

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 35094/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 14 September 2023

E van der Schyff

In the matter between:

FREDRICK ALBERTUS BARNARD PLAINTIFF

and

THE ROAD ACCIDENT FUND DEFENDANT
(LINK 4[...])

JUDGMENT

Van der Schyff J

Introduction

[1] The plaintiff was involved in a motor vehicle accident on 23 June 2018. The plaintiff was the driver of the motor vehicle. It is the plaintiff's case that he struck a donkey that was hit by another motor vehicle and left on the road surface. The defendant questioned whether the animal was hit by another vehicle, and if the court found that it was, it raised the aspect of contributory negligence on the plaintiff's side. Merits and quantum are in dispute.

This trial deals only with the merits, as the plaintiff's Rule 33(4) application to separate merits and quantum was granted.

Evidence

[2] Two witnesses testified on behalf of the plaintiff, to wit, the plaintiff and his fiancée, who was a passenger in the vehicle. The parties also agreed that the documents presented to the court would be accepted as evidence, and there would be no need to call the authors.

[3] The plaintiff testified that he has a code 14 driver's licence. On the day of the accident, he left his home in Hoedspruit around 2h30 in the morning with his fiancée and their three children to visit family in the Free State. Everybody's seatbelts were fastened. He frequently drives on the road in question.

[4] They travelled on a two-lane tar road. His windscreen was clean, and the lights were in a working condition. The road was dry, and it was not raining. He passed between the tunnel and Ohrigstad. He approached a bend in the road. He was driving within the speed limit of 80km/ph. After the bend, the road is straight but from his side with an incline. Exiting the bend, he saw an oncoming vehicle with its lights on bright. He flicked his lights a few times, but the approaching driver did not dim its lights. The car's lights blinded him, and he struck something in his lane when the car was next to him. He lost control, and the vehicle rolled over. When the vehicle stopped, he enquired about his passengers' safety. It became apparent that one of the children was fatally injured.

[5] After he exited the vehicle and tended to his family members, he walked around the scene to see what he struck. Evidently, a black (dark-colored) donkey was lying in his travel lane. As he walked around the scene, he saw indications in the other lane that the donkey had previously been struck by another vehicle; he found pieces of hair, intestines, and blood on the

road. He did not see other donkeys in the area. He testified that he could not have done anything to avoid colliding with the object in the road. He added during cross-examination that he would also have hit the donkey if it was on its feet as he was blinded by the approaching vehicle.

[6] The second witness confirmed the plaintiff's evidence. She testified that when they exited the bend and saw the approaching vehicle's lights, the plaintiff slowed down. She testified that the plaintiff could not swerve to the other lane because the vehicle in the other lane was next to them. The plaintiff testified that he did not reduce speed when he saw the approaching vehicle.

[7] When the police arrived, they took photos of the accident scene. They did not take photos of the blood, intestines, and hair in the other lane. A report was handed in from Toyota wherein it is explained that the airbags did not deploy because the point of impact was too low.

[8] During cross-examination, it was put to the plaintiff that he was driving at an excessive speed. Counsel referred the plaintiff to the report produced by Toyota. In this report, the following is recorded:

‘The vehicle was travelling at speeds between 132km/hr and 13 km/hr during the last 5 seconds of impact.’

[9] The plaintiff reiterated that he was driving within the speed limit.

[10] It was also put to the plaintiff during cross-examination that he should have expected animals near the road because he passed a settlement. He said again that he saw no other animals in the area.

Discussion

[11] The present matter highlights the predicament faced by many legal practitioners representing the Road Accident Fund (Fund). Since no witnesses were called to testify on behalf of the Fund, despite such witnesses being available, the only version before the court is that of the plaintiff. By agreeing to accept the documentary evidence without calling the authors of the respective documents, the Fund deprived itself of an opportunity to contest ambiguities. Where a witness's credibility cannot be questioned, the court is bound to accept that witness's version of events, particularly if such a version is not improbable or far-fetched.

[12] The respondent's counsel submitted that the plaintiff's failure to take evasive steps, reduce his speed, and apply his brakes to avoid colliding with the object in the road caused or contributed to the accident. He said with reference to *Flanders and Another v Trans Zambezi Express (Pty) Ltd and Another*¹ that a driver must ensure a good balance between visibility and the speed the driver travels.

[13] Based on the evidence before me, there is no reason to doubt the plaintiff's version that the donkey lying in his lane was previously hit by a vehicle traveling in the opposite direction and trajected into his lane. The plaintiff explained that he showed the intestines, hair, and blood to the police when they were at the scene, and he can't explain why they did not include photos thereof in the police plan. The defendant was at liberty to call the relevant police official as a witness to explain whether there was any indication that the donkey was initially hit in the other lane. Due to the Fund's failure to do so, doubt cannot be cast on the plaintiff's evidence. The same applies to the plaintiff's evidence regarding the speed he travelled.

