

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 3335/2009

Date Heard: 14 June 2012

Date Delivered: 19 June 2012

In the matter between:

ALBERT REGENALD JACOBS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

EKSTEEN J:

[1] On the evening of 31 July 2007 at approximately 18h50 the plaintiff sustained severe bodily injuries in a motor vehicle collision which occurred on the road between Rocklands and Uitenhage when his vehicle left the trafficable surface of the road and overturned on the gravel verge. The plaintiff alleges that he was presented with a sudden emergency when one approaching vehicle ("the unidentified insured vehicle") overtook another thereby moving onto its incorrect side of the road in the face of the approach of the plaintiff. The plaintiff claims that he was obliged to take evasive action which caused him to lose control of his vehicle. The plaintiff accordingly claims damages against the defendant.

[2] By agreement between the parties the issues relating to the causation of the accident and the negligence giving rise thereto have been separated from the other issues in the matter and I am accordingly called upon to determine solely whether the defendant is liable for all or part of such damages as the plaintiff may have suffered in as a result of the collision.

[3] Mr Shaun Myburgh is a pig farmer resident on the smallholding Withoogte which lies immediately adjacent to the road leading from Rocklands to Uitenhage. His house and his shed are situated more or less alongside one another approximately 100 metres away from the tarred road. There are numerous large trees between the shed and the road in the vicinity of his boundary fence.

[4] Mr Myburgh was standing outside his shed on the evening of 31 July 2007 and paid no particular attention to the traffic on the tar road until he suddenly heard a noise, which he subsequently concluded was caused by tyres dragged across gravel, which was followed by two or three loud noises. He looked up in the direction of the road slightly to his left towards Rocklands and noted there the lights of a stationary motor vehicle shining directly into his property across the veld. He stood still, petrified, for approximately twenty seconds and then, realising that an accident had occurred, ran to the scene. On his arrival at the scene he found the motor vehicle of the plaintiff lying on its side, on top of his

boundary fence and up against an electrical pole with the plaintiff trapped beneath the body of the vehicle. A second vehicle, which he assumed had been following the plaintiff's vehicle, had also come to a stop at the scene. He did not however speak to the driver of this vehicle. Thereafter a number of people gathered there and the police, the fire services and the traffic department all arrived. The fire services lifted the vehicle so as to release the plaintiff and he was removed to hospital. Myburgh did not speak to the police who attended at the scene.

[5] Mr Myburgh states that the speed limit on the road in front of his property is 100km/h. The road had a tarred surface which he considered to have been in a relatively good condition and it was dry. As previously recorded it was already dark. At the entrance to his smallholding, Mr Myburgh says, there is a barrier line for traffic travelling from Uitenhage towards Rocklands. Ordinarily the road carries significant traffic which is, in the evenings, predominantly in the direction from Uitenhage towards Rocklands.

[6] Under cross-examination Mr Myburgh states that from where he was standing at the shed he has a clear view, but for the trees, of the road. Beyond the trees the road proceeding towards Rocklands is clearly visible and motor vehicles travelling towards Rocklands would have been visible from his position provided they had their headlights on. Mr Myburgh expressed the view that had motor vehicles travelled along that

stretch towards Rocklands immediately after the collision had occurred he would have seen such vehicles. He did not see any vehicles there. Mr **Paterson**, on behalf of the defendant, suggested to Mr Myburgh that if the version of the plaintiff was true the unidentified insured vehicle would logically have continued to travel down that stretch of road towards Rocklands. Mr Myburgh reiterated that he did not see such a vehicle and reaffirmed his opinion that he would have seen such a vehicle had it travelled there. Mr Myburgh was not aware of any other vehicle involved in the collision save that of the plaintiff.

[7] The plaintiff testified that he is an electrical contractor and had been at a meeting in Coega on 31 July 2007 whilst his workforce were engaged in contract work on Cape Road in the area of Hunter's Retreat. After concluding his meeting at Coega, at approximately 17h00, he proceeded to the worksite where his workforce had been engaged. He inspected the site and thereafter proceeded to the Hunter's Hotel where he had two beers, as he often did after a busy day's work.

