



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

[1] REPORTABLE: NO

[2] OF INTEREST TO OTHER JUDGES: NO

12/06/2019
DATE


SIGNATURE

CASE NO:A 329/18

In the matter between:

LUSANDA DYANI

Appellant

and

THULAGANYO MPHAMO

Respondent

JUDGMENT

KEKANA AJ

[1] This is an appeal against the whole judgement of the honourable magistrate M.J Khotso delivered on the 18th May 2018. We proceeded to hear the matter on an unopposed basis after being satisfied that the respondent had been served with the

notice of appeal and the notice of set down. The appellant instituted a claim against the respondent for damages in the sum of R59 821.93 resulting from a collision between her vehicle and the respondent's vehicle. The respondent denied liability and filed a counterclaim for damages to his vehicle in the sum of R18 137.95.

[2] The trial proceeded on the issue of liability only with the issue of quantum being postponed for later determination. The appellant testified and called her 16 year old daughter, who was a passenger at the time of the collision, as a witness. The respondent testified and did not call any witness.

[3] The appellant testified that she was travelling along Visagie Street, which is a one way street. She was on her way to church which is also on Visagie Street. She was driving in the middle lane and she decided to change to the outer lane in order to park the vehicle. She noticed the respondent's vehicle reversing at a high speed, she stopped the vehicle and hooted in order to draw the respondent's attention to her vehicle. The respondent bumped the right front side of her vehicle.

[4] During cross-examination she stated that when she first noticed the respondent's vehicle it was 10 metres away. At the time of the collision the front wheel of her vehicle was on the white lane separating the two lanes. When asked why she did not avoid the collision by moving back to the middle lane she stated that it did not cross her mind.

[5] Mbali Dyani, the appellant's daughter testified that they were on their way to church at approximately 11h40. They were close to their destination when the appellant decided to move from the middle lane to the outer lane. She saw the respondent's vehicle ahead of them. He stopped his vehicle and reversed. The appellant stopped and hooted when she saw the respondent reversing but he carried on reversing and collided into their vehicle. She demonstrated the distance at which the respondent's vehicle was when they first saw it reversing. The distance was estimated to be approximately 6 metres.

[6] The respondent testified that he was driving slowly along Visagie Street looking for parking. He saw a parking bay and stopped in order to park his vehicle. He looked in the rear view mirror and seeing that there were no vehicles coming from

behind him, he started reversing. He suddenly heard a loud bang as the appellant's vehicle bumped the rear of his vehicle.

[7] The trial court found that the appellant failed to prove on a balance of probabilities that the respondent's negligence caused the collision and made the following orders:

- ' 1. That the plaintiff has on a balance of probabilities not discharged the onus resting on it proving that the defendant's negligence caused the collision between their respective vehicles
2. That the plaintiffs claim is accordingly dismissed
3. that the defendant has on a balance of probabilities discharged the onus resting on it of proving its locus standi in the matter
4. That the defendant's counterclaim that the collision was caused by the plaintiff's negligence is consequently upheld
5. That quantum be and is hereby postponed sine die
6. That the plaintiff is ordered to pay defendant's costs on attorney and client scale.'

[8] The trial court found that there was a material contradiction between the appellant and her daughter regarding the distance between the two vehicles. The appellant said there was a distance of 10 meters while the distance given by her daughter was estimated to be 6 meters. The trial court found that from their evidence, both drivers had ample time and opportunity to avoid the collision. It found further that hooting was not the best option available to the appellant to avoid the collision but rather that the best option under the circumstances was to drive back to the middle lane. It also found that the plaintiff found herself in a situation of sudden emergency and failed to act accordingly. The trial court then concluded that the appellant was the sole cause of the collision.

[9] It was submitted on behalf of the appellant that the court erred in finding that there was a material contradiction between the evidence of the plaintiff and her daughter regarding the distance between the vehicles. The distance between the

two vehicles was immaterial in concluding that both drivers could have reacted to avoid the collision. The trial court erred in finding that the accident was solely caused by the plaintiff's negligence, when also finding that the defendant was to blame for that collision.

[10] It was further submitted that the trial court erred in finding: (a) that the plaintiff's sketch plan of the collision shows that the plaintiff's vehicle was on a collision course with the defendant's vehicle, when it was the plaintiff's evidence that her vehicle was stationary at the time of the collision; (b) the plaintiff found herself in sudden emergency and failed to act accordingly; and (c) hooting was not the best option under the circumstances as the defendant could have been playing loud music.

