



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **CA & R 30/2016**
Datum aangehoor/Date heard: **19 / 09 /2016**
Datum gelewer/Date delivered: **02 / 12 /2016**

In the appeal of:

LOUISE VORSTER

Appellant

and

**THE SOL PLAATJE MUNICIPALITY
FAYIKA ALEXANDER**

First Respondent
Second Respondent

Coram: Williams, J et Erasmus, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

- [1] This is an appeal against the judgment of the Magistrate Kimberley, in terms whereof the claim of the appellant (hereinafter referred to as "the plaintiff") had been dismissed after having found that the plaintiff had not proved negligence on the part of the defendants.

[2] The plaintiff herein instituted action against the defendants for damages arising from a motor vehicle collision. The following facts are common cause between the parties:

- 2.1 The plaintiff had complied with the provisions of Act 40 of 2002;
- 2.2 The collision occurred between a silver BMW 530i vehicle (hereinafter referred to as 'the BMW') and a municipal compactor truck (hereinafter referred to as 'the truck') on 8 July 2014 at the intersection of MacDougall and Memorial Roads, Kimberley (hereinafter referred to as 'the intersection');
- 2.3 The intersection was regulated by traffic lights in all directions;
- 2.4 The road was dry, there was nothing obscuring the view of either of the drivers and the collision took place in broad daylight.
- 2.5 A certain Mr Jooste was driving the plaintiff's BMW at the time of the collision.
- 2.6 The first defendant was the owner of the truck and, at the time of the collision, the second defendant had been the driver of the truck;

2.7 The first defendant accepted being vicariously liable for the actions of his employee, being the second defendant herein.

[3] At the commencement of the trial the quantum and merits were separated and the learned Magistrate was required to decide on the issue of negligence only. The plaintiff's attorney, Mr Steyn, placed on record:

"Dit is 'n motorbotsing en die partye het vooraf ooreengekom dat die meriete en kwantum apart bereg sal word en dat ons van u sal verlang bloot om net 'n bevinding te maak op die meriete en in hierdie geval die dispuut met betrekking tot die kwessie van nalatigheid."

[4] Mr Job, on behalf of the defendants, confirmed this to be the position.

[5] The plaintiff specifically pleaded that the collision was caused by the sole and exclusive negligence of the driver of the first defendant's vehicle and listed several grounds therefor. The defendants disputed the negligence of the second defendant as well as the quantum of the damages claimed. The defendants pleaded that the collision had been caused by the sole and exclusive negligence of the driver of the plaintiff's vehicle.

- [6] Adv Olivier, on behalf of the defendants, submitted before us that the issues to be decided on appeal are whether the appellant had succeeded in showing negligence on the part of the second defendant and further, whether or not the quantum of the claim should be dealt with in terms of the provisions of the Apportionment of Damages Act, No 34 of 1956 ('the Act').
- [7] Adv Sieberhagen, on behalf of the appellants, submitted that the learned Magistrate had erred in not finding that the second defendant had acted negligently. She also submitted that the issue of contributory negligence and apportionment of damages are not relevant in this instance as the plaintiff had not been the driver of the BMW at the time of the collision.
- [8] A large portion of the judgment of the Court *a quo* was allocated to the negligence of Mr Jooste, the driver of the plaintiff's vehicle. The learned Magistrate found that he had been negligent and, as a result thereof had caused the collision and also that the plaintiff had not proved any negligence on the part of second defendant.
- [9] The learned Magistrate, in the judgment, noted that the defendants pleaded contributory negligence on the side of the driver of the plaintiff's vehicle. In this instance the plaintiff was not the driver of the BMW and her claim cannot be subject to apportionment as she had not been at fault. The

driver, Mr Jooste, was not a party to the proceedings, as he had not been joined as a third party in terms of rule 28A of the Magistrate's Court Rules. In terms of this rule an apportionment of fault in the form of a declaratory order could have been sought against Jooste.¹ Mr Jooste had also not been served with a notice in terms section 2(2) of the Apportionment of Damages Act, 34 of 1956 and no relief under section 2(6)(a) of the said Act had been sought against him in the form of a judgment for the payment of a sum of money determined by the court. This being the position the contributory negligence of Mr Jooste, as conceded by him, is not relevant for the adjudication of the negligence of the second defendant. If the second defendant had been only 1% negligent and there was a sufficient causal link between the conduct of the second defendant and the collision, the plaintiff would be successful. The defendants would then be liable for payment of the plaintiff's proven damages resulting from the collision. It appears from the reasoning of the learned Magistrate that this was not taken into account in the evaluation of the evidence.

