principle on sudden emergency is what a reasonable person in the position of the insured driver would do in the circumstances. He submits further that the insured driver

was under immediate threat of physical violence by the Plaintiff. He finally submit that the court should find in favour of the Defendant by dismissing the Plaintiff claim as the Plaintiff failed to proof its case on a balance of probabilities.

[9] Sudden emergency is summarised in *Thornton and Another v Fisser 1928 AD 398 at 412* as quoted by Els J in *Ntsala and others v Mutual & federal Insurance Co Ltd 1996 (2) SA 184 (T)* at page 192 as “a man who,... by some unforeseen external contingency, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.”

[10] The court further held that “a party to an action can only rely on the doctrine of sudden emergency if and when the sudden emergency in which he finds himself is not his own doing”. It is further stated that “if the insured driver’s action or neglect are the reason or cause of the sudden emergency, he can for that reason be found to be negligent.”

[11] According to the insured driver, the Plaintiff was standing in the middle of the gravel road just before the road widens up toward the Polokwane- Burgersfort tarmac road. The Plaintiff had stones in his hand some 3 metre ahead. He thought of alighting the motor vehicle with a view to negotiate with the Plaintiff to move away from the road. He conceded that the Plaintiff did not throw any stones at his motor vehicle. He, instead, “accelerated more” or revved the motor vehicle more that made a high rev sound. He, at that moment, thought of swerving towards his right on to the widening portion of the road but Plaintiff, as he allege, jumped in front and was as a consequent, struck by the motor vehicle.

[12] I, in my evaluation, infer that the insured driver revved the motor vehicle more to instil fear to the Plaintiff by the high rev sound with intend to scare Plaintiff. In my view, the insured driver’s attitude was, at that moment, that of “you either give way or I run you over.”

[13] Accepting that the Plaintiff had taken some alcohol, he in my view, could have “jumped off” trying to give way but could not do so timeously due to his weak reflexes impaired by alcohol. He thus failed to judge or ascertain as to which direction the motor vehicle was going to turn to. He could not remember what happened to date. He only became aware that he landed underneath the motor vehicle when the defence version was put to him under cross- examination. He eyes “popped out” when that version was put to him.

[14] Counsel for the Defendant submits that the onus of proving the insured driver’s negligence rest with the Plaintiff. I indeed agree with the counsel submissions. This principle has been applied in Ntsala’s case where the court was “satisfied that the onus rests throughout on the Plaintiff to prove negligence on the part of the Defendant, the latter must produce evidence to the contrary; he must tell the remainder of the story, or take a

risk that judgment be given against him. (page 190F).

[15] Considering the Plaintiff's testimony, an inference can be drawn that the Defendant was negligent. It is probable, in my view, for a motor vehicle, coming from behind the pedestrian, to strike him on the left. Even though there was no sketch plan that was drawn for the convenience of the court, I managed to comprehend exactly how the accident, on the evidence tendered, could have happened.

[16] The explanation the insured driver furnished on the part of his conduct that either excludes negligence on his party or is equally consistent with negligence, he allege that the Plaintiff was standing 1 meter away from the motor vehicle than in the middle of the road with the Plaintiffs left side facing the motor vehicle with stones in his hands. He conceded that there were no stones pelted at his motor vehicle either at the party or by the group that earlier "blocked" their way. He further conceded that the group never chased after them and that there was no threat of throwing the stones at the motor vehicle. The Plaintiff only had the stones in his hands.

[17] In *Msutu v Protea Assurance CO Ltd 1991 (1) SA 583 (C)* where the insured driver had left his car for the aid of a woman who was being assaulted by a group of persons, that he himself was been assaulted and when passing the group of attackers, they started throwing stones at the car, some of which hit the motor vehicle. One of the stones hit the windscreen, cracking the entire windscreen in such a manner that it was difficult to see through it. The driver ducked his head and drove on to escape. He knocked down the Plaintiff. The court held that the insured driver was not negligent in continuing to drive his car when the windscreen had been smashed by one of the stone thrown at him, and driving with his vision thereby impaired. The court further held that "in the sudden emergency, in which the insured driver found himself, with his life threatened, he could not be blamed for continuing to make his escape and he was not at fault in running the Plaintiff down".

[18] The insured driver's motor vehicle was never pelted with stones at the party, by the group that "blocked" their way or by the Plaintiff at the scene of the accident. The insured driver, who initially thought of negotiating with the Plaintiff, was, in my view, not in a "life threatening" situation at the time the accident occurred. The sudden emergency the Defendant alleges to have found himself in is, in my view, of his own doing by his attitude of "get of the road or run the risk of been run over." Causing the high sound by revving the motor vehicle higher instilled, in my view, fear on the part of Plaintiff whose reflexes and sense of judgment has been impaired by the intake of alcohol, could have jumped with intent to "give way" to the revved motor vehicle. He, unfortunately, was run over.

[19] I am further of the view that a reasonable man, in the position the insured driver found himself, would have acted differently by either pursuing the negotiation process with the Plaintiff with Loraine assisting. I

find the insured driver's life to have not being in danger.

[20] I, as a result, find the insured driver to have been negligent and the Defendant stands to compensate the Plaintiff's proven or agreed damages.

[21] I, thus make the following order;

1. The Defendant is liable to compensate the Plaintiff's proven or agreed damages;
2. Defendant is ordered to pay Plaintiffs costs of this trial on party and party scale;
3. The determination of quantum is postponed sine die.

AML PHATUD1

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 26 APRIL 2010

For the Appellant: Adv Kekana

Instructed by: Messrs Mphahlele

For the Respondent: Adv Knoetze

Instructed by: Messrs K Mortimer

Date of Judgment: 5 MAY 2010