



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 58510/2008

DATE: 26/5/2010

DELETE WHICHEVER IS NOT APPLICABLE

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

14/05/10

DATE

SIGNATURE

IN THE MATTER BETWEEN

F M NTUMBA

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

OMAR, AJ

- [1] This is an action for damages arising out of severe bodily injuries sustained by the plaintiff during a motor vehicle collision which occurred on 8 February 2008 at the intersection of Gibson and Buccleuch Roads, Johannesburg, when the motorcycle which he was riding collided with a white Ford light delivery vehicle

(the insured vehicle) driven by one L J Ramonyai (the insured driver). The plaintiff has been rendered a quadriplegic as a result of the injuries sustained during the said collision.

- [2] At the commencement of the hearing the parties by agreement requested the court to order that the issues of the merits and *quantum* be separated in terms of the provisions of rule 33(4). The order was granted and the matter accordingly proceeded on the merits. The issue of *quantum* of the plaintiff's damages was postponed *sine die*.
- [3] The plaintiff alleges that the insured vehicle executed a right hand turn in front of him at the last possible moment as a result of which he could not avoid the accident. He collided head on with the insured vehicle. His last recollection was one of being flung over the insured vehicle.
- [4] The defendant's version, based on a statement by Ramonyai, was that the insured vehicle had come to a standstill on his correct side of Buccleuch Road in an obligatory right turn lane, where he waited for the plaintiff to pass. The plaintiff's motorcycle approached at high speed and skid on the water, as a result of which he lost control and collided with the insured vehicle's right hand side whilst it was on its correct side of the road.

- [5] It is common cause that the plaintiff carries the *onus* to prove negligence on the part of the insured driver on a balance of probabilities. The defendant's defence is essentially one of a denial that the plaintiff was involved in the collision and the defendant avers that the collision was caused exclusively by the negligence of the plaintiff. The defendant does not rely on a plea of contributory negligence in terms of the provisions of the Apportionment of Damages Act 34 of 1956. Accordingly the sole dispute is whether the insured driver was negligent to some or other degree. A number of photographs were handed in as exhibits at the trial.
- [6] The plaintiff testified himself and called his brother Mr Chi-Chi Ntumba (Chi-Chi) and sister Ms Tete Ntumba (Tete) as witnesses. The defendant called the insured driver to testify on its behalf. No other witnesses were called by the defendant.
- [7] The plaintiff testified that he left his home, which is about one kilometre from the accident scene at about 07:30. It was a clear day and the road surface was dry. The headlight of the motorcycle was switched on as it occurs automatically when the motorcycle is switched on. He was riding the motorcycle at a speed of between 40 and 60kph along Buccleuch Road on his correct side of the road. As he approached the intersection of Buccleuch and Gibson Roads, he noticed the insured vehicle on the opposite side of Buccleuch Road where it was standing in a lane reserved for vehicles which were obliged to turn right which is clearly depicted on the photographs which were handed in as exhibits at the trial.

When he was very close to the insured vehicle it suddenly turned to its right as a result of which he collided with the front left side of the insured vehicle. Although he attempted to apply brakes there was nothing he could do to avoid the collision as he was already too close. He was flung over the insured vehicle and could not remember anything after that. He was rendered unconscious. He did not drive fast and he could not swerve to the left as he was already too close to the insured vehicle. There was no reason to avoid water as there was no water to avoid. He is sitting in a wheelchair due to the injuries he sustained as a result of the collision.

- [8] On cross-examination by counsel for the defendant the plaintiff was adamant that there was no water which ran across the road which prompted him to take evasive action to avoid the water causing his motorcycle to slip and collide with the insured vehicle. He also denied that he had travelled in excess of the speed limit.
- [9] The second witness Mr Chi-Chi Ntumba testified that an unknown man informed him that his brother had been involved in an accident. He rushed to the scene accompanied by his sister, Ms Tete Ntumba. He saw the insured vehicle where it was stationary in a partially turned position across the lane of travel which the plaintiff would have followed up Buccleuch Road. He also saw the motorcycle which the plaintiff rode lying on the road surface a short distance in front of the insured vehicle. The plaintiff was lying against the pavement in a stream of water

running down the left hand side of the lane in which the plaintiff was travelling. This water was running into an adjacent gutter. The plaintiff was unconscious. A short while later after he spoke to him the plaintiff regained consciousness. There was no water running across the road. The only water was the small stream of water running down the side of the road into the gutter. The road surface was not wet. He saw damage on the front of the insured vehicle but could not remember exactly where.

[10] During cross-examination by counsel for the defendant, it was put to the witness that the insured driver will say that the collision took place whilst he was still on his correct side of the road but that the vehicle had run forward after the collision because the insured driver had not fully applied the handbrake. This was denied by the witness. This version was not put to the plaintiff.

[11] The third witness Ms Tete Ntumba testified that she arrived at the scene shortly after the collision with her brother, the second witness. Her evidence accorded essentially with that of the second witness. She also took photographs of the motorcycle after it had been moved onto the pavement some time after the accident. She saw the damage to the front of insured vehicle somewhere between the headlight and the grill.