[8] The plaintiff then proceeded to go home, along the road from Rocklands to Uitenhage, where he lives. He says that he was travelling at about 80-90km an hour with his headlights on. He noted a vehicle approaching from the opposite direction, also with its headlights on. When the approaching vehicle was approximately 50-60 metres ahead of him he suddenly noticed the headlights of the unidentified insured vehicle

emerging from behind the first vehicle and it then proceeded to overtake the first vehicle directly in the face of the plaintiff's approach. The plaintiff says that the unidentified insured vehicle was directly in front of him in his lane and he was obliged to swerve off the trafficable surface in order to avoid a head-on collision. In this process he lost control of his vehicle and it rolled.

[9] Under cross-examination the plaintiff was confronted with an affidavit which he had made to the defendant in terms of the Road Accident Fund Act, 56 of 1996 prior to the summons. In the statement the plaintiff had recorded as follows:

"Just before the S-bends at the crest of the plateau, and just before the road makes a detour towards the S-bends, I accounted vehicles from the front in the oncoming lane and all of sudden a vehicle overtook these vehicles and approached me head-on in my lane."
(*Sic*)

[10] The plaintiff contends that the statement contains an error in that he had observed only two vehicles approaching him and that the following vehicle had overtaken the leading vehicle. He is unable to account for the error although he did read the statement before signature. I pause to mention that the plaintiff is Afrikaans speaking and he says that he is not fluent in English although he does understand a bit of it.

[11] The plaintiff was also taxed on his failure to have reported the

matter to the police and his failure to have made a statement to the police. In this regard the plaintiff states that he was hospitalised and had been in hospital for a week or two. Upon his release from hospital he was telephoned by a police officer who had indicated that he would contact him later. The police officer was not true to his word and the plaintiff says that he did not of his own initiative approach the police.

[12] The plaintiff did institute a comprehensive insurance claim in respect of the damage to his vehicle. The claim was submitted via his broker, one Adele Kolesky. The documentation relating to the claim is admitted and has been handed in. It emerges from these documents, and from the evidence of Ms Kolesky to which I shall refer below, that the claim was reported to her on 1 August 2007. On the same day she lodged the claim with Santam Insurance. In lodging the claim Ms Kolesky recorded as follows:

“Telephonic claim: Description of event. Kliënt het on 'n draai gegaan en effens van die pad af en toe het die kliënt oor 'n slaggat gery, beheer verloor en die voertuig het gerol.”

This recordal of the event makes no mention of any oncoming traffic which gave rise to the plaintiff swerving off the trafficable surface.

[13] Confronted with this recordal in cross-examination the plaintiff initially acknowledged that the version of events must have been obtained

from him as he was the only person who knew what had occurred and he postulated that the report records what he would have relayed in respect of the events which occurred after he had been confronted with the sudden emergency and after he had swerved. He states that he is unsure whether he or his wife would have reported the event but stated, although he had no recall thereof, that the version must have come from him. In re-examination, however, when he was referred to medical records and the fact that he was at that stage in hospital the plaintiff states that he was in no position whatsoever to make any telephone call and if the report was made on 1 August 2007 he does not think it could have come from him. He continued to state that he is unaware of any pothole as referred to but states that his son had advised him the following day that he had been to the scene of the accident and that it would appear that he, the plaintiff, had driven through a pothole. The version reported to Santam Insurance accords with the alleged observation by plaintiff's son.

[14] Prior to litigation the plaintiff was questioned by an employee of the defendant. He gave an explanation as to the manner in which the collision occurred which accords with his evidence in court, save that it too refers to the vehicle hitting a hole. Plaintiff does not deny that he advised the defendant accordingly but states that he does not have any knowledge of a pothole.