[11] The two versions before the trial court were mutually destructive in the sense that the acceptance of the one version had to lead to the rejection of the other. The appellant bore the onus to prove that the respondent was liable for the damages suffered by her as a result of the collision. The appellant could only succeed if she satisfied the trial court on a balance of probabilities that her version was true and therefore acceptable and the version advanced by the respondent was either false or mistaken and fell to be rejected. See *National Employer's General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (A)

[12] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* (427/01) [2002] ZASCA 98 (6 September 2002) the court held as follows:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with

what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[13] In *National Employer's General Insurance Co Ltd v Jagers* 1984 (4) SA432 ECD at 440 E-H Eksteen AJP stated that "In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours 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 nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false."

[14] The court a quo failed to weigh up and test the appellant's allegations against general probabilities. The trial court stated as follows: "In casu, the Plaintiff saw the defendant allegedly reversing at a high speed from about 10 meters away, creating an unexpected emergency that needed quick thinking to get away. The Plaintiff unfortunately froze..."

[15] It is clear the trial court accepted the version of the appellant that the respondent collided into her vehicle which was stationary at the time. It however found that

stopping and hooting, as the appellant did was not the best cause of action under the circumstances. The reason provided by the court for this finding was based on speculation that the respondent could have been playing music and therefore not heard the hooting.

[16] In my view the trial court erred in its approach to the mutually destructive versions. Having accepted the appellant's version, it ought to have rejected the respondent's version that the appellant is the one that collided into the back of his vehicle which was stationary. Although the court did not deal with the respondent's version, by implication it appears to have rejected the respondent's version.

[17] According to the respondent he had his vehicle in reverse and he also had his right indicator on when he heard a bang. The respondent testified under cross-examination that once his vehicle came to a halt he looked back using the two side mirrors and the rearview mirror to see whether there was any vehicle coming from behind. He confirmed that at no point in time did he see the appellant's vehicle until it collided into his vehicle.

[18] He further confirmed that he did not check the lane next to the lane he was on. He was asked "... You testified that you did not look to the back of the other lanes. How did you know whether there are cars in the other lanes behind you?" and his reply was "because after the bump I looked to the back."

[19] The respondent's version that he looked back but did not see the appellant's vehicle until it collided into his vehicle does not seem plausible. It also seems improbable that the appellant who was travelling slowly, at approximately 40km p/h according to the respondent, changed lanes and collided into the respondent's vehicle which had its reverse lights and right indicator on.

[20] In my view the version of the appellant was more plausible. She was consistent in her version that upon noticing that the respondent was reversing towards her vehicle at a high speed, she stopped and hooted. Therefore in my view the trial court ought to have accepted the version of the appellant as more probable and rejected the respondent's version as either mistaken or false.

[21] Regarding the finding that the evasive action was not the best option under the circumstances, the trial court found that the respondent's conduct of reversing at a high speed 'created an unexpected emergency which required quick thinking to get away'. However there was no evidence led to this effect. Even if it could be found to have been proven that there was sudden emergency created by the respondent's conduct, the appellant cannot be criticised for the action she took under the circumstances.

[22] The court in *Ntsala and Others Mutual & Federal Insurance Ltd* 1996 (2) SA 184(T) at 192 f-h said:

"Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option, which resulted in a collision. Van der Heever J (as he then was) in *Cooper v Armstrong* 1939 OPD 140 at 148 said the following: "Where a plaintiff is put in jeopardy by the unexpected and patently wrongful conduct of the defendant, it seems to me irrational meticulously to examine his reactions in the placid atmosphere of the Court in the light of after-acquired knowledge; to hold that, had he but taken such and such a step, the accident would have been avoided, and that consequently he also was negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others."

[23] According to the appellant, she hooted to draw the respondent's attention, however despite this, the respondent collided into her vehicle. The respondent in this case failed to keep a proper lookout alternatively he failed to apply brakes of his vehicle and was therefore negligent.

[24] I therefore find that the trial court erred in finding that the appellant could have avoided the collision by moving back to the middle lane. Having found that the

collision was caused by the sole negligence of the respondent, I will therefore not deal with the issue of the respondent's locus standi.

I therefore make the following order:

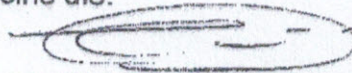
1. The appeal succeeds with costs.
2. The order of the court below is set aside and is substituted with the following order:

“2.1 The defendant is liable for 100% of the plaintiff's proven damages;

2.2 The defendant's counterclaim is dismissed;

2.3 The defendant to pay the plaintiff's costs on a party and party scale;

2.4 That quantum is hereby postponed sine die.”



Kekana P D
Acting Judge of the High Court

I agree



Makhuvele T A N
Judge of the High Court

FOR THE APPELLANT: ADV J VAN DER MERWE
INSTRUCTED BY COUZYH HERTZOG HORAK INC
FOR THE RESPONDENT: NO APPEARANCE