

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 590/2019

Heard: 27 July 2022

Judgment delivered: 05 August 2022

REPORTABLE: NO

Circulate to Judges: NO

Circulate to Regional Magistrates: NO

Circulate to Magistrates: YES/NO

In the matter between:-

**ANNA SOPHIA SIEBERHAGEN N.O. ON BEHALF OF
WIEKUS EFRIAM RIET**

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT:

INTRODUCTION:-

[1] Mr Wiekus Efraim Riet was injured on 13 May 2018 in a motor vehicle accident on the Diamond Park main road at or near Greenpoint, Kimberley, Northern Cape Province. He was a pedestrian. Mr Mosala was driving a white Opel Corsa bakkie with registration number [....].

[2] Despite the agreement reached between the parties in the Rule 37 conference that the merits and the quantum would be adjudicated separately, the parties at the outset of the hearing applied for a separation between the issues of merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court. This application was granted, and the trial accordingly proceeded on the merits.

[3] Mr Riet is duly assisted herein by his appointed *curatrix ad litem*, Mrs AS Sieberhagen.

[4] The plaintiff alleged that the accident was caused by the sole negligence of the Mr Mosala.

[5] In its plea, the defendant denied the plaintiff's allegation that that was the sole cause of the accident as alleged. The defendant's alternative and conditional pleas are that:-

5.1 the accident was caused by the sole negligence of the plaintiff; or

5.2 the accident was caused by the contributory negligence of the plaintiff. Accordingly, the defendant prayed that the plaintiff's damages, if proven, should be apportioned in accordance with his degree of negligence *vis-à-vis* that of the driver.

[6] The question for determination is whether the collision was caused by negligence on the part of the insured driver; and, if so, whether Mr Riet's negligence was a contributory cause.

[7] The onus is on the plaintiff on the first issue. If he fails, that will be the end of the matter. If he succeeds, he is entitled to his proven damages in full. The onus on the second issue is on the defendant.

EVIDENCE:-

[8] Mr Riet was unable to testify due to his poor memory and Messrs DL Pieters and I Appie were called to testify on his behalf.

[9] Mr DL Pieters testified that:-

9.1 He has been Mr Riet's caregiver since he was discharged from hospital on 23 December 2018;

9.2 Mr Riet is unable to testify as he cannot remember the collision or how he sustained his injuries;

9.3 On 13 May 2018 at approximately 11:00, he and Mr Riet went to Oom Jan's tavern where they were met by Mr Appie and another friend. Mr Appie took photos of Mr Riet and their friend while they were standing on the paving at the side of the road;

9.4 Mr Pieters remained seated on a crate, drinking a Black Label beer, and he was watching them take the photos;

9.5 Mr Riet crossed the road to buy coal at the tuck shop across from the tavern;

9.6 He witnessed the insured driver reversing from his yard in the same street and driving very fast, more than 40/60 km/hour in their direction;

9.7 The insured driver did not stop at the four-way stop, but kept on speeding towards them;

9.8 Mr Appie and their friend jumped out of the road;

9.9 The insured driver's vehicle veered into the right lane and collided with Mr Riet;

9.10 The insured driver did not apply his brakes or hoot prior to the collision. He only applied his brakes after the collision;

9.11 Mr Riet was flung through the air and landed some distance away; and

9.12 The insured driver brought his vehicle to a standstill approximately 3 houses further down the road.

[10] Under cross examination, Mr Pieters persisted with his evidence without being swayed. I do not hesitate to accept his evidence as a credible and reliable version of the accident. His evidence was not tarnished by any contradictions.

[11] Mr Appie's evidence, although not faultless in that he experienced problems when questioned on estimated distances, corroborated Mr Pieters's evidence in material respects, especially with regard to the following:-

11.1 Where Mr Riet, himself and their friend were standing before the collision;

11.2 The insured driver travelled at high speed;

11.3 The insured driver did not hoot or brake before the collision;

11.4 The insured driver swerved into the wrong lane and collided with Mr Riet; and

11.5 After the collision, the insured driver brought his vehicle to standstill approximately 5 or 6 houses away.

[12] The insured driver, Mr Mosala, testified on behalf of the defendant. His evidence, when examined in chief, was that:-

12.1 He stopped at the four-way stop and witnessed people, with beers, standing in the road in his lane;

12.2 He was travelling at approximately 20/40km per hour;

12.3 He tried to hoot, but the pedestrians did not move away.

12.4 He attempted to swerve to avoid them, but Mr Riet moved into the right lane where he collided with him.

[13] Tellingly, however, the insured driver also testified that he could see everything on the road before the collision.