[14] The standard of proof in civil cases is the well-known balance of probabilities. This requires of the party on whom the onus lies to satisfy the court that he is entitled to succeed in his claim or defence.²

¹ 2009 (4) SA 192 (SCA).

² *Pillay v Krishna* 1946 AD 946

[15] The plaintiff's counsel correctly submitted that the donkey could not have dropped dead lying in the road, and a common-sense approach should be followed. It is a reasonable and probable inference that the donkey was earlier hit by another vehicle and was then projected by the impact from the opposite lane to the middle of the lane where the plaintiff was traveling.

[16] It was the duty of the motorist who initially collided with the animal to either remove it from the road or give sufficient warning to oncoming traffic. The unknown driver's failure to do so constitutes negligence. The plaintiff's counsel referred to, amongst others, the decision in *Manderson v Century Insurance Co Ltd*,³ where it was held that the negligence of the person responsible for leaving a stationary obstruction on the road is continuous. Hence, a driver's failure to remove, in that case, a stationary vehicle from its dangerous position was the cause of the collision. In a similar scenario, the case of *C and Others v Road Accident Fund*,⁴ the plaintiff collided with a tire lying in the emergency lane of a road. After considering the evidence and comparable cases, the court held that the most plausible inference to be drawn is that the object emanated from the driving of another vehicle. The unknown driver was, *among other things*, negligent in that they abandoned that vehicle's wheel and axle assembly in the emergency lane, failed to remove the object, left it unattended, and failed to put out any warning signs alerting other motorists of the danger it posed.

[17] In *Grobler v Santam Versekering Bpk*,⁵ a car collided with a horse at night and killed it. The driver failed to remove or take reasonable steps to cause the dead horse to be removed from the road. Another vehicle thereafter collided with the dead horse, and a passenger suffered damages from the resultant injuries. The court held that such damages arose out of the driving of the first vehicle and were caused by the driver's negligence.

³ 1951 (1) SA 533 (A) at 542H-543A.

⁴ (2018/027323) [2023] ZAGPJHC 349 (18 April 2023).

⁵ 1996 (2) SA 643 (T).

[18]

In *Flander*,⁶ the court explained that the negligence required to establish liability in civil actions is determined by a simple test, namely the standard of care and skill that the reasonable man would observe. Very importantly, the court then stated – ‘The standard will, of course, depend on the peculiar circumstances of each individual case.’ The court continued:

‘In this regard, the full court referred to *Seemane v AA Mutual Insurance Association Ltd*, where it was held ‘that there is no generally valid rule of law that a driver must so regulate his speed that he can stop within the limits of his field of vision’, and proceeded as follows:

‘However, in circumstances where the driver of the vehicle should have foreseen the possibility of unlighted obstructions in the road and where he realises that he might be blinded by the lights of an oncoming vehicle, he might be held to be negligent if he does not apply his brakes and slow down because “(t)he ultimate issue always is whether the facts establish negligence, not whether they show that the driver in question failed to keep his speed within the range of his vision, *though such failure may in a particular case be a crucial factor in deciding whether or not there was negligence*”’(Footnotes omitted.)

[19]

It is trite that in our law, a driver is bound to guard against danger he could and should have foreseen. What is reasonably foreseeable would depend on surrounding circumstances. *In casu*, there is no evidence before the court in relation to this particular road at the particular time that the accident occurred. The Fund did not place any evidence before the court where it can be inferred from that the plaintiff had to guard against the possibility of their being animals or other reasonably foreseeable obstructions on that particular road. Even if one was to accept that the plaintiff travelled at high speed, instead of the 80 km/ph he testified, there is no evidence that he could have avoided the collision if he was travelling at a slower speed. In addition, I cannot disregard the second witness’s evidence that she felt the vehicle reducing speed when she saw

⁶ *Flander*, *supra* at para [13].

the oncoming vehicle. While he might not have done it deliberately, the plaintiff is an experienced driver driving heavy vehicles. Based on the second witness's evidence, it can't be discounted that he reacted instinctively without thinking about it and, as a result, can't recall reducing speed.

ORDER

In the result, the following order is granted:

- 1. The defendant is liable to pay hundred percent of the plaintiff's proven or agreed damages.**
- 2. The defendant is liable to pay the costs of this trial.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the plaintiff:	P.J. Vermeulen SC
Instructed by:	Savage, Jooste & Adams Inc.
For the defendant:	M.O. Sekgotha
Instructed by:	State Attorney
Date of the hearing:	31 August 2023
Date of judgment:	14 September 2023