



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

12/5/15

CASE NO: A590/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
12/5/15	
DATE	SIGNATURE

In the matter between:

STEFANI SMITH

APPELLANT

And

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

STRAUSS, AJ:

1. The Appellant appeal against the judgment of the regional court, Pretoria, granting absolution from the instance with costs, after close of the appellant's case for damages resulting from an accident that occurred between the appellant and the respondents insured driver.
2. The parties in the court *a quo* agreed that merits and quantum be separated and after the appellant had testified in regards to the merits of her claim her case was closed, the respondent applied for absolution from the instance, which was then granted by the court *a quo*.
3. In argument on appeal before this court the respondent raised two points *in limine* regarding non-compliance with a power of attorney filed on behalf of the appellant and non-compliance in filing the leave to appeal late. These two points however were abandoned after the respondents counsel obtained such instructions, and the only issue left before this court was to decide if absolution of the instance should have been granted by the court *a quo* after the appellant had closed her case.
4. The appellant testified that on the evening of 11 November 2011, at 19h30 she was traveling in the fast lane of the N1 highway at 120 km per hour. There is an emergency lane on the far left side of the road, the insured driver was stationary on the most right side of the road and she only noticed the

insured driver shortly before the time of impact, when she collided with the rear end of his vehicle. The insured driver's vehicle was protruding significantly into her lane of travel. She did not see any head lights, hazard indicators that were switched on, and or any triangles placed behind the insured drivers vehicle.

5. In cross examination it was put to the appellant that the insured driver had put out a triangle to warn traffic as well as having his hazards on, and that he had been stationary for approximately an hour prior to the collision. It was also put to the appellant that many other vehicles had passed the insured driver's vehicle and had therefore seen his vehicle. It was put to the appellant that the insured driver had moved as far to the right side of the road as possible, and only a small part of his vehicle was protruding into the lane of travel of vehicles passing him from the back. It was put to her that she did not maintain a proper look out and her negligence was therefore the sole cause of the collision.
6. The court *a quo* in dismissing the appellants claim based its judgment on the statements put to the appellant under cross examination. The court *a quo* also had regards to the particulars of claim of the appellant in that in such particulars no specific grounds of negligence of the insured driver, as testified by the appellant, were set out therein. The court *a quo* however accepted that the one ground of negligence stating that the insured driver was negligent in that "*he did not have due consideration to other road users*" could be applied

to the facts of the case. The court *a quo* however found that the appellant had not quit her of her onus to prove that the insured driver had been negligent in this stated ground of negligence.

7. I will first have regard to the law in regards to factors to be considered by a court when granting or not granting absolution. The test is clear: the plaintiff must make out a prima facie case in the sense that there is evidence relating to all the elements of a claim on the strength of which the court can find in favour of the plaintiff.

8. The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in ***Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H*** in these terms:

“when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff”
Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).”

9. This implies that an appellant had to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim, to

survive absolution because without such evidence no court could find for the appellant.

10. As set out in ***Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2***. “As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” (Gascoyne (loc cit)) – a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.’ See ***Gordon Lloyd Page & Associates v Rivera 2001 (1) SA 88 (SCA) at 92E-93A***.

11. It has also been stated that a party who applies for absolution from the instance at the end of a plaintiff’s case takes a risk, even though the plaintiff’s case be weak. If the application succeeds the plaintiff’s action is ended, the plaintiff must pay the costs and the defendant is relieved of the decision

whether to lead evidence and of having his body of evidence scrutinized should he choose to provide it. But time and time again plaintiffs against whom absolution has been ordered have appealed successfully and left the defendant to pay the costs of both the application and the appeal and with the need to decide what is to be done next.

12. In ***Build-A-Brick BK en 'n Ander v Eskom 1996 (1) SA 115 (O) at 123 A – E***. “Hattingh J found:

“that the test to be applied in determining the question whether the defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. Consequently, at the absolution stage the plaintiff’s evidence should hold a reasonable possibility of success for him and should the Court be uncertain whether the plaintiff’s evidence has satisfied this test, absolution ought to be refused.”

13. The question *in casu* is whether the appellant had crossed the low threshold of proof that the law sets after her case was closed but the defendant’s was not.

