

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

Case No.: 1082/2011
Date heard: 07 March 2012
Date available: 18 October 2012

In the matter between:

JUAN-PIERRE GERHARDUS DOUBELL

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

DAMBUZA, J:

[1] This is a claim for damages suffered by the plaintiff on 20 June 2009 as a result of a motor vehicle collision.

[2] At the commencement of the trial counsel brought to my attention an agreement reached between the parties, that issues relating to negligence of the drivers of the motor vehicle and the motorcycle involved in the collision be determined separately from issues relating to the quantum of damages claimed. An application was moved for an order in those terms and I granted an order accordingly. The matter therefore proceeded only on issues pertaining to the negligence.

[3] It is common cause that during the afternoon of 20 June 2009 a collision occurred between a motor vehicle with registration number DHR 995 EC (the insured vehicle) which was being driven by Paul Little (the insured driver) and a motorcycle with registration number FBH 977 EC, then driven by the plaintiff. The collision occurred along Winterhoekrylaan (also referred to as Winterhoek Drive), in Uitenhage, a road depicted in the photographs contained in photo albums, Exhibits "A", "B", "D" and "E".

[4] Winterhoekrylaan (or the segment thereof where the collision happened) was described in evidence a straight road, with a single-carriage in each of the two opposite directions. The Uitenhage Golf Club is located along this road; on the left side thereof when travelling in the direction that the insured vehicle and the motorcycle were travelling. At some distance to the main gate towards the golf club, the road dips and then inclines towards the golf club.

[5] The evidence was that a vehicle coming out of the dip becomes visible at a distance of approximately 132 metres from the entrance to the golf club. About 9 metres past the entrance to the golf club, and diagonally opposite to the entrance to the golf club, another road, Currie Street, joins Winterhoekrylaan on the right side when travelling in the direction of the insured vehicle.

[6] The collision occurred about 10 meters past the entrance to the golf club. The insured vehicle and the motorcycle had been travelling in the same direction, towards the West, immediately prior to the collision.

[7] It was not in dispute at the trial that the plaintiff bore the onus of proving negligence on the part of the insured driver and to prove that such negligence was the cause of the collision, whilst the defendant bore the onus of proving the pleaded contributory negligence on the part of the plaintiff. *Mr Nepgen* who appeared on behalf of the plaintiff placed on record that the plaintiff had, during the Rule 37 discussions, unsuccessfully sought an admission from the defendant, that the plaintiff could not recall any details relating to the collision. He stated that, because the plaintiff could not recall the details of the collision he was going to give evidence at the trial. I could not, at that stage, give him the confirmation he sought, that I would not draw a negative inference from the plaintiff's failure to testify.

[8] It has been said that in civil cases a party's failure to give gainsaying testimony under oath or affirmation may have an adverse effect on his (or her) case. However the effect of such failure will depend on all the circumstances of the case.¹ Courts determine the propriety of drawing an inference from failure to testify in the context of the strength of the probabilities that the party who failed to give evidence was negligent in relation to the cause of action. In *Dlakela v Transkei Electricity Supply Commission*² White J, on the approach set out in

¹ Schwikkard. Van der Merwe; Principles of Evidence; 2nd Ed; at 510.

² 1997 (4) SA 523 (Tk).

*Galante v Dickson*³, found that the probability was so strong that the plaintiff had not been negligent that any adverse inference drawn from his failure to testify would not persuade the court's finding on the absence of negligence on his part. The approach was set out by Schreiner JA in *Galante* as follows:

“[I]t seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.”

[9] I shall therefore consider the issue of whether any negative inference should be drawn from the plaintiff's failure to testify against this background.

[10] *Mr Nepgen* submitted that, on a proper consideration of all the evidence led, negligence on the part of the insured driver had been proved and that no negligence had been proved on the part of the plaintiff. He submitted that the issues fall to be determined on Mrs Rudman's evidence or the plaintiff's version of the collision, as this is the only reliable version before me.

