



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4992/2014

In the matter between:

WILLEM HENDRIK VAN PLETZEN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 16 & 17 MAY 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 01 JUNE 2017

[1] This is an action instituted in accordance with the provisions of the Road Accident Fund Act 56 of 1956 (as amended) in respect of personal injuries sustained by the plaintiff. It is common cause that the plaintiff was involved in a “hit and run” accident on the 5th February 2011 near the corner of Kellner Street and Second Avenue in Westdene, Bloemfontein. This left him with extensive multiple injuries to the head, face and right leg.

- [2] The only issue to be determined in this matter is the merits. It is common cause that the defendant accepted liability and that the dispute revolves around the degree of negligence on the part of the insured driver.
- [3] At the outset of the trial, counsel for the plaintiff brought an application that I should make a ruling that the defendant had already conceded the merits and that there is no outstanding issue to be adjudicated. He pertinently referred to the Request for Further Particulars, Further Particulars and the Minutes of the Pre-Trial Conference in terms of the Uniform Rules of Court number 37 where the defendant repeatedly accepted 1 % liability towards the plaintiff. I was not persuaded with his submission and I dismissed the application. I shall deal with the reasons of my ruling in the following paragraphs.
- [4] The occurrences of that fateful day for the plaintiff were narrated by the sole witness namely Stephanè Victor who was employed as a taxi driver by the plaintiff's father. She received a telephone call from the plaintiff requesting her to pick him up at Ulong Lounge situated in Second Avenue. It was around 22H00. On her arrival the street was busy and she parked her taxi on the side of the street and made a call to the plaintiff who was in conversation with an unknown person while sitting on the steps of the premises he was visiting.
- [5] According to her, she parked her motor vehicle facing Kellner Street in the north with Zastron Street in the south. The plaintiff stood up and took steps to cross Second Avenue from east to west. It is important to note that all the buildings that were on her side have been demolished probably to make way for a new development. On that day visibility was hindered by the buildings that were on her side of the street.
- [6] The plaintiff walked up to the edge of the street and located himself between the two (2) motor vehicles that were parked on his side of the road. He made his observations by looking on his left and right side before crossing the street. He took the first step to cross the street. On the blink of an eye, a grey motor vehicle racing up Kellner Street from the west to the east with

noisy music appeared on the scene. It turned to the right into Second Avenue and all she heard was the screeching tyres and she took her eyes off the plaintiff to attend to an enquiry from her passenger. The next moment she noticed the plaintiff sprawled on the tarmac of the street. She momentarily froze in disbelief with shock. Commotion ensued as bystanders rushed to the plaintiff as he lay on the tarmac. The insured driver did not stop but sped off from the scene of the accident. An unknown man jumped into his motor vehicle and gave chase but it turned out to be an exercise in futility.

- [7] Mr Snyman submitted that the witness gave a good account of what transpired on that night and that I should find that the plaintiff has proved his case on a balance of probabilities. In essence that the insured driver was wholly to be blamed for the accident and that there was nothing that the plaintiff could have done to avoid it. He kept a proper lookout and acted in the manner that was expected of him when he attempted to cross the street.
- [8] The submission of Mr Gcasamba was to the effect that the plaintiff was also to be apportioned the negligence given his conduct. He did not keep a proper lookout and entered the street when it was inopportune to do so. It was largely because of this indiscretion on his part that he was involved in the accident.
- [9] In the application I referred to in paragraph 3, Mr Snyman relied on the judgement of **Daffue J in Du Toit obo Dikeni v Road Accident Fund 2016 (1) SA 367 (FB)**. In paragraph 18 the court said the following: **“The merits were set down for hearing on 27th May 2014. It is common cause that the collision between the two (2) motor vehicles occurred very close to the middle of the road and that the plaintiff had to prove merely 1% negligence on the part of the first insured driver to obtain full compensation to be proved or agreed upon.”** The issue of proving 1% negligence in such circumstances (**my emphasis**) is the correct restatement of the legal position.