14. The respondent argued in essence that the court *a quo* was correct in granting absolution only based on the evidence of the appellant in that she had not quitted herself of her burden of proof on a balance of probabilities to convince the court that she was not negligent in colliding with the rear end of the respondent insured vehicle which was stationary next to the far right lane (fast lane) after it had broken down.
15. Their main criticism of the appellant's version is that she did not see the insured driver earlier and only noticed it shortly prior to collision, she therefore took no evasive action. They argue that she did not keep a proper look out and must be criticised because she did not see the warning signs placed by the insured driver, and she could also not explain why other vehicles were able to pass the insured driver without collision.
16. The respondent conceded that any statement in cross examination was not evidence, and this court should not take note thereof but simply find on the evidence of the appellant that she had not proven any percentage of negligence on the side of the respondent insured driver.
17. The above concession is rightly made but to the contrary the argument of the respondent that the onus on the appellant was one of a balance of probability after the close of her case, is incorrect. The principal set out in case law mentioned *supra* clearly indicate that at absolution stage, if the appellant's

evidence should have held a reasonable possibility of success for her, and if the court *a quo* was uncertain whether the appellant's evidence has satisfied this test, absolution ought to have been refused. This court must consider whether there was "evidence upon which a reasonable man might have found for the appellant.

18. This court however also took issue with the pleadings in that the specific grounds of negligence pleaded by the appellant in her particulars of claim do not refer to the specific acts of negligence of the respondent. At a mere glance of the particulars it is the normal "catch all" grounds pleaded in summons's against the respondents. Similarly the plea of the respondent were also the normal denial and contributory negligence grounds pleaded.
19. On this point the following can be said. Having regard to the pleadings the appellant failed to plead specific grounds of negligence of the insured driver's part, inter alia that he was stationary next to the road encroaching on her lane of travel, without any warning signs and hazard lights and or a triangle and that he had brought his vehicle to a standstill at a place and time when it was inopportune to do so. That he also failed to warn traffic of the dangerous situation created by his vehicle, and that he did not utilise the emergency lane. This was certainly the evidence of the appellant in the court *a quo* but no such grounds of negligence were contained in the particulars of claim.

20. As I understand the law, in issuing summons the appellant was obliged to allege negligence on the part of the other in order to prove liability, and vice versa, each party must prove what it alleges. In other words, the saying he who alleges must prove, applies to both parties. Thus, in the present instance the appellant had to prove that the respondent was the cause of the collision on specific grounds of negligence with reference to what transpired on the day of the collision.

21. In regards to the specific grounds of negligence not pleaded but testified to under oath, an objection by counsel for respondent in the court *a quo* was raised. In answer to this, it was argued on behalf of the appellant in the court *a quo* that paragraph 4.4 and 4.6 of the particulars of claim were wide enough to include these grounds of negligence as paragraph 4.4 stated

“he failed to have due consideration to other road users of the road”

Paragraph 4.6:

“He failed to take any or adequate steps to avoid the accident when by the exercise of reasonable care and diligence he could and should have done so”

22. This was also the argument of counsel for the appellant in this court. The rule that parties are limited to their pleading is apposite in these circumstances. This rule is normally upheld due to the fact that a party cannot be allowed in a

trial to canvass an issue not contained in its pleadings, as this element of surprise is prejudicial to the party being unaware what case it had to meet.

23. However, this court cannot find that the respondent was caught unawares and could not prepare its case in reply to the evidence of the appellant in the court *a quo*. The versions by both parties were canvassed and discussed by discovery and pre trials held between them. Thus all the parties in the court *a quo* knew the case of the other but it was certainly not with any particularity and or to specific extend, pleaded in the pleadings.
24. The issue, should not be the tendered evidence of the appellant as to the insured driver's specific negligence which were all material facts and are all specific grounds of negligence, but could these grounds be in general incorporated in the maxim "not having regards to other road users or exercising reasonable care".
25. The issue is, I find, that if these were material facts on which the appellant relied to prove her case did the appellant not have to prove these facts in order to prove that the respondent's insured driver was negligent. It was conceded that these grounds were not included in the particulars of claim but counsel for the appellant argued that even if they were not specifically mentioned the appellant in the court *a quo* did not attempt to canvas another issue which was not pleaded.

