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

CASE NO: 3645/2016
Date heard: 15 June 2018
Date delivered: 28 June 2018

In the matter between

PHILLIPUS ARNOLDUS DU PLESSIS — Plaintiff

And

ROAD ACCIDENT FUND — Defendant

JUDGMENT

GOOSEN, J.

[1] On 27 September 2014 a collision occurred between a motorcycle, driven by the plaintiff, and a motor vehicle driven by Mr Sampson, the insured driver. The collision occurred at approximately 7.00pm near the intersection between Buffelsfontein Road and Glendore Road.[1] As a result of the collision the plaintiff suffered certain injuries. He accordingly instituted a claim for damages against the defendant. The parties reached agreement in relation to the quantum of each of the heads of damages. What remained in issue was the determination of the liability of the defendant.

[2] The plaintiff's claim was formulated on the basis that the insured driver was solely negligent. It is alleged that he failed to keep a proper lookout; drove at an excessive speed in the circumstances; failed to apply the brakes of his vehicle timeously or at all; travelled without the vehicle headlights on and failed to avoid the collision when he could and should have done so. The defendant denied that the insured driver was negligent in any manner. What is to be determined therefore is whether the

[1] The street was incorrectly referred to as Glendore Road whereas it is in fact Genadendal Road. Nothing turns on this.

plaintiff has, on the evidence, discharged the *onus*, on a balance of probabilities, that the insured driver was negligent in one or more of the respects pleaded.

[3] The plaintiff testified that on the afternoon of 27 September he had gone to a friend's house for a meal. He was returning home at approximately 7pm that evening. He was travelling in Glendore Road (in a northerly direction) towards the intersection with Buffelsfontein Road. The intersection is a T-junction. Buffelsfontein Road is a main road which runs in an east-west direction. The intersection is controlled by a stop sign in Glendore Road.

[4] It was raining that evening and the road surface was wet. Visibility was not good. It was already dark and the street lights were on. The headlamp of the plaintiff's motorcycle was also on. Buffelsfontein Road is lit with street lights which are situated on the northern curb of the road. Glendore Road is also lit with street lights. There is a street lamp situated at the intersection on the north-east side in Glendore Road. There is also a street lamp in Buffelsfontein Road, on the western side of the head of the T-junction. These street lights were lit on the night in question.

[5] The plaintiff stated that he lives in a townhouse complex, which is situated on the northern side of Buffelsfontein Road, opposite the intersection. There is however, no vehicle access directly from Buffelsfontein Road to the townhouse complex. The complex is set back from the road by some distance. Between the northern edge of the road and the townhouse complex there is a gravel verge and a wide grassed area. Short wooden poles form a fence line, preventing any vehicle access onto the grass verge.

[6] The plaintiff said that since he rides a motorcycle he would usually take a "shortcut" from Buffelsfontein Road passing between the wooden poles in order to access the complex. He said he drove his motorcycle up to the intersection where he stopped. He looked around, saw no other vehicles and then pulled off into Buffelsfontein Road making a right turn. He proceeded along Buffelsfontein (in an easterly direction) for a short distance up to the vicinity of the next lamppost. This, he said was about 45 m. He was looking to follow a different shortcut because there was water on the sidewalk. In the vicinity of the lamppost he pulled his motorcycle off the road onto the gravel verge and stopped. His motorcycle was facing towards the short wooden poles. He put his right foot down on the gravel. As he did so his motorcycle was struck at the back and he was flung off. He "woke up", having briefly lost consciousness, lying on the gravel. He was later taken from the scene by emergency personnel.

[7] With reference to photographs taken of his motorcycle after the collision and of the area, he indicated that the damage to his motorcycle was on the right side, where it had scraped along the ground. He also pointed to the area, depicted on the photographs, near the lamppost where the collision occurred. He testified to a sketch plan, prepared by himself, depicting his path of travel up to the point of impact.

[8] The point of impact, he explained, was off the tar surface of the road, where he had stopped his motorcycle on the gravel verge approximately 45 m from the intersection.

[9] In cross-examination he reaffirmed that when he had looked to his left and right, whilst stopped at the intersection, he had seen no other vehicles. He stated that he had pulled off and proceeded slowly down Buffelsfontein Road whilst looking for a place where he could cross over to his

townhouse complex. He stated that he was not able to use his usual path of travel because there was water on the side of the road and, having cleaned his motorcycle earlier that day, did not want to get it muddy by driving into the water. He stated that when he "woke up" after the collision he was lying on the gravel surface in the mud and water. His motorcycle was also lying nearby off the road surface in the vicinity of the wooden poles. He conceded that whilst enjoying the meal with his friend he had consumed some alcohol.