[15] Finally, the plaintiff was taxed on his consumption of alcohol which did not form part of the initial report made to Santam Insurance nor did it form part of the discussion held with the defendant. Plaintiff readily acknowledged that he had consumed two beers and when it was put to him that he was under the influence of alcohol he admitted same, stating that he had consumed two beers. Notwithstanding the foregoing admission he states that he did not feel that the two beers had had any effect on his conduct or his ability to drive.

[16] Both Myburgh and the plaintiff made a favourable impression upon me in the witness box. Myburgh is an independent witness who testified in a very straightforward manner as to what he had seen. The plaintiff, although taxed with a number of inconsistencies contained in documentation, remained unshaken in his version. I shall revert to these issues below.

[17] The defendant called Ms Adele Kolesky. She confirms the notification of the claim as set out earlier and her lodgement thereof with Santam Insurance in the terms which I have recorded earlier. She states that she was never advised of the presence or involvement of any other vehicle save that of the plaintiff. She is however unsure who made the report to her and states that it may have been reported to her by the plaintiff's son.

[18] At a later stage, on 30 August 2007, when the claim was paid out the plaintiff signed a general release form. Ms Kolesky's signature appears on this document as a witness. She testified that in general the release form would be sent to her by the insurance company in order to acquire the claimant's signature. In the present instance she is unsure whether the plaintiff signed this document in her presence or whether she had sent it on to him for signature. She does however acknowledge that she signed as a witness.

[19] On the evidence plaintiff contends that I should hold that the collision was due solely to the negligence of the unidentified insured driver. On behalf of the defendant, on the other hand, it is argued that I should reject the plaintiff's evidence and dismiss the claim.

[20] It is common cause that the ordinary civil onus, on a balance of probabilities, rests upon the plaintiff to establish the negligence on the part of the unidentified insured driver. There is only one version of the events which gave rise to the accident, that being the version testified to by the plaintiff. No other eyewitness to the collision testified. On an acceptance of the plaintiff's evidence it seems to me that the unidentified insured driver was clearly negligent in overtaking another vehicle at a time when it was both dangerous and inopportune to do so and in the face of the plaintiff's oncoming vehicle. Although the defendant has pleaded contributory negligence nothing has emerged from the evidence

upon which I can make a finding that the plaintiff, on his own version, was also negligent. I shall revert to this issue below.

[21] Mr **Paterson**, on behalf of the defendant, argues that the plaintiff has not discharged the onus and that I should reject the evidence of the plaintiff. Much reliance is placed on the evidence of Mr Myburgh. It is true that Mr Myburgh did express the view that had there been traffic in the direction from Uitenhage to Rocklands which proceeded beyond the point of the collision immediately after the collision he would have seen such traffic. This, at best for the defendant, is only an opinion. This, in my view, cannot displace the evidence of the plaintiff. Mr Myburgh was going about his own business when his attention was drawn to the motor accident. Understandably, on his own evidence, he gazed in amazement for a short period and then rushed to the scene of the accident. I have no doubt that his attention would have been firmly focused on the plaintiff's vehicle which had overturned on the gravel verge. When he arrived at the scene he states that a second vehicle which he assumed had been following the vehicle of the plaintiff had also arrived and stopped at the scene. That his attention was not focused on other traffic on the road is borne out by the fact that he never observed the motion of this vehicle and he was constrained to concede that he did not know whether the vehicle in fact followed the plaintiff's vehicle. Although he concluded that no other vehicle had been involved in the collision I do not think that his evidence is destructive of the plaintiff's version.

[22] Mr **Paterson** has placed considerable weight on the plaintiff's initial acknowledgement in cross-examination that the version of the accident which was reported to Santam Insurance, which makes no mention of any other vehicle, must have been obtained from him. I think however that there is some force in the counter-argument raised in re-examination that it is improbable that such a version could have emanated from him on 1 August 2007. It is common cause between the parties that he was at that stage in the intensive care unit of the hospital. He testifies that he has no recall of any events during that period and his first continuous recall of events after the accident was from the afternoon of 2 August 2007. This, coupled with his evidence that his son had attended at the scene of the accident and advised him that he must have hit a pothole seems to me to indicate a real likelihood that the version reported to Ms Kolesky emanated from his son. Ms Kolesky concedes that she was unable to recall who had notified her of the claim and then adds, spontaneously and of her own volition, that it may have been the plaintiff's son who phoned. I am accordingly of the view that the plaintiff's initial conclusion that the version presented to Santam Insurance "must have been" obtained from him, may well be incorrect. I certainly did not gain the impression that the plaintiff may be dishonest.