- [10] However, the circumstances in that matter are vastly different to our present circumstances. In that matter the court was saddled with a passenger claim for compensation. The parties probably reached an agreement on that basis without the court making a determination on the matter. This case before me is an accident involving a pedestrian whose conduct also have to be scrutinized and where appropriate the necessary apportionment be applied.
- [11] The use of a public road requires a careful consideration of both motor vehicle drivers and pedestrians to ensure their safety and that of other road users. Second Avenue in Westdene is abuzz with revellers visiting different restaurants and bars in the area. It is a hive of activity at night particularly by young people milling around. On the day in question it was no different. A crisp question to be posed and answered is, how would a reasonable driver in that situation or similar situation have acted? The testimony of the only witness is that the insured driver came down Kellner Street in a high speed and with screeching tyres turned into Second Avenue. He did not apply any brakes or sounded a hooter to warn other road users of the impending danger.
- [12] In the circumstances it was foreseeable that the likelihood of harm occurring was an eventuality. He did not take any steps to guard against such occurrence but simply proceeded with his conduct. It is also instructive that even after colliding with the plaintiff, he simply drove off and measures taken to locate him did not yield any fruits. Stephanè Victor impressed me in the manner that she was candid and direct as she dealt with the questions posed to her. She did not see the impact and readily admitted that aspect. The incident happened in a flash second and the next moment the plaintiff was lying on the tarmac with the speeding motor vehicle driving on. It must be noted that the defendant did not lead any evidence to contradict Victor's evidence. Even the cross-examination did not yield any contradictions.
- [13] On the other hand, the plaintiff observed the flow of the traffic on both sides before embarking on crossing the road. It is apparent that he was aware of the lurking danger of crossing the road without ensuring one's safety. When it was safe to do so, he took the first step to cross to the other side. He was

barely at it when he was hit by the passing speeding motor vehicle. He acted like a reasonable, prudent pedestrian who should not cross the road without proper lookout. Acting in the contrary exposes one to the reasonable risk of collision with passing motor vehicles. This was held in **Swanepoel v Parity Insurance Co Ltd 1963 (3) SA 819 (W)** and confirmed in **Dlangamandla v Road Accident Fund 2011 (5) SA 565 (FB)**. He took the necessary steps and applied the only available precautions to him. There is no allegation(s) against him of any untoward conduct on the day in causing or contributing to the accident.

[14] Mr Gcasamba was at pains to substantiate his submission that I should find that the plaintiff at least contributed in part of the accident. There is no basis for such a finding but rather that the insured driver was wholly responsible in causing the collision. The plaintiff did not testify because he is severely injured and he has no recollection of the events as they unfolded on that night. Mr Snyman urged me to make a finding that the insured driver created a dangerous situation and that the plaintiff did not and could not have been expected to have an opportunity to avoid the accident. I agree with him on this aspect because his submission is consistent with the evidence led in this matter. I am satisfied that the plaintiff has discharged the necessary onus of proof on a balance of probabilities as required by the law.

[15] In so far as the costs are concerned, I do not have any reason to depart from the general rule that the costs follow the event. Mr Snyman submitted that I make a cost order including the travelling and accommodation costs of the witness Stephanè Victor. The reason that he advanced was that she was now resident in Johannesburg and that the plaintiff will be unfairly prejudiced if made to incur such costs. He was cautious in emphasizing that he is not by any stretch of imagination asking for qualifying fees or costs of such nature.

[16] The issue whether to award or not award costs lies in my discretion which must be exercised in a judicial manner. In doing so, one must strive to achieve a just and equitable decision. The witness called by the plaintiff was

immensely helpful but cannot be classified in any different category than all other lay witnesses. It is incumbent upon litigants to ensure that necessary witnesses are brought to court in order to advance their matters. Every witness (except an expert) called by a party is necessary for his/her case. I am therefore not convinced to exercise my discretion to the extent of making a special order of costs other than the general one.

Accordingly, I make the following order:-

1. Judgement in favour of the plaintiff.
2. The defendant is ordered to pay the plaintiff's costs for the 16th and 17th May 2017.

MATHEBULA, J

On behalf of applicant:	Adv. C Snyman
Instructed by:	Bezuidenhouts Inc.

On behalf of respondents:	Mr M Gcasamba
Instructed by:	Maduba Attorneys