[11] Aletta Magdalena Rudman, a member of the South African Police Services, gave evidence on behalf of the plaintiff. It is not in dispute that Mrs Rudman was also driving her vehicle along Winterhoekrylaan, when the collision occurred. Her evidence was that the insured vehicle was travelling along

³ 1950 (2) SA 460 (A) at 465.

Winterhoekrylaan, with the plaintiff's motorcycle travelling some distance behind it, in the same direction. Mrs Rudman was travelling in the direction opposite to that of the insured vehicle and the motorcycle. She testified that she observed the insured vehicle exiting the golf course through the main entrance, entering Winterhoekrylaan obliquely and proceeding across the road in the direction of Currie Street until its front wheels crossed the centre line. It was travelling "very slowly". She gained the impression that the intention of the insured driver was to go into Currie Street. However, the insured vehicle suddenly veered to its left and returned to its original lane of travel, colliding with the motorcycle which was in the process of overtaking the insured vehicle on the left.

[12] On impact the plaintiff was flung from the motorcycle; he slid on the ground and ended up under one of the vehicles parked on the left side of the road.

[13] In evidence, the insured driver disputed that he had just exited the golf club when the collision occurred. His evidence was that he had been driving along Winterhoekrylaan, from his home, which is about two kilometres from the golf club. He was going to the golf club. About 60 metres before reaching the entrance to the golf club he reduced his speed and signalled his intention to turn to the left. When he was in front of the entrance to the golf club he noticed an empty space outside the premises of the golf club, in front of the club house; he decided to park in that space. He turned the vehicle towards his left and, as it mounted the kerb, with its rear wheels on the trafficable portion of the road, the

plaintiff's motorcycle collided with it. He had not been aware of the presence of the motorcycle behind the insured vehicle until the collision occurred.

[14] Mrs Rudman testified confidently and her evidence was clear and consistent. She did however, in some parts of her evidence, speculate on what the plaintiff would have observed whilst travelling behind the insured vehicle. For example she stated that the motorcycle could not travel fast as it was not certain what the insured driver intended to do or where he intended to go. But in essence her evidence was that she gained the impression that the insured driver intended to cross Winterhoekrylaan into Currie Street. In my view her evidence in this regard accords not only with the probabilities, but also with the evidence of the insured driver who admitted, during cross-examination, that he might have veered to his right shortly before making the left turn. The insured driver insisted however, that even if he did veer to the right, he remained within his correct side of the road and the wheels of the insured vehicle never crossed the centre line as Mrs Rudman alleged. His responses to questions asked during cross-examination were as follows:⁴

“Now from where you were turning, did you move to your right before you turned? --- Only within the limits of the road, if I did turn right, the limits of my side of the road....

Because Mrs Rudman says that before you turned to your left, that your, both front wheels of your vehicle were over the centre line of the road and it appeared to her that you were intending on moving up Currie Road. --- That was not my intention and I don't recall crossing the middle of the road, if she was

⁴ At 102 of the record

coming in the opposite direction towards me, would be no point in crossing to the other side of the road, otherwise I'd hit her.

Are you able to dispute whether you crossed the centre of the road or not? --

- No, I am not able to dispute it."

[15] On the whole, the insured driver had difficulty in explaining how the accident happened. Firstly, he had difficulty in explaining where he had intended to park. Initially I understood his evidence to be that he had intended to park on the car park inside the premises of the golf club but when he saw the empty parking space in front of the club house he then decided to park in that space. During cross examination, he "clarified" his intentions as follows:

"My real intention is normally to park in front of the clubhouse, that is where I would normally park with the car, but on seeing cars in front of the clubhouse, I had the decision to turn into the parking area and on approaching the parking area, I saw a space between the tree and my friend's car."

[16] Be that as it may, his evidence further was that he had spotted the parking space between two vehicles, a truck or bakkie and a white sedan depicted on the first photograph in Exhibit A.

[17] It was common cause that the photographs contained in Exhibits A to E were taken immediately after the collision, and that the vehicles depicted therein had not been moved from the positions they were in prior to the collision. It appeared to me (and both counsel were in agreement) that there was no image

of a truck or bakkie on the relevant photograph, and that what the insured driver thought was a truck in the photograph was, in fact, a boundary wall of the golf club. But even after this was brought to his attention the insured driver insisted that he had intended to park *“between the bakkie and the white car, there was a space under the tree”*. This gave me an impression that the insured driver was reconstructing the collision from what he thought he observed on the photographs, rather than giving evidence of the collision as he recalled it. I may state that it was also part of the insured driver’s evidence that he had intended parking on a parking space between two vehicles. Whilst I do not fault the insured driver for his erroneous interpretation of the photograph; his evidence of collision does not set out an intelligible explanation of the collision and his explanation for where he was going to park is left wanting. It is also significant that he did not see other vehicles that were in his immediate vicinity at the time of the collision, including Mrs Rudman’s vehicle and the plaintiff’s motorcycle. In the end I found him to be an unreliable witness.

[18] The insured driver did not dispute, during cross-examination, that he veered towards his right prior to executing the left turn towards the parking space. He also admitted that he did not, prior to executing such a turn to the left, look in the rear view mirror and was not aware of the plaintiff’s presence behind him at any stage prior to turning. On the evidence before me he had negligently created an impression that he could be turning to the right and it is my view that other drivers were entitled to regulate their driving according to the impression he

had created. I am persuaded that there was a general duty on the insured driver to satisfy himself before making the left turn, that it was safe for him to turn left, and that he had a specific obligation to do so because of the impression he had created, that he might be turning to the right. He failed in this duty. The insured driver was therefore negligent in the manner in which he drove the insured vehicle.

[19] As to whether any negligence on the part of the plaintiff was proved, the only evidence on the manner in which the plaintiff drove the motorcycle is that of Mrs Rudman's evidence. The submission by *Mr Jooste* who appeared on behalf of the defendant was that the plaintiff had failed in his duty to slow down and stop until the insured driver, who had appeared hesitant as to where he wanted to go, had cleared the road, before attempting to overtake on the left of the insured vehicle. I do agree that whilst, Mrs Rudman's evidence was that her impression was that the insured driver intended to go into Currie Street, she also testified that she became uncertain as to where he was going. I can only conclude that the plaintiff, having observed the course taken by the insured vehicle in front of him, would have formed the same impression as Mrs Rudman.

[20] I do not agree, however, that the obligation(s) on the plaintiff, as a driver, towards the insured vehicle, were as unlimited as *Mr Jooste* submitted. The argument by *Mr Jooste* was that insured driver always had a right to change his course of travel for any reason and the plaintiff was obliged to stop and wait until the insured driver had cleared the way. It is trite law that road users have a duty

to act reasonably on the road. Flowing from this duty is an entitlement, by drivers, to assume that other drivers will act also reasonably. **Klopper**, in *The Law of Collisions in South Africa*⁵, to which Mr Neppen referred me, explains the general duties and rights of drivers on public roads follows:

“Because a driver is under a duty to act reasonably, he is entitled to expect other road users to do the same. This principle translates into certain assumptions a driver of a motor vehicle is justified to make when his duties and driving skills are considered. These justified assumptions are inherent in the process of establishing whether a driver was negligent in not complying with the various duties imposed on a driver. However, the existence of justified assumptions does not relieve a driver from the duty to appreciate that other drivers may act unreasonably and to provide for such a contingency by taking all possible reasonable steps to avoid a collision occasioned by another driver’s unreasonable behaviour. A driver will be negligent if the unreasonable conduct is generally foreseeable and he does not take reasonable preventative action to avoid a collision.

During the course of time, certain justified assumptions which relate to specific situations have been recognised. The assumptions are that other road users will:

- Keep left when using a road;
- Signal his intention to turn and will turn at an opportune moment and in a reasonable manner;
- Behave reasonably when overtaking or being overtaken.....”

[21] With specific reference to overtaking Regulation 298 of the Regulations promulgated in terms of the National Road Traffic Act 93 of 1996 provides that:

⁵ 7th Ed; at 72.