[23] The affidavit made by the plaintiff and which was referred to in cross-examination is a typed document. That its preparation lacked

meticulous attention is apparent from the obvious language error contained in the portion relied upon – "... I accounted vehicles from the front ...". If the plaintiff did read the statement prior to signature without identifying such glaring deficiencies it seems to me to corroborate his alleged limitations relating to the English language. In any event, accepting the discrepancy between his evidence and this statement, it does not undermine his version of events giving rise to the accident. His version remains consistent that the unidentified insured vehicle moved onto its incorrect side of the road as it proceeded to execute an overtaking manoeuvre in the face of the approach of the plaintiff.

[24] Mr **Paterson** has alluded too to the observations contained in the police accident report, which similarly reflects a conclusion that it had been a single vehicle collision. This version could clearly not have been obtained from the plaintiff at the scene of the collision and it is perfectly acceptable that any observations made at the scene of the collision would have been suggestive of a single vehicle collision as there was no impact between the unidentified insured vehicle and the plaintiff's vehicle. In these circumstances I do not think that the observations of the police officer who attended at the scene of the collision advances the debate at all. In any event, he did not testify, and I have no evidence of the reasons for his conclusions or the source of his information.

[25] On a consideration of all the evidence I do not find any basis upon

which the plaintiff's evidence could be rejected. His version of the events accords with probability and is the only eyewitness account before me. In the circumstances I find that the driver of the unidentified insured vehicle was negligent and that his negligence contributed to the causation of the accident.

[26] Although the defendant has pleaded, in the alternative, in the event that I find that the driver of the unidentified insured vehicle was negligent, that the plaintiff was also negligent and that his negligence was a contributory cause of the accident, the defendant is bound to rely on the evidence of the plaintiff in respect of the manner in which the collision occurred for purposes of this argument. Mr Paterson, on behalf of the defendant, correctly in my view, acknowledged that he had difficulty in promoting an argument in support of this pleading. He did however, somewhat tentatively, argue that I should find that the plaintiff too was negligent in that he drove his vehicle at a time when his facilities were impaired by the consumption of alcohol and that he drove too fast in the circumstances. In respect of the latter there is no basis for such a finding. The plaintiff travelled at a speed of approximately 80-90km/h in an area where the speed limit is 100km/h. The road is relatively straight and the evidence is that it was a tarred road with relatively good surface which was dry. The plaintiff was readily forthcoming in evidence with the fact that he had consumed two beers but stated that he did not think that the intake of alcohol had affected his driving ability. No cross-

examination was directed at the effect of such alcohol on his driving and no evidence was led which could be indicative of any impairment.

[27] In all the circumstances I am of the view that the defendant has not established negligence on the part of the plaintiff. I conclude accordingly that it was exclusively the negligence of the driver of the unidentified insured vehicle which gave rise to the collision.

[28] In the result I make the following order:

1. The defendant is liable to the plaintiff for such damages as the plaintiff is able to establish that he has suffered in and as a result of the collision which occurred on 31 July 2007.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the trial in respect of the merits, such costs to include the costs of one inspection *in loco* attended by counsel and the plaintiff's attorney.
3. The defendant is ordered to pay interest on the plaintiff's taxed costs calculated at the legal rate from a date fourteen (14) days after taxation to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv A Frost instructed by Tewies Labuschagne
Attorneys, Port Elizabeth

For Defendant: Adv N Paterson instructed by Joubert Galpin & Searle
Inc, Port Elizabeth