26. The question this Court asks itself is whether or not inferences of negligence can be drawn from the evidence led by the appellant which might have obliged the court *a quo* to have the respondent to place evidence before it in rebuttal. Even though the appellant did not call upon the existence of circumstantial evidence, justice will be seen to have been done if I look into this aspect.
27. Care should be taken by courts when they attempt to draw inferences from the proven facts in a case that the exercise should not amount to reliance on conjecture and speculation. Reference to conjecture and speculation is best demonstrated among others in the case of **Casswell v Powell Duffryn Associated Collieries Ltd 1939 (3) All ER 722 at 733** as follows:
- "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive approved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."*
28. It is trite that in civil cases at this stage of the proceedings when absolution is sought, a plaintiff seeking to invoke reliance on inferences should merely show that the inference they seek to rely on and which they want the court to make is the most readily apparent and acceptable from a number of possible inferences. See :**AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) at 614H-615B**. The decision follows on an earlier one of

Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 38H wherein the learned justice expressed the following view:

“Hierdie skyn daarop te dui dat by ‘n aansoek om absolusie aan die einde van ‘n eiser se saak, daar nie ‘n oorweging van verskillende moontlike afleidings sou geskied nie, maar slegs ‘n bepaling of een van die redelike afleidings ten gunste van die eiser is.”

29. Sight should at all times not be lost that what is required is that only one reasonable inference is sufficient for a *prima facie* inference of negligence to be drawn. Circumstantial evidence depends ultimately upon facts which are proved by direct evidence. When we deal with circumstantial evidence we should always bear in mind that its use involves an additional source of potential error because the court is not immune from being mistaken in its reasoning.

30. As stated in ***Ocean Accident & Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A)***, *“the inference which the court seeks to or may draw may be a non sequitur or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It may happen that the trier of fact is so pleased at having thought of a theory to explain the facts that he or she may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and which thus cannot legitimately be inferred.”*

31. On the evidence tendered by the appellant in the court *a quo* her evidence provided enough facts and details for a reasonable inference that would be sufficient for a *prima facie* inference of negligence on the insured driver's side, to be drawn. The degree of negligence I will not venture to speculate about, but certainly in the circumstances any facts leading to such an inference was enough to give the benefit of the doubt to the appellant to prevent absolution after her evidence.
32. Counsel for the appellant in argument when faced with the lack of the particular grounds of negligence in the particulars of claim, changed track in continuing to argue on the pleadings, and they then sought an amendment thereof, and they did so also after Tolmay J, directed several questions in this regards.
33. It is trite that court of appeal has the powers under provision of section 22 of the Act to allow an amendment of pleadings on appeal, the amendment will only be allowed in cases in which the issues have been thoroughly canvassed at trial in the court *a quo*.
34. The respondent conceded that the issues between the parties were thoroughly canvassed at trial and further that the respondent would not object to any amendment sought. Counsel for the appellant provided this court with a hastily drafted application for amendment which included the specific grounds

of negligence of the insured driver as testified to by the appellant in the court *a quo*.

35. I find, that the amendment requested is *bona fide* and will not lead to any prejudice of the respondent, and the amendment when effected by the appellant will amend the particulars of claim to enable ventilation of the issues between the parties, as a result the appeal should be upheld.

36. I therefore make the following order:

1. **The appeal is upheld.**
2. **The court *a quo*'s order is set aside and replaced with the following order.**
"absolution of the instance is refused with costs."
3. **The trial is referred back to the regional court Pretoria under case number 2500/2012 to continue between the parties, before another magistrate.**
4. **The appellant shall file their amended particulars of claim as set out in the notice of amendment dated 30 April 2015, in the court *a quo* within 10 days from date of this order.**
5. **The cost of appeal to be paid by the respondent.**

STRAUSS AJ

ACTING JUDGE OF THE HIGH COURT

A handwritten signature in black ink, appearing to read 'R Tolmay', is written over a horizontal line.

R TOLMAY J

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

COUNSEL FOR THE APPELLANT: ADV JA DU PLESSIS

ATTORNEY FOR THE APPELLANT: RIETTE OOSTHUIZEN

COUNSEL FOR THE RESPONDENT: ADV L BOTHA

ATTORNEY FOR THE RESPONDENT: MOTHLE JOOMA SABDIA INC