“Subject to the provisions of subsections (2) and (4) and subregulation 296, the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass to the right thereof at a safe distance and shall not again drive on the left side of the roadway until safely clear of the vehicle so passed: Provided that, in the circumstances as aforesaid, passing on the left of such vehicle shall be permissible if the person driving the passing vehicle can do so with safety to himself and other traffic or property which is or may be on such road and

- (a) the vehicle being passed is turning to its right or the driver thereof has signalled his or her intention of turning to his or her right;
- (b) such road is a public road in an urban area and-
 - (i) is restricted to vehicles moving in one direction; and
 - (ii) the roadway is of sufficient width for two or more lines of moving vehicles;
- (c) such road is a public road in an urban area and the roadway is of sufficient width for two or more lines of moving vehicles moving in each direction;
- (d) the roadway of such road is restricted to vehicles moving in one direction and is divided into traffic lanes by appropriate road traffic signs; or
- (e) he or she is driving in compliance with the directions of a traffic officer or is driving in traffic which is under the general direction of such officer, and in accordance with such direction:

Provided further that in no event shall any passing referred to in paragraph (a), (b), (c) or (d) be done by driving on the shoulders of the roadway or on the verge of the public road concerned.”

[22] Drivers are also entitled to assume that when they overtake a vehicle, the overtaken vehicle will not deviate from its course.⁶

[23] It therefore seems to me that whilst the plaintiff had a right to conclude, from the course in which the insured vehicle was driven, that it would be turning

⁶ Klopper (*supra*) at 73.

right into Currie Street, there remained a duty on him to take into account that the insured driver might be an unreasonable driver. After all on Mrs Rudman's evidence, apart from driving obliquely across the first lane of the road, the insured driver exhibited uncertainty as to his intentions and had not "signalled" an intention to make a right turn by using the vehicle indicators.

[24] As it was submitted on behalf of the plaintiff there is no evidence to support the allegations of negligence on the part of the plaintiff made by the defendant in the plea. *Mr Jooste* submitted that the plaintiff's negligence can be inferred on the principle of *res ipsa loquitur*. Kloppe explains this principle as follows:⁷

"*Res ipsa loquitur* implies that the facts of the case indicate negligence where the proven facts are the only available evidence.

Res ipsa loquitur does not create any presumption of negligence and does not transfer the burden of proof. It is only an indication, through the proven facts, of the probabilities, which may justify or support a finding of negligence on a balance of probabilities. In order for a party to rely on *res ipsa loquitur* sufficient proof of the facts to justify the inference of negligence from the proven facts has to be adduced. Where reliance is placed on *res ipsa loquitur* the plaintiff is bound to the facts alleged to have been the cause of the accident. The rule does not apply where a defendant leads sufficient exonerating evidence, which makes the inference of negligence against the defendant improbable. *Res ipsa loquitur* can only operate where the only reasonable inference that can be made from the directly proven facts is one of negligence."

⁷ Kloppe (*supra*) at 78.

[25] My view is that although the evidence is that the insured driver drove hesitantly, and the law imposes a duty on drivers to be mindful of “unreasonable drivers”, that evidence *does not constitute proof that the plaintiff drove his motorcycle negligently and that such negligence contributed to the collision*. Mrs Rudman’s evidence that the plaintiff drove “normally” does not, on its own, sustain a finding of contributory negligence on the part of the plaintiff.

[26] In the context of no incidence of negligence having been proved against the plaintiff I find no justification for a negative inference to be drawn from the plaintiff’s failure to testify.

[27] Consequently judgment is granted against the defendant for:

- (a) 100% of such damages as the plaintiff may prove to have suffered as a result of the collision that occurred on 20 June 2009;
- (b) the costs of trial; which costs shall include the costs of the photographs contained in Exhibits A to E.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For plaintiff:

Adv J Nepgen

Instructed by
Le Roux Inc of Port Elizabeth

For defendant:

Adv P Jooste

Instructed by
Wilke Weiss van Rooyen Inc of Port Elizabeth