

Reportable/Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH**

Case No: 954/2011

Date Heard: 14/02/12

Date Delivered: 16/02/12

In the matter between

JAKOBUS STEWART KRITZINGER

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

REVELAS J

[1] The plaintiff instituted an action for damages against the defendant as a result of severe injuries he had sustained during a motor vehicle collision which occurred on 8 December 2008, in Uitenhage. The plaintiff was the driver of a green 600 CC Kawasaki motorcycle at the time. The other vehicle involved in the collision (of the insured vehicle) was a light weight Chana truck, driven by Mr Eden Alexander. The accident occurred at the intersection of Caledon Road, which is the main through road in Uitenhage, and Market Street, an access road.

[2] The principal injury sustained by the plaintiff during the accident was a fracture of his lower spine at T 10, which left him a paraplegic confined to a wheel chair, and with the loss of control over his bladder

functions.

[3] On 31 January 2012 an order was made in terms of Rule 33(4) of the Uniform Rules of Court, to the effect that the merits and quantum of the plaintiff's action be separated. The matter therefore proceeded for trial only in respect of the merits.

[4] Many facts in this matter were common cause, such as the date, time and place of the accident, as well as the point of impact and the fact that the insured vehicle (driven by Mr Alexander) ended up in the left hand lane of Caledon Road where the travel direction is east, i.e. in the opposite direction. It is common cause that Market Street enters Caledon Road but does not continue over to the other side of it. Caledon Road is a dual through way, separated by an island which is more than three metres wide and the traffic on either side of it moves in two opposite directions.

[5] The two witnesses for the plaintiff were the plaintiff himself, and Mr Llewelyn Dickson, who was also driving in Caledon Road in the vicinity of where the collision in question occurred. It was further common cause that the plaintiff and Mr Dickson were travelling from east to west in Caledon Road, away from Port Elizabeth, and in that area Caledon Road consisted of two lanes.

[6] It was the case for the plaintiff that Mr Alexander turned into, and attempted to cross Caledon Road at a time when it was not safe or opportune to do so and that this was the sole cause of the accident. The defendant's case was that the plaintiff drove his motorcycle at an excessive speed, and that caused the accident. Therefore it was not liable to compensate him for any damages he suffered as a result of the collision.

[7] According to Mr Alexander, he drove in Market Street and wanted to

turn right into Caledon Road, travelling in the opposite direction, towards Port Elizabeth. To achieve that, he had to traverse both lanes in Caledon Road in which the traffic moved west, and turn right into the other lanes in Caledon Road where the traffic moved east.

[8] Mr Dickson witnessed the collision. He said he was travelling on his bakkie in the left lane of Caledon Road, between three and four o'clock that afternoon, and the road was very busy. The traffic on his side of the island travelled from East to West. About sixty metres before the intersection with Market Street, he had stopped at a robot controlled intersection. Thereafter he continued with Caledon Road towards the Market Street intersection. He was travelling at a speed of about 30 to 40 kilometres per hour. He recalled one motor vehicle driving in front of him, a white Polo. He also noticed the plaintiff in front of him on a motorcycle, but in the right lane. Mr Dickson said he observed the insured vehicle coming out of Market Street, crossing the left lane of Caledon Road in which he was travelling then continuing onto the right lane in which the plaintiff was driving. The plaintiff was about 15 metres away from the insured vehicle at that stage. He saw that the plaintiff's motorcycle fell over onto its side, taking the plaintiff with, and they skidded under the insured vehicle, and perhaps collided with it. The insured vehicle then drove over the plaintiff with its right rear wheel. At the time he thought the plaintiff had applied his brakes so forcefully to avoid colliding with the insured vehicle, that the front wheels collapsed, causing the motorcycle to fall over and skid into the truck. Based on his own observations, he said there was nothing the plaintiff could do to avoid the accident. To the plaintiff's left was the white Polo, and to his right was the island and the road with oncoming traffic travelling in the opposite direction.

[9] Mr Dickson said he immediately stopped his car on the side of the road, close to the collision, and switched off the engine of the plaintiff's motorcycle. He emphasized that the plaintiff was not driving at an

excessive speed, which he estimated to be about 50 or 55 kilometres per hour, and added that being a motorcycle owner and driver himself, he would have recognized the sound of the motorcycle's engine accelerating if the plaintiff had been driving more than 55 kilometres per hour, or at an excessive speed.

[10] The plaintiff also denied that he drove at an excessive speed along Caledon Road. He had also stopped at the robot controlled intersection situated lower down, before Market Street. When the robot turned green he continued with Caledon Road, and he observed two vehicles closely next to him. He said he was travelling at a speed of approximately 55 kilometres per hour and noticed the insured vehicle only when it was in his path of travel, which was the right lane. To avoid connecting with the insured vehicle "face on" he pulled his motorcycle down and caused it to fall over on its side. He was uncertain as to whether he applied his brakes. He was also not able to recall the actual impact.

[11] The plaintiff disputed Mr Alexander's version (as put to him by the defendant's counsel), which was that the insured vehicle entered Caledon Road when it was safe to do so, as the plaintiff was still far away when he entered the road, and because of the plaintiff's excessive speed, covering a substantial distance in a short period of time, the collision occurred.