- [10] It is trite that the test to be applied in respect of motor vehicle collisions is whether the driver had acted as any reasonable person would have acted under the prevailing circumstances.² If such reasonable person in the position of the second

¹ Hart v Santam Insurance Co Ltd 1975(4) SA 275 (E) at 277D-G

² Kruger v Coetzee 1966(2) SA 428 (A) at 430E; Griffiths v Netherlands Ins 1976(4) SA 691 (A) at 695G

defendant would have foreseen the reasonable possibility of his conduct injuring another in his property and causing him patrimonial loss and could have taken reasonable steps to prevent against the occurrence, but still failed to do so, the plaintiff would have succeeded in proving that the second defendant was negligent.

- [11] From applicable case law it appears that a breach of statutory provisions and/or duties pertaining to actions frequently executed by drivers will usually justify a conclusion of negligence on the part of a driver.
- [12] In this instance the plaintiff relied on several grounds of negligence, as set out in the particulars of claim. These included several common law duties owed to other road users, *inter alia*, the duty to keep a proper lookout, to apply brakes timeously, to consider the safety of other road users, to approach an intersection at an acceptable speed and to prevent a collision which he could have prevented by applying reasonable care. Establishing whether or not the plaintiff had proved that the second defendant was negligent requires an evaluation of the evidence.
- [13] It was the uncontested evidence of Mr Jooste that shortly before 08:00 on the morning of Friday 18 July 2014 he had approached the intersection from the direction of the Diamond Pavilion Mall and stopped as the lights had already turned red.

When the light had turned green for him he looked to his left for vehicles that might have been approaching from the direction of Ritchie and others still standing in the intersection, waiting to turn right in the direction of the Pavilion Mall and then looked to the front. The collision took place after he had slowly proceeded approximately 4 meters into the intersection. According to Jooste the truck had hit the BMW on the front right hand side and the impact pushed the BMW to the left.

- [14] During cross-examination Mr Jooste conceded only having looked to his left when the light had turned green for him to enter the intersection and not having looked to the right. In fact he conceded that his failure in this regard constituted negligence on his part and that this negligence had contributed to the collision. He denied however that the collision had been caused solely by his negligence.
- [15] The second defendant's version, as put to Mr Jooste, was that the truck had almost exited the intersection when Jooste had entered same and collided with the midsection of the truck. It was put to him that from the damage to the BMW, it appears as though he had driven into the truck. Jooste denied this version and stated that the damage to the BMW was mostly on the front end of the vehicle or as he put it, "the nose of the vehicle". This is corroborated by the photos taken of the BMW after the collision.

- [16] According to Jooste, the truck must have entered the intersection when the light was amber or had already turned red. He further added that the second defendant had not applied the brakes.
- [17] The other witness, Mr Jooste's son, who had also testified on behalf of the plaintiff, corroborated evidence that the BMW had been stationary at the red traffic light. He confirmed that they had proceeded slowly into the intersection, after the light had turned green. He also affirmed that the truck had hit the BMW on the right front section, but denied that the BMW had driven into the truck.
- [18] Mr De Villiers, an independent witness, was a pedestrian who had approached the intersection from the direction of the Pavilion Mall. He had observed the stationary vehicles at the red traffic light in MacDougall Street. He was crossing the intersection while facing the red traffic light, when he observed the truck approaching the intersection from his right out of Memorial Road. He did not perceive it to pose any threat to him. While crossing the street, he noticed that the light had changed to amber for the vehicles approaching from the right from Memorial Road. After having crossed the street and reaching the other side of the intersection he heard the impact of the collision behind him. He stated that the truck had been some distance away as he would not have crossed had he not been able to do so safely.

- [19] During cross-examination he testified that the truck must have been at least 30 meters away from him and that the traffic light for the vehicles travelling on Memorial Road only turned red after he had reached the other side of the road.
- [20] The second defendant, Mr Alexander, testified that he had been travelling on Memorial Road in the direction of Ritchie. He had entered the intersection while the traffic light was still green for him. He had heard the impact on having almost exited the intersection. He concluded that the BMW had driven into the truck as it passed as he had observed a mark on the last wheel of the truck.
- [21] During cross-examination it was elicited that the truck weighed in excess of 10 tonnes. The driver's seat was approximately two meters above ground level and the cabin of the vehicle had large windows making proper observation possible. The length of the truck was described as needing two parking spaces to park. According to him he was travelling at a speed of 30 or 40 kilometres per hour whilst approaching the intersection. He had reduced speed as per usual when coming to that intersection. Even when the light was green for him, he would keep a lookout for cars on the left and usually reduce his speed as anything could happen at the intersection. At the time of reducing his speed, he was approximately the length of the truck away from the solid line at the entrance to the intersection. He had entered the

intersection travelling approximately 30 or 40 kilometers per hour.

[22] During cross-examination it emerged that Mr Alexander had only reduced speed after entering the intersection. He had not observed any vehicles on entering the intersection and the truck had been the only vehicle in the intersection. He had neither observed the vehicle of the plaintiff, nor the pedestrian at all. He could not explain where the BMW had come from. He had not observed any vehicles waiting at the intersection from the direction of the Pavilion Mall in MacDougall Street. According to Alexander, the traffic lights were green on his approach to the intersection, from the time he had reached the overhead billboards, situated approximately 40 metres from the entrance to the intersection. He conceded that had he observed the BMW at the intersection, he would have applied his brakes before entering the intersection.

[23] From the evidence it appears and must be accepted that the BMW entered the intersection after the light had already changed from red to green, allowing him to proceed. It has not been contradicted that the BMW, which had been travelling straight on into MacDougall Street, had already moved approximately 4 metres into the intersection when the collision had occurred. As appeared from Mr Jooste's evidence and from the photos illustrating the damage to the BMW, it

had been hit on the right front section of the nose of the vehicle.

[24] When considering the issue of negligence, it should be done in the context of accepted duties of drivers owing to other road users. All road users are required to keep a proper lookout at all times so as to avoid colliding with other road users.³ It entails more than merely looking straight ahead and requires an awareness of what is happening in the immediate vicinity. This standard is even higher for the driver travelling on a road with intersections.⁴ The duty of a driver is to have regard to traffic coming from a side street, to exercise reasonable care and avoid colliding with another car entering the intersection. It should be kept in mind that priority does not confer an absolute right of way.⁵

[25] When approaching an intersection regulated by a traffic light the driver does not have an absolute right to proceed and cannot ignore a vehicle of which he is aware, even if that vehicle is driven in a negligent manner. He is required to regulate his speed and his entry so as to not endanger the safety of traffic.⁶ When entering a main thoroughfare and proceeding across the path of traffic, a driver is required to proceed with great caution, keeping a careful lookout and

³ Butt v Van den Camp 1982(3) SA 819 (A)

⁴ Martindale v Wolfaardt 1940 AD 235 at 242 and 245; Kotton v Schultz 1953 (1) PH O3 (A)

⁵ Van der Westhuizen v SA Liberal Insurance Co Ltd 1949 (3) SA 160 (C) at 172

⁶ Santam Insurance Co Ltd v Gouws 1985 (2) SA 629 (A) at 634

adjusting his speed to be able to stop within a few feet should a vehicle appear too near to him.⁷

[26] There is no general right entitling a driver to proceed against an amber light as a driver is required to keep a proper lookout for and regulate his speed so that he can respond timeously to an adverse signal without having to stop suddenly. He is however required to stop if he observes either a red or amber light against him.⁸

[27] If these principles are applied to the second defendant, we are satisfied that he did not act like a reasonable person under the circumstances that had prevailed at the time of the collision. He had not kept a proper lookout in that he had not seen the BMW and pedestrian. He had not taken any steps to reduce his speed before entering the traffic light controlled intersection during peak hour traffic. It should have been accepted by the Court *a quo* that Mr Jooste had entered the intersection when the light had already turned green for him. On the probabilities it must then be accepted that, at best for the second defendant, the traffic light had turned from green to amber on his approach to the intersection. On his own version he proceeded into the intersection without having applied the brakes and/or reducing speed. A reasonable

⁷ Grobbelaar v Federated Employers Insurance Co Ltd 1974 (2) SA 225 (A); Rondalia Assurance Corporation of SA Ltd v Page 1975 (1) SA 708 (A)

⁸ S v Van Stryp 1979 (2) SA 707 (E)

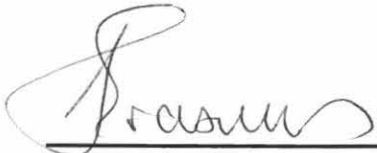
driver in his position would have foreseen the possibility of a collision and damages arising from such collision and would have taken reasonable steps to have prevented the collision and resulting damage from occurring. He did not exercise the standard of conduct which the law required of him and was therefore negligent. In our view there is a sufficient causal link between the conduct of the second defendant and the collision and damages arising therefrom. The appeal therefor stands to succeed.

Wherefore we make the following order:

- 1 THE APPEAL SUCCEEDS WITH COSTS.**
- 2 THE ORDER OF THE MAGISTRATE IS SET ASIDE AND IS REPLACED WITH THE FOLLOWING:**

"1 THE PLAINTIFF'S CASE ON THE MERITS SUCCEEDS;

2 THE DEFENDANTS ARE ORDERED JOINTLY AND SEVERALLY TO PAY THE PLAINTIFF'S COSTS IN RESPECT OF THE TRIAL ON THE MERITS."
- 3 THE CASE IS REFERRED BACK TO THE MAGISTRATE KIMBERLEY FOR THE ADJUDICATION OF THE QUANTUM OF THE PLAINTIFF'S CLAIM.**



SL ERASMUS
ACTING JUDGE

I concur.



CC WILLIAMS
JUDGE

<u>For the Appellant:</u>	Adv. N. Sieberhagen (oio Duncan & Rothman)
<u>For the Respondent:</u>	Adv. D. Olivier (oio Job Attorneys)