On cross-examination she could not say how much water was flowing into the gutter as she did not pay attention.

- [12] The insured driver Mr L J Ramonyai, testified that he was travelling from west to east on Buccleuch Road, approaching the Gibson Street intersection. He intended to turn right into Gibson Street and that he indicated to turn as he was approaching the intersection. When he reached the place where he was about to turn, he saw the plaintiff approaching the intersection. The road is not a straight road, it has curves. He was not turning at that stage and he saw the motorcycle approaching on the island. As he was slowing down to turn right at the intersection in the right hand turn lane, the plaintiff travelled into his lane and collided with his vehicle on the front right of the vehicle. His vehicle was stationary when the collision occurred. After the collision, he went out to check with the plaintiff and his vehicle moved a little to the right side for approximately two metres. He jumped back into the car and re-applied the handbrake. The motorcycle was travelling fast approximately 130-140kph. There was water on the side of the road.
- [13] On cross-examination by plaintiff's counsel the witness testified that the water did not play any part in the collision and the motorcycle went straight on the island proceeding straight into his vehicle. When confronted with his written statement which formed the basis upon which the defendant defended the action, he testified that his statement was drawn up by his uncle who was able to formulate things more understandably in English. He confirmed that he read the statement before he signed it and he was aware that it was important to convey correct information regarding the collision to the attorneys for the defendant who had requested him

to provide the statement. He indicated that he could read and write and in fact read out the statement in English in court. When confronted during cross-examination with the conflicting version contained in his statement, compared to his evidence, he denied that he read the statement. He also testified that the two passengers sitting next to him in the insured vehicle said that they did not see anything until at the moment of impact. The witness could not give a reason why the motorcycle came straight at him on his correct side of the road and collide with his vehicle. He indicated on photograph 1 of the exhibits where the motorcycle was when he saw it for the first time and estimated the distance initially to be between 80 and 100 metres and reduced it later to approximately 70 metres.

[14] The plaintiff and the witnesses who testified on his behalf created the impression of truthfulness and there was nothing improbable in their versions. The plaintiff stood up well to cross-examination. He did not contradict himself and was consistent and confident. No challenge of substance was also launched on any aspect of their evidence in cross-examination. I have found the plaintiff and the witnesses who testified on his behalf to be credible and reliable witnesses.

[15] Mr L J Ramonyai, the only witness for the defendant and who was the driver of the insured vehicle, was not a very impressive witness.

As mentioned earlier, he was confronted in cross-examination with his written statement which formed the basis upon which the defendant defended the action. He testified that his statement was drawn up by his uncle who was able to formulate things more understandably in English. He confirmed that he had read the statement before he signed it. He was aware that it was important to convey correct information regarding the collision to the attorney for the defendant who had requested him to provide the statement. He indicated that he could read and write and in fact correctly read out the statement in English in court. His evidence was that he had noticed that certain aspects which he did not understand when he read it the first time after his uncle had written it. During cross-examination when confronted with the conflicting version contained in his statement, compared to his evidence, he denied that he read the statement. This conflicts with his evidence that he had read it and even noticed aspects which he had not understood. It is also highly improbable. The version in the statement is not reconcilable with his evidence in court.

- [16] Ramonyai testified that he assessed the speed of the motorcycle as between 130 and 140kph, a version which was never put to the plaintiff. He is unlikely to have conveyed this version to the defendant's legal representatives. Had he done so, it is inconceivable that that version would not have been put to the plaintiff. His version seems to have been adjusted as he testified. The defendant's case was premised on, *inter alia*, the excessive speed at which the plaintiff is alleged to have travelled. The issue of speed must have been canvassed with Ramonyai by

the defendant's counsel – hence the suggestion to the plaintiff during cross-examination that he travelled at a speed in excess of 60kph. It would have been expected of Ramonyai to have told defendant's counsel of his estimation of the speed because it would specifically have been canvassed with him. It is inconceivable that an issue so central to the dispute would not have been put explicitly to the plaintiff. The only reasonable inference is that Ramonyai developed his version of the speed as and when he testified.

[17] Ramonyai's version of the collision is that the motorcycle, from a distance, simply carried on straight across the painted island on the incorrect side of the road without slowing down and then colliding head on into a slow moving or semi-stationary vehicle. This version, in the face of ample space to the left and the correct side of the road, and with no other cars on the road to pass safely, is in my view totally improbable. This is why I believe Ramonyai could not offer an explanation or reason why the motorcycle would come straight at him and collide with his vehicle. I find it further highly improbable that Ramonyai would leave his vehicle permitting it to roll forward towards the right for a few metres before bringing it to a standstill. Further, there were two passengers in the front of the vehicle who would not allow the vehicle to roll.