[10] The insured driver testified that on the evening in question he had been at his parent's home where he was then staying. He had returned from work earlier that afternoon. He explained that he was on call as an electrician and that he had received a call-out to attend to a fishing vessel in the Port Elizabeth harbour. He was *en route* to the harbour when the collision had occurred. He was driving a Volkswagen Caddy. He stated that he was proceeding down Buffelsfontein in an easterly direction and that he was travelling approximately 60 km/h, which is the speed limit on that section of road. It had been raining and the road surface was wet. Street lights were on and, he stated, his headlights were on.

[11] As he approached the intersection he noticed the plaintiff's motorcycle approaching the intersection in Glendore Road. It had its headlights on. He slowed down as he approached the intersection. He stated that the motorcycle did not stop at the intersection. Instead, it proceeded into Buffelsfontein at what he described as "an angle" directly across Buffelsfontein Road. He immediately applied the brakes of his vehicle. However, the vehicle skidded on the wet road surface and it struck the back of the motorcycle. He said that, so far as he could recall, the left front of his vehicle struck the rear of the motorcycle on the left-hand side.

[12] When his vehicle came to a halt, it was still on the tar surface of Buffelsfontein Road. The motorcycle had come to a rest, off the road surface to the left. The driver of the motorcycle was lying on the gravel verge. The insured driver stated that after the collision he had driven his vehicle off the tar surface onto the gravel verge.

[13] In cross-examination he was asked whether he had not, apart from breaking, attempted to avoid the collision by swerving his motor vehicle. He stated that he did not. When asked why it was put to the plaintiff that he would say that he had swerved his vehicle to the right he could offer no explanation. He conceded in cross-examination that the dashboard lights of the vehicle he was driving automatically light up when the vehicle is on, irrespective of whether the headlights are on. When asked whether it was possible that he had not turned on his headlights he denied this, saying that his headlights were on because it was already dark and he had turned them on when he started driving. When asked whether he could have avoided the collision by passing the motorcycle to the right, he stated that the motorcycle had crossed diagonally into Buffelsfontein Road directly in front of him and that all that he could do was to apply brakes to avoid striking the motor vehicle. He conceded that his vehicle skidded along the tar surface. He was however adamant that the collision had occurred on the tar surface and not on the gravel verge as the plaintiff had testified. Although he could not remember specifically where the point of impact was, he stated that it was at a point closer to the intersection than that indicated by the plaintiff and that it was on the tar surface.

[14] The plaintiff bears the *onus* to establish on a balance of probabilities that the collision was due to the negligence of the insured driver.

[15] It was argued on behalf of the plaintiff that, having regard to the conflicting versions between the plaintiff and the insured driver, that the court would resolve the conflict by taking into account the credibility of the respective witnesses, the reliability of the evidence and the inherent probabilities and improbabilities. The essential dispute in their respective versions, relates to the point of impact of the collision; whether the plaintiff stopped at the intersection before entering Buffelsfontein; and whether the insured driver was driving with his vehicle headlights on.

[16] It was argued that since the plaintiff testified that he had looked around to determine whether there was any traffic on Buffelsfontein Road and that he had said that there was no traffic, that it must be inferred that the insured driver was driving his motor vehicle without headlights. It was further argued that the point of impact as described by the plaintiff accords with the objective evidence, namely that the motorcycle was struck from the rear and that it had fallen onto its right side, which was damaged, and that the motorcycle had come to rest on the gravel verge. Furthermore, that the plaintiff had also been flung onto the gravel verge where he came to rest. It was submitted that the damage to the rear of the motorcycle and the fact that the insured driver conceded that the damage to his vehicle was on the left front of the vehicle indicated that the collision had occurred in the manner described by the plaintiff.

[17] I disagree. The damage to the motor vehicle and the position that it came to rest in after the collision and the damage to the insured driver's motor vehicle do not, with any force of probability, point to the mechanism of the collision as described by the plaintiff. Such damage is equally consistent with the mechanism of the collision described by the insured driver. Equally so, the position that the motorcycle came to rest in does not establish, by necessary inference, that the collision occurred either on the gravel verge or on the tar surface of the road.

[18] What is telling is the probability of the sequence of events described by the plaintiff. In this regard the plaintiff stated that he had seen no vehicle approaching from the left-hand side in Buffelsfontein Road and that he had therefore entered Buffelsfontein Road turning to his right and proceeding slowly until a point approximately 45 m from the intersection where he turned his motorcycle off the road surface onto the gravel and stopped. According to him the entire motorcycle was on the gravel. He had brought it to a halt and placed his right foot on the gravel surface. It was at that point that the motorcycle was struck from the rear on the left-hand side.

[19] For the collision to have occurred in that manner with the point of impact being on the gravel verge it would necessarily mean that the insured driver had either driven off the tar surface or that the vehicle had skidded off the tar surface before impacting with the motorcycle. No other explanation is possible. The plaintiff presented no evidence in regard to how the collision occurred, other than that the motorcycle was struck from the back on the left-hand side when it was already stationary on the gravel verge.

[20] The insured driver stated that when the motorcycle entered Buffelsfontein Road and crossed into his path of travel immediately before the intersection he applied brakes hard and his vehicle skidded. According to him the motorcycle was not stationary at the point of impact and the motorcycle was on the tar surface.

[21] In my view, the plaintiff's description of the point of impact and, in particular, that the motorcycle was stationary and that his right foot was on the gravel at the point of impact is highly improbable. It would suggest that he had already driven along Buffelsfontein Road for the distance of

approximately 45 m and that he had driven his motorcycle off the tar surface onto the gravel and brought it to a halt, prior to the insured driver braking heavily to avoid a collision. It would suggest that the braking had caused the vehicle to veer off the tar surface so that it could impact the motorcycle. Far more probable, in my view, is the version presented by the insured driver. His evidence was that the motorcycle had approached the intersection at Glendore Road slowly but that it did not stop. Instead it entered the intersection directly in front of him into his path of travel at an angle across Buffelsfontein. He applied brakes heavily but, due to the wet conditions, the vehicle skidded striking the motorcycle.

[22] The suggestion, in argument, was that it should be found that the insured driver was driving his vehicle in the dark without his headlights based on the fact that the plaintiff did not see the vehicle approaching. The fact that the plaintiff did not see the insured driver's vehicle approaching the intersection does not allow, as the only reasonable inference to be drawn, the conclusion that the insured driver was driving without headlights on. It is equally probable, perhaps more probable, that the plaintiff did not keep a proper lookout prior to entering the intersection at Buffelsfontein Road.

[23] Neither the plaintiff nor the insured driver impressed as an outstanding witnesses. Their evidence is each subject to some criticism, inasmuch as it was vague in certain respects. The fact that neither witness stood out as a particularly impressive witness does not mean that either witness's version is to be rejected as not credible. Where a court is faced with a conflict in evidence by witnesses whose credibility cannot be impeached, it will have regard to the inherent probabilities and improbabilities in the version in determining which version to accept. I have already pointed to the fact that the plaintiff's version is improbable in certain important respects, whereas the insured driver's testimony is not affected by such inherent improbabilities. There was no evidence to gainsay the insured

driver's version that he was driving his motor vehicle with his headlights on. In my view that evidence must be accepted. It is certainly not possible to reject the evidence solely on the basis that the plaintiff did not see the insured driver's vehicle as it approached the intersection. The acceptance of the fact that the insured driver was driving his vehicle with his headlights on, has the effect that it must be found that the plaintiff, in driving his motorcycle into the intersection into the path of the oncoming vehicle, on the basis that he had not seen it, was undoubtedly negligent. It was suggested in argument that if the insured driver's vehicle did indeed have the headlights on, then the act of driving into the intersection was "almost suicidal". That would be so if the plaintiff had seen the vehicle. His evidence however was that he did not see the vehicle. His failure to see the vehicle is, on the acceptable and reliable evidence, attributable to the fact that he did not keep a proper lookout.

[24] It must be borne in mind that the plaintiff bears the *onus* of proof that the insured driver was negligent in one or more respects. I have already pointed to the fact that there is no evidence to gainsay the evidence of the insured driver that he was driving his vehicle with a headlights on. I have also indicated that the point of impact, to which the plaintiff testified is, upon an appraisal of the evidence as a whole, improbable. The insured driver's evidence as to the point of impact, being on the car surface, is more probable and, in my view that evidence is to be accepted. This points ineluctably to a conclusion that the plaintiff rather than the insured driver was negligent and that the collision was caused by the plaintiff's negligence inasmuch as he drove his motorcycle into the intersection into the path of an oncoming vehicle when it was unsafe and inopportune to do so. There is, in my view, no evidence upon which the court can apportion some of the blame for the collision to the insured driver. It follows that the plaintiff has not discharged the *onus* and accordingly that the plaintiff's claim falls to be dismissed.

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

The plaintiff's claim is dismissed with costs.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Plaintiff
Adv. D. Niekerk
Instructed by Mc Williams & Elliot Inc.

For the Defendant
Adv. N. Paterson
Instructed by Ketse Nonkwelo Inc.