[12] The plaintiff was an experienced motorcyclist who had been driving motorcycles for about twenty years when the accident occurred. He was in possession of a learner's licence for the bigger 600 CC motorcycle he was driving at the time. At all relevant times before he was the holder of a valid motorcycle licences for his three previous motorcycles.

[13] Mr Alexander, testified that before he entered into Caledon Road he looked to his right, then to his left, and then to his right again. When he first looked to his right for the first time he saw vehicles waiting for the

robot to turn green at the intersection below. He said he noticed a police van and a Polo (on his right). They were at a safe distance from him at about thirty metres. He said that he also saw the plaintiff at a safe distance away, when he (Mr Alexander) had already covered 75% of Caledon Road. He disputed Mr Dickon's evidence that the plaintiff was fifteen metres away from him when he entered Caledon Road. When he looked left it was at the oncoming traffic in the lane going from east to west into which he was about to turn. When he looked to his right for the second time, he observed the motorcycle driven by the plaintiff suddenly very close to him. He heard screeching sounds and about four seconds later he felt the impact on the rear wheel of his truck as the motorcycle collided with his truck and caused it to move into the left lane on the other side of the island (where the traffic moved west). According to him, when the impact occurred, the police van had not even passed him yet.

[14] Mr Alexander repeatedly said that he moved into Caledon Road when it was safe to do so. The correctness of this assertion was the principal enquiry in this trial. As a starting point I must stress that it stands to reason that a higher degree of vigilance is required from a driver who wishes to turn right into a double lane road with traffic travelling in opposite directions than from the drivers in a through road, than from the driver in the through road. In *Protea Assurance Co Ltd v LTA Building (SWA) Ltd and Another* 1988(1) SA 303 (AD) the following was held:

"While it is true that a driver in a through road does not have an absolute right of precedence and is not relieved from the duty of keeping a general look-out, he is not under a duty to keep the cross-road under the same careful observation which would be required if it was not a stop street".

These remarks are also applicable to the present enquiry where there was a yield sign at the corner of Market Street and the main through street.

Mr Alexander still had an *onus* to ensure that it was safe to enter the through road. (See also: *Aboubaker v Holiday* 1955(2) CPD 633 and *National Employers General Assurance Company Ltd vs Sullivan* 1988(1) SA 27A at 36 D-F).

[15] It was significant that Mr Alexander said that he saw the vehicles which were in the lanes he intended to traverse waiting for the robot to turn green at the intersection lower down in the road. In an affidavit Mr Alexander had made to the police more than three years ago, and only five days after the accident, he did not mention this. He said he was approaching the yield sign at the end of Market Street, when he saw the police van and Polo approaching on his right. More significantly, he said that it was when he was turning, that he saw the plaintiff approaching him in the right lane. In other words, that is when he first noticed the plaintiff.

[16] Mr Alexander's explanation for his statement to the police being either incomplete or contrary to his court testimony, was that he did not know for what purpose he was required to make the statement, ought to be rejected. The preamble to the statement clearly states that he was being investigated in respect of possible negligent and/or reckless driving charges. The statement is also made in Mr Alexander's own handwriting.

[17] The plaintiff and Mr Dickson corroborated each other in all material respects. Both were prepared to make concessions which could have been adverse to the plaintiff's case. Their combined version is also to a large degree corroborated by Mr Alexander's statement to the police, which seems more probable than this testimony in court. On the uncontradicted evidence of Mr Dickson and the plaintiff, the plaintiff's motorcycle was fifteen metres away when the insured vehicle entered the plaintiff's lane.

[18] During cross-examination, Mr Alexander's evidence was that he saw the plaintiff seven metres away from him when the insured vehicle had already covered eighty percent of the right lane in which the plaintiff was travelling. It already had its nose past the island, and as he was about to turn right, he suddenly saw the "bike on top of me". The aforesaid evidence also suggests strongly that if it is correct, an accident was in any event bound to happen. Therefore, on his own version it was not safe for him to negotiate Caledon Road in the way and at the time he did.

[19] Mr Alexander did not impress me as a truthful witness, whereas the plaintiff and Mr Dickson did. I accept the plaintiff's version of the accident as supported by Mr Dickson who was also an independent witness.

[20] In my view, the plaintiff had limited opportunity and very little time to react to the danger of the impending collision. With moving traffic on either side of him, he could not swerve to any side. Whatever pressure he applied to the brakes would not have mattered in the prevailing circumstances. Therefore there was also no contributory negligence on the part of the plaintiff. Accordingly, the driver of the insured vehicle was solely to blame for the accident.

[21] Therefore, the defendant is liable to pay to the plaintiff such damages as he may prove he had suffered as a result of the injuries he sustained during the collision which occurred on 8 December 2008.

[22] The defendant is to pay the plaintiff's costs of suit which shall include the costs of the pre-trial conference (attended by plaintiff's counsel), the inspection *in loco* and photographs of the scene of the accident.

E REVELAS
Judge of the High Court

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