[18] When there are two mutually distinctive versions a decision of absolution from the instance will follow unless the plaintiff's version can demonstrate a higher probability value than the version of the defendant. This is particularly so since

the plaintiff bears the overall *onus* of establishing his case on a preponderance of probabilities. The correct approach for deciding whether a plaintiff has discharged his *onus* was stated in the *dictum* of WESSELS, JA in *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199:

"Where there are two stories mutually destructive / before the *onus* is discharged the court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other false."

- [19] It is essential in this case to determine which of the two versions is the more probable. As indicated earlier, the version of the defendant is beset with inherent improbabilities. Further, the probabilities are certainly not evenly balanced.

I am of the view that it is far more probable that the insured vehicle ended up straddling the lane of oncoming traffic because the collision occurred as testified by the plaintiff.

- [20] I am satisfied that the version of the plaintiff as supported by the evidence of the witnesses on his behalf, is on a balance of probabilities true and reliable and the version of L J Ramonyai is inherently improbable and therefore false.

- [21] There is no doubt in my mind that Ramonyai was negligent in executing a right hand turn across the path of oncoming traffic at a dangerous or inopportune

moment. To turn right is an inherently dangerous manoeuvre and should only be executed when it is clear to do so.

- [22] As indicated earlier, the issue of contributory negligence, given the fact that the defendant does not rely on contributory negligence, does not arise. The defendant did not, in any event, discharge the *onus* which it would have carried, had the issue of contributory negligence been properly raised.

The plaintiff, on his version, had no opportunity to take any other avoiding action which a reasonable driver or rider in his position could and would have taken and which he failed to do. Although the plaintiff does not have an absolute right of precedence and retains the duty to keep a general look-out, [see *National Employers' General Insurance Co Ltd v Sullivan* 1988 1 SA 27 (A)], he is not obliged to anticipate unlawful or reckless conduct from other motorists.

- [23] In the result, I find that the plaintiff has discharged the *onus* of proving that Mr L J Ramonyai was solely responsible for the collision. The defendant is therefore liable to compensate him for 100% of his proved or agreed damages arising from the injuries sustained in and as a result of the collision which occurred on 8 February 2008.

- [24] With regard to the issue of costs, it was conceded by counsel for the defendant that, in the light of the *quantum* involved, the employment of senior counsel is

justified. However, it was submitted by counsel for the defendant that the costs of the plaintiff's expert witness, Prof G Lemmer, should not be allowed in the light of the fact that he did not testify and the speed at which the plaintiff was travelling was challenged and in dispute.

Counsel for the plaintiff submitted that the plaintiff was entitled and that it was reasonable to have employed the services of Prof G Lemmer. Prof Lemmer is an accident reconstruction specialist and his report and notice of his intention to adduce this evidence is contained in the plaintiff's notice in terms of rule 36(9)(b). His evidence would have been relevant on the issue of speed, an issue pertinently raised by the defendant in its plea. Although the defendant does not raise the issue of contributory negligence pertinently, it was anticipated that an amendment may follow to raise the issue of contributory negligence. No amendment followed. Prof Lemmer was present throughout the trial.

It was submitted further that it is trite law that the question of the costs of an expert witness is twofold. Firstly, if the retention of the services of an expert was reasonable, a party should not be deprived of the costs incurred in respect thereof. Secondly, it is usually reasonable to request the attendance of such an expert to hear the evidence regarding the issue in respect of which such expert would be required to testify. The plaintiff acted reasonably in retaining the services of Prof Lemmer and that it was equally reasonable to have required of him to listen to attend to the evidence. Given the fact that there was no serious challenge on

the issue of speed and that the defendant did not elect, even at the last moment, to introduce the issue of contributory negligence, it was not necessary to lead the evidence of Prof Lemmer. However, there is no reason why the plaintiff should not be entitled to his costs for, firstly, obtaining the report of Prof Lemmer and, secondly, the costs or fees of Prof Lemmer for his attendance at court.

I totally agree with the submissions made by the plaintiff's counsel regarding the costs of Prof Lemmer.

Accordingly, I make the following order:

1. It is declared that the defendant is liable for 100% of the plaintiff's proved or agreed damages arising from the injuries sustained in and as a result of the collision which occurred on 8 February 2008.
2. The defendant is ordered to pay the reasonable taxed or agreed party and party costs of the plaintiff on the High Court scale, such costs to include-
 - 2.1 the fees of senior counsel;
 - 2.2 the preparation and reservation fees of Prof G Lemmer (including his attendance at court on 12 April 2010) and the costs of obtaining his report dated 23 March 2010;
 - 2.3 value added tax.

3. As guidance to the taxing master, it is regarded that the following persons were necessary witnesses:

- 3.1 the plaintiff;
- 3.2 Mr Chi-Chi Ntumba;
- 3.3 Ms Tete Ntumba.

4. The costs payable by the defendant shall bear interest at 15,5% per annum calculated from date of affixing the taxing master's allocatur or date of agreement in respect of costs, to date of payment.



S S OMAR

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

58510-2008

HEARD ON:
FOR THE PLAINTIFF:
INSTRUCTED BY:
FOR THE DEFENDANT:
INSTRUCTED BY: