IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 2881/2017

Date Heard: 30/04/2019

Date Delivered: 30/05/2019

Not Reportable

In the matter between:

RICHARD ALLAN SMITH Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKAULA J:

[1] The plaintiff issued summons against the defendant based on a "hit and run" accident which occurred on 3 May 2016 on the N2 Freeway in Port Elizabeth. The plaintiff at the time of the accident was a pedestrian. He was pushed onto oncoming traffic by a person who was robbing him. I shall elaborate on this when I deal with the evidence.

[2] The parties agreed to separate the merits from *quantum.* I made an order in terms thereof. The matter served before me on liability. The plaintiff and his wife were the only witnesses called. The defendant, for obvious reasons, did not have a witness because the insured driver did not stop after the accident.

[3] The issues before me are whether (a) the insured driver was negligent and if so whether (b) there was a causative contributory negligence on the part of the plaintiff.

[4] Three photographs depicting the scene were handed in by consent. The plaintiff confirmed the scene as depicted on the photographs. He testified that on the day he was walking along the N2 freeway from Moffat on Main to Vistarus mission station in Sydenham. He was walking with his wife and son who were sixteen years old at the time. They decided to rest on a metal barrier (the barrier). He sat with his leg away from the road i.e. with his back towards the road. His wife and son sat on the barrier to his left. They were carrying three bags. Three men approached them as they were resting. One of them was carrying a knife. He wielded the knife and attempted to stab the plaintiff. The plaintiff reacted by jumping onto the yellow line or emergency lane and fought back. The attacker, on realising that the plaintiff was too strong for him, swung him around and threw the plaintiff in front of the insured motor vehicle. The plaintiff was struck by the insured motor vehicle on the outside lane closer to the yellow line. He got injured and was taken by ambulance to the hospital.

[5] The plaintiff testified that the whole thing happened in a spit second. He did not see the insured motor vehicle approaching nor could he describe it. He contended that the insured driver possibly had little opportunity to do anything in order to avoid the collision with him. He further conceded that it was unlawful for them to have walked on the freeway and the insured driver was not expecting any pedestrians on the freeway. His cross-examination by *Mr Paterson*, for the defendant, went on as follows:

> "*Mr Paterson*: You would agree with me being thrown in front of oncoming traffic the driver of the vehicle had little opportunity to do anything?
>
> Mr Smith: Possible yes.
>
> *Mr Paterson*: He is driving on a freeway where he does not expect people on the freeway, as you indicated it is unlawful for people to be on the freeway, is that correct?
>
> Mr Smith: That is correct.
>
> *Mr Paterson*: He can be driving as much as 120km/h on the freeway. *(Sic)*
>
> Mr Smith: That is correct.
>
> *Mr Paterson*: Everything lawfully and legally he could have been doing, is that correct?
>
> Mr Smith: That is correct.
>
> *Mr Paterson*: So you cannot say whether he kept a proper lookout?
>
> Mr Smith: No.
>
> *Mr Paterson*: You cannot say whether he was driving in a speed in excessive circumstances prevailing? *(Sic)*
>
> Mr Smith: No, I cannot say that.

Mr Paterson:	You cannot say what he did, if he tried to apply his brakes or otherwise?
Mr Smith:	No, I cannot say that.
Mr Paterson:	You cannot say that he had any opportunity to avoid the collision between himself and the person thrown into the road?
Mr Smith:	No, I cannot say that.
Mr Paterson:	And you would agree with me that you having not been flung in the road there would be no opportunity for him to take evasive action?
Mr Smith:	That is correct.
Mr Paterson:	Thank you M' Lord, I have no further questions".

[6] The next witness called was Carol Ann Smith, the wife of the plaintiff. She confirmed the evidence of the plaintiff in respect of the events that took place prior to the collision. She was standing on the grass side next to the barrier when her husband was hit by a red Volkswagen Golf driven by an elderly man. She testified that the insured driver did not slow down nor swerve before the collision. She maintained that the driver could have braked if he wanted to. She stated that after the car ran over the plaintiff the driver accelerated and drove off from the scene. The plaintiff remained lying on the left side of the road. She was assisted by three gentlemen who stopped after the collision in moving the plaintiff out of the road. An ambulance was called and he plaintiff was taken to hospital for treatment. Their assailants ran away with their two bags. The incident occurred at about 14h00 on a clear sunny day.

[7] She confirmed that the freeway was meant for motor vehicles only and not pedestrians. The speed limit is 120km/h. She testified that the insured driver had an opportunity to slow down before the accident. She based that on the fact that, after the accident, she was able to jump onto the road and redirect traffic so as to avoid cars running over the plaintiff. When pressed under cross-examination that the insured driver would have had little opportunity, little time, and little distance to have been able to brake, she responded by saying "I would not know how to answer that".

[8] The defence case was closed without the leading of evidence for obvious reasons.

[9] *Mr Niekerk*, for the plaintiff argued that the insured driver did not keep a proper look-out. He should have seen that there were people on the freeway who were not supposed to have been on the freeway. He ought to have seen that there was a scuffle between them and should have exercised caution and took measures to avoid colliding with the plaintiff. Furthermore, his failure to stop after the accident overwhelmingly supports the view that he was wrong hence he did not even report the accident to the police, *Mr Niekerk* submitted. The plaintiff argued that there was no contributory negligence established by the defendant. The reason being that the plaintiff was involuntarily pushed on the path of travel of the oncoming traffic.

[10] *Mr Paterson* argued that the insured driver could not have done anything in the circumstances because the throwing of the plaintiff on his path of travel occurred in a split second. He submitted that there was no obligation on the part of the insured driver to slow down and interrupt traffic for people who were outside the roadway. He submitted further that under the circumstances it could not be inferred that the insured driver did not keep a proper look out. He argued further that there could be a multitude of reasons why the insured driver did not stop after the accident.

[11] The evidence tendered is that of the plaintiff, his wife and photographs of the scene. The photographs depict the road as an open and slightly declining road. The insured driver could see the plaintiff and his family leaning on the barrier at a distance. Furthermore, nothing obscured the insured driver from seeing the three gentlemen walking towards the plaintiff as testified by the latter. Upon meeting, one of the gentlemen suddenly attacked the plaintiff with a knife. The plaintiff's evidence is that the attack was quick. In a spilt second the plaintiff was swung around and pushed on the path of the oncoming traffic hence the collision. There is absolutely no evidence that the insured driver was in a position to have observed the scuffle before the collision. There was nothing untoward, prior to the collision, which could have caused the insured driver to be overly cautious. They were not in his path of travel. They were not attempting to cross the road. In the words of the witnesses, all that ensued occurred very fast and in a fraction of a second or split second as they put it. Even the witnesses are of the view, as reflected above, that the insured driver could have done little, if anything, to avoid colliding with the plaintiff.

[12] I do not agree with *Mr Niekerk* in his argument that the insured driver did not stop because he knew he was negligent. There are various inferences that can be drawn from his non-failure to stop. One could be that he was afraid to stop because of the manner in which the plaintiff ended up on the road. He may have been afraid of the person who was attempting to stab the plaintiff. But that he did not stop does not indicate that he was negligent especially when there is no evidence to suggest that. In the same breath, I am unable to say whether the insured driver did not reduce the speed he was traveling on seeing them walking on the side of the road. Nothing suggests that the plaintiff was also negligent. The plaintiff involuntarily found himself on the road. I am unable to find on the probabilities that the insured driver was negligent in colliding with the plaintiff.

[13] In the result, I will issue the following order.

The action is dismissed with costs.

JUDGE MAKAULA
Judge of the High Court

Counsel for the Plaintiff: *Adv D Niekerk*

Port Elizabeth

Instructed by:	*McWilliams & Elliot Inc.* *Port Elizabeth*
Counsel for the Defendant:	*Adv N Paterson*
Instructed by:	*Ketse Nonkwelo* *Port Elizabeth*
Date Heard:	*30 April 2019*
Date Delivered:	*30 May 2019*