[14] Under cross-examination, he testified that:-

14.1 He lives in the same street where the collision occurred

14.2 He knew that there was a tuck shop and a tavern close to the four-way stop and that there possibly could be pedestrians in the vicinity;

14.3 He had already noticed the people in the road when he stopped at the four-way stop;

14.4 He expected the pedestrians to move away when he hooted;

14.5 It did not cross his mind to slow down or stop as he had already swerved into the wrong lane to avoid the pedestrians;

14.6 He could not immediately apply his brakes after the collision as he could not see properly due to the shattered windscreen and the fact that Mr Riet was lying on top of the bonnet; and

14.7 He brought his vehicle to stand still approximately 18-20m from the point of impact.

APPLICABLE LEGAL PRINCIPLES:-

[15] It is trite that the plaintiff bears the overall *onus* to prove, on a balance of probabilities, that the insured was driving negligently at the time of the collision. In **Stacey v Kent**¹, Kroon J, writing for the majority of the Full Bench, put it in this way:-

“...The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.”

[16] The application of the balance of probability test, where there are two factually different versions before court, has been enunciated by our courts as follows:-

“In deciding whether the plaintiff has discharged the onus of proof, the estimate of the credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favour the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nonetheless believes him and is satisfied that his evidence is true and that the defendant's version is false. It is not desirable for a Court first to consider the question of the credibility of the witnesses and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry.”²

[17] The author, WE Cooper³ writes as follows about a pedestrian's duty when crossing a road:-

¹ 1995 (3) SA 344 (ECD) at 352H-I.

² National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E).

³ Delictual Liability in Motor Law; See also Beech v Setzkom 1928 CPD 500 on 504

“A pedestrian who intends crossing a road should do so at an opportune moment and he must exercise reasonable care. He must use his senses to ascertain whether any motor vehicles are approaching. He should keep a proper look-out; he should acquaint himself with the vicinity and scan the road so as to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety. Usually a pedestrian will look to left and to right before entering the road. Once he reaches the centre of the road he should devote his attention to motor vehicles approaching from his left.”

[18] In **Pearce v Taylor**,⁴ Pittman J stated as follows about the pedestrian duty:-

“Obviously the extent of the pedestrian’s duty must be determined in accordance with the circumstances, e.g., the nature and width of the road, and here the one in question is comparatively narrow, and the situation unfolded in the evidence rather one to which the remarks of the present learned Chief Justice in Baratz v. Johannesburg Municipality ([1913] T.P.D. at p. 741), should be applied, viz.: “As was pointed out in Clark v. Petrie (16 Sc.L.R. pp. 626, 627), there is no obligation on a foot-passenger crossing a street to be constantly looking in all directions. It may be a wise precaution, but to omit it is not always negligence. A foot-passenger must take reasonable precautions to see that at the moment of crossing he is not in immediate danger of being run over, but he need not be constantly looking back to see if he is being pursued by a tram.”

[19] WE Cooper comments as follows about the duties of a driver:-⁵

“A driver is required to exercise reasonable care and vigilance not only towards a pedestrian he sees, or ought reasonably to see, on or near the road; he is obliged to exercise the same reasonable care and vigilance towards an unseen pedestrian whose presence he should reasonably foresee or anticipate because, for example, of the proximity of a school or of a passenger bus.”

⁴ 1934 EDL page 199.

⁵ **Supra**, on page 195.

ANALYSIS OF THE EVIDENCE:-

[20] It is common cause that the collision occurred in the right lane as a result of the fact that the insured driver swerved into the incorrect lane;

[21] In my view, if the insured driver was indeed travelling slowly, he would have been able to timeously brake and/or even come to a complete standstill before colliding with Mr Riet, who he observed before the collision.

[22] Based on the insured driver's own evidence, the insured driver should have noticed Mr Riet's movement and adjusted his speed shortly after he reached the four-way stop. He failed to do so. Moreover, he should reasonably have foreseen or anticipated the presence of a pedestrian in the vicinity, on account of his knowledge of the proximity of the tavern and tuck shop. In *casu*, the insured driver failed to exercise reasonable care and vigilance.

[23] The only reasonable inference that can be drawn from the evidence is that:-

23.1 The insured driver did not stop at the four-way stop;

23.2 The insured driver was travelling at a high speed;

23.3 The insured driver did not apply his brakes or hooted prior to the collision; and

23.4 Mr Riet was already on the right side of the road when the insured driver swerved.

[24] In view of the credible and logical corroborative evidence of Messrs Pieters and Appie, I also find it improbable that Mr Riet jumped into the right when he saw the insured driver's vehicle approaching him.

[25] In weighing up and testing the plaintiff's allegations against the general probabilities, I am satisfied that the plaintiff's version is true and accurate and

acceptable, and that the version advanced by the defendant is therefore false or mistaken, and falls to be rejected.

[26] In this matter, I could detect no negligence in the conduct of the plaintiff. The evidence clearly points to the insured driver as the person exclusively responsible for the accident.

ORDER:

In the result the following order is made:

[1] The issues of merits and quantum are separated in terms of Rule 33(4) of the Uniform Rules of Court:

[2] The issue of quantum is postponed *sine die*;

[3] The collision under consideration was caused solely by the negligence of the insured driver;

[4] The defendant is liable for 100% of the plaintiff's agreed upon or proven damages;

[5] The defendant is to bear the costs of this hearing on a party and party scale.

**STANTON, A
ACTING JUDGE**

**On behalf of the plaintiff:
On behlafof the defendant**

Adv. JM Rust
Mr